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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

219, 220, 221, U. S.

BOOK 55,

LAWYERS' EDITION,

CITED "LAW ED."

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.

BY

THE PUBLISHERS' EDITORIAL STAFF

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JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. EDWARD DOUGLASS WHITE.[1]

ASSOCIATE JUSTICES,

HON. JOHN MARSHALL HARLAN,
HON. JOSEPH MCKENNA,
HON. OLIVER WENDELL HOLMES,
HON. WILLIAM R. DAY,
HON. HORACE H. LURTON,
HON. CHARLES EVANS HUGHES,
HON. WILLIS VAN DEVANTER,[2]
HON. JOSEPH RUCKER LAMAR.[3]

ATTORNEY GENERAL,

HON. GEORGE W. WICKERSHAM.

SOLICITOR GENERAL,

HON. FREDERICK W. LEHMANN.[4]

CLERK,

JAMES HALL MCKENNEY, ESQ.

REPORTER.

HON. CHARLES HENRY BUTLER.

MARSHAL,

JOHN MONTGOMERY WRIGHT, ESQ.

[1] Commission ordered recorded, December 19, 1910.
[2] Commission ordered recorded, January 3, 1911.
[3] Commission ordered recorded, January 3, 1911.
[4] Commission ordered recorded, December 19, 1910.

126057

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

From January 10, 1910, to January 9, 1911.

TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE, RESPECTIVELY.

For Order of Court Making Allotment, see 54 L. ed., Appendix I. p. 1215.

Names of Justices, and Whence Appointed.	By Whom Appointed.	Circuits. 1902–1903.	Commissioned.	Sworn in.
Associate Justice OLIVER WENDELL HOLMES, Massachusetts.	President Roosevelt.	First. Me., N. H., Mass., R. I.	1902. (Dec. 4.)	1902. (Dec. 8.)
Associate Justice HORACE H. LURTON, Tennessee.	President Taft.	Second. Vermont, Conn., New York.	1909. (Dec. 20.)	1910. (Jan. 3.)
Associate Justice WILLIAM H. MOODY, Massachusetts.	President Roosevelt.	Third. New Jersey, Pa., Del.	1906. (Dec. 12.)	1906. (Dec. 17.)
Chief Justice MELVILLE W. FULLER, Illinois.	President Cleveland.	Fourth. Md., Va., N. C., W. Va., S. C.	1888. (July 20.)	1888. (Oct. 8.)
Associate Justice EDWARD D. WHITE, Louisiana.	President Cleveland.	Fifth. Ga., Ala., Fla., Miss., La., Tex.	1894. (Feb. 19.)	1894. (Mar. 12.)
Associate Justice JOHN M. HARLAN, Kentucky.	President Hayes.	Sixth. Ky., Tenn., Ohio, Mich.	1877. (Nov. 29.)	1877. (Dec. 10.)
Associate Justice WILLIAM R. DAY, Ohio.	President Roosevelt.	Seventh. Ind., Ill., Wis.	1903. (Feb. 23.)	1903. (Mar. 2.)
Associate Justice DAVID J. BREWER, Kansas.	President Harrison.	Eighth. Minn., Iowa, Mo., Kan., Ark., Neb., Colo., N. D., S. D., Utah, Wyo., Oklahoma, New Mex.*	1889. (Dec. 18.)	1890. (Jan. 6.)
Associate Justice JOSEPH McKENNA, California.	President McKinley.	Ninth. Cal., Or., Nev., Mont., Wash., Idaho, Alaska,* Arizona,* Hawaii.*	1898. (Jan. 21.)	1898. (Jan. 26.)

Territories assigned to circuits by order of the Supreme Court.

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

January 9, 1911.

TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE, RESPECTIVELY.

For Order of Court Making Allotment, see *infra*, Appendix III. p. 906.

Names of Justices, and Whence Appointed.	By Whom Appointed.	Circuits. 1902–1903.	Commissioned.	Sworn in.
Associate Justice OLIVER WENDELL HOLMES, Massachusetts.	President Roosevelt.	First. Me., N. H., Mass., R. I.	1902. (Dec. 4.)	1902. (Dec. 8.)
Associate Justice CHARLES E. HUGHES, New York.	President Taft.	Second. Vermont, Conn., New York.	1910. (May 2.)	1910. (Oct. 10.)
Associate Justice HORACE H. LURTON, Tennessee.	President Taft.	Third. New Jersey, Pa., Del.	1909. (Dec. 20.)	1910. (Jan. 3.)
Chief Justice EDWARD D. WHITE, Louisiana.	President Taft.	Fourth. Md., Va., N. C., W. Va., S. C.	1910. (Dec. 12.)	1910. (Dec. 19.)
Associate Justice JOSEPH R. LAMAR, Georgia.	President Taft.	Fifth. Ga., Ala., Fla., Miss., La., Tex.	1910. (Dec. 17.)	1911. (Jan. 3.)
Associate Justice JOHN M. HARLAN, Kentucky.	President Hayes.	Sixth. Ky., Tenn., Ohio, Mich.	1877. (Nov. 29.)	1877. (Dec. 10.)
Associate Justice WILLIAM R. DAY, Ohio.	President Roosevelt.	Seventh. Ind., Ill., Wis.	1903. (Feb. 23.)	1903. (Mar. 2.)
Associate Justice WILLIS VAN DEVANTER, Wyoming.	President Taft.	Eighth. Minn., Iowa, Mo., Kan., Ark., Neb., Colo., N. D., S. D., Utah, Wyo., Oklahoma, New Mex.*	1910. (Dec. 16.)	1911. (Jan. 3.)
Associate Justice JOSEPH McKENNA, California.	President McKinley.	Ninth. Cal., Or., Nev., Mont., Wash., Idaho, Alaska,* Arizona,* Hawaii.*	1898. (Jan. 21.)	1898. (Jan. 26.)

*Territories assigned to circuits by order of the Supreme Court.

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AT

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1910.

1] *UNITED STATES, Plff. in Err.,
v.
PRESS PUBLISHING COMPANY.

(See S. C. Reporter's ed. 1–17.)

Federal courts — jurisdiction — crimes on government reservations.

1. Punishment in the Federal courts as an offense against the United States, but only in the way and to the extent that such offense would have been punishable if the territory embraced by the government reservation where the crime was committed had remained subject to the jurisdiction of the state, is what was intended by the act of July 7, 1898 (30 Stat. at L. 717, chap. 576, U. S. Comp. Stat. 1901, p. 3652), § 2, adopting such punishment for offenses committed in places under the exclusive jurisdiction and control of the United States as the laws of the state in which such places are situated now provide for a like offense, the punishment therefor not being otherwise provided for by any law of the United States.

[For other cases, see Courts, VI. c, in Digest Sup. Ct. 1908.]

Federal courts — criminal libel in government reservation.

2. The circulation in the government reservation at West Point and in the Postoffice building in New York city, of copies of a newspaper containing a criminal libel printed and primarily published in such city, cannot be punished in the Federal courts under the act of July 7, 1898 (30 Stat. at L. 717, chap. 576), § 2, providing that offenses committed in places under the exclusive jurisdiction and control of the United States, when not expressly made criminal by any law of the United States, shall be punished in accordance with the laws of the state in which such places are situated, since the state laws afford adequate punishment for the offense, without resorting to the Federal courts, and their plain purpose is that there shall be but a single prosecution and conviction for a criminal libel.

[For other cases, see Courts, VI. c, in Digest Sup. Ct. 1908.]

[No. 541.]

Argued October 24, 1910. Decided January 3, 1911.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment quashing for want of jurisdiction an indictment for publishing a criminal libel in a government reservation. Affirmed.

Statement by Mr. Chief Justice White:

On March 4, 1909, upon the assumed authority of the 2d section of an act of Congress approved July 7, 1898 (chap. 576, 30 Stat. at L. 717, U. S. Comp. Stat. 1901, p. 3652), a grand jury in the circuit court of the United States for the southern district of New York found a true bill against the Press Publishing Company, charging the commission of alleged criminal libels, set out in an indictment composed of fourteen counts. The asserted libels were contained in six issues of the World, a newspaper printed in the city of New York, of which newspaper the defendant in error, a New York corporation, was publisher. The first seven counts dealt with the publication of the libels by circulating copies of the newspaper containing the same within the reservation and military post in Orange county, New York, known as West Point. The remaining counts dealt with the publication of each of the libels by the delivery of a copy of the issue of the World containing the same to a postoffice inspector at his office in the Postoffice building in the city

of New York. Both West Point and the Postoffice building were averred to be places within the exclusive jurisdiction of the United States. Those who were alleged in each count to have been criminally libeled 3]were, at the *time of the publications, the President of the United States, the Secretary of War, and certain private individuals. The alleged libelous articles related to the purchase by the United States of the Panama canal. We need not state the contents of the articles, since, in the view taken of the case, we shall be only called upon to determine whether, conceding the publications to have been libelous as charged in the indictment, they constituted offenses against the United States within the purview of the act of 1898.

The case went to trial upon a plea of not guilty. The circulation of the newspapers containing the alleged libels on the military reservation, and their delivery to the inspector at the postoffice, as charged in the indictment, was admitted by the defendant. The government, on the other hand, admitted that all of the issues of the World newspaper referred to in the indictment were printed in the defendant's printing establishment in the city of New York, and were circulated therefrom.

At the close of the evidence introduced by the government, the defendant moved to quash the indictment or to instruct a verdict of acquittal, upon the following grounds:

"First. That court has no jurisdiction in this case, because there is no statute of the United States authorizing the prosecution.

"Second. The act of 1898 does not apply to the case as disclosed by the evidence.

"Third. If construed so as to cover the acts shown by the evidence, the act is unconstitutional.

"Fourth. The offense, if any, was committed wholly within the jurisdiction of the state of New York, and was punishable there.

"Fifth. The defendant, being a corporation, is incapable of committing the offense charged in the indictment."

The court announced, that it had concluded that the indictment was not authorized by the act of 1898, and therefore the motion to quash would be sustained. Be- 4] fore, *however, any formal entry to that effect was made, in order to obviate any question of double jeopardy, upon motion of the attorney for the United States a juror was withdrawn, and thereafter a judgment was duly entered quashing the indictment, it being expressly recited in the judgment that it was based upon a construction of the statute. To review the action of the trial court, this writ of error is prosecuted by the United States, under the authority of the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1909, p. 220).

Mr. **James C. McReynolds** argued the cause, and, with Attorney General Wickersham and Mr. Stuart McNamara, filed a brief for plaintiff in error.

Mr. **De Lancey Nicoll** argued the cause, and, with Messrs. John D. Lindsay and Raymond D. Thurber, filed a brief for defendant in error.

*Mr. Chief Justice **White**, after mak- [8 ing the foregoing statement, delivered the opinion of the court:

As we have stated, the indictment was based on the act of July 7, 1898 (30 Stat. at L. 717, § 2, chap. 576, U. S. Comp. Stat. 1901, p. 3652). The effect of the act, as pointed out in Franklin v. United States, 216 U. S. 559, 568, 569, 54 L. ed. 615, 618, 30 Sup. Ct. Rep. 434, 435, was to incorporate the criminal laws of the several states, in force on July 1, 1898, into the statute, and to make such criminal laws, to the extent of such incorporation, laws of the United States. The text of the 2d section of the act of 1898 is this:

"That when any offense is committed in any place jurisdiction over which has been retained by the United States, or ceded to it by a state, or which has been purchased with the consent of a state for the erection of a fort, magazine, arsenal, dockyard, or other needful building or structure, the punishment for which offense is not provided for by any law of the United States, the person committing such offense shall, upon conviction in a circuit or district court of the United States for the district in which the offense was committed, be liable to and receive the same punishment as the laws of the state in which such place is situated now provide for the like offense when committed within the jurisdiction of such state and the said courts are hereby vested with jurisdiction for such purpose; and no subsequent repeal of any such state law shall affect any such prosecution.

As it is conceded that there is no statute of the United States expressly defining and punishing the crime of criminal libel when committed on a United States reservation, etc., it follows that in order to determine the correctness of the ruling of the court below we are called upon (a) to accurately fix the extent to which, by the effect of the act of 1898, the criminal laws of the states were incorporated therein so as to authorize the punishment of crimes *de- [9

fined by such laws as offenses against the United States, and (b) this being done, to make an analysis of the criminal laws of the state of New York to ascertain whether the particular offenses here charged were made punishable by those laws, and if so, whether, by virtue of the act of 1898, they constituted offenses against the laws of the United States, punishable in the courts of the United States.

It is certain, on the face of the quoted section, that it exclusively relates to offenses committed on United States reservations, etc., which are "not provided for by any law of the United States," and that as to such offenses the state law, when they are by that law defined and punished, is adopted and made applicable. That is to say, while the statute leaves no doubt where acts are done on reservations which are expressly prohibited and punished as crimes by a law of the United States, that law is dominant and controlling, yet, on the other hand, where no law of the United States has expressly provided for the punishment of offenses committed on reservations, all acts done on such reservations which are made criminal by the laws of the several states are left to be punished under the applicable state statutes. When these results of the statute are borne in mind, it becomes manifest that Congress, in adopting it, sedulously considered the twofold character of our constitutional government, and had in view the enlightened purpose, so far as the punishment of crime was concerned, to interfere as little as might be with the authority of the states on that subject over all territory situated within their exterior boundaries, and which hence would be subject to exclusive state jurisdiction but for the existence of a United States reservation. In accomplishing these purposes it is apparent that the statute, instead of fixing by its own terms the punishment for crimes committed on such reservations which were not previously provided for by a law of the United [10] *States, adopted and wrote in the state law, with the single difference that the offense, although punished as an offense against the United States, was nevertheless punishable only in the way and to the extent that it would have been punishable if the territory embraced by the reservation remained subject to the jurisdiction of the state. While this meaning, we think, stands out in bold relief from the text of the section, the correctness of such meaning will be nevertheless readily demonstrated, even if, for the sake of argument, it be conceded that the text is ambiguous. We say this because a consideration of the genesis and development of the legislation which the act of 1898 embodies will leave no doubt that the construction we have given to the act enforces the exclusive and only purpose intended to be accomplished by its adoption.

It is undoubted, as pointed out in Franklin v. United States, supra, that the forerunner of the act of 1898 was the act of March 3, 1825 (chap. 65, 4 Stat. at L. 115), since the act of 1898 is virtually a repetition of the act of 1825, except as to provisions plainly inserted merely for the purpose of bring under the sway of the act United States reservations which, on account of the restrictive terms of the act of 1825, were not embraced within the sphere of its operations. The act of 1825 was entitled "An Act More Effectually to Provide for the Punishment of Certain Crimes against the United States, and for Other Purposes." Sections 1 and 2 of the act provided for the punishment of arson when committed within any fort, dockyard, and other enumerated places, "the site whereof is ceded to, and under the jurisdiction of, the United States." The 3d section was as follows:

"Section 3. And be it further enacted, that if any offense shall be committed in any of the places aforesaid, the punishment of which offense is not specially provided for by any law of the United States, such offense shall, upon a conviction in any court of the United States having *cog- [11 nizance thereof, be liable to, and receive the same punishment as the laws of the state in which such fort, dockyard, navy yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated, provide for the like offense when committed within the body of any county of such state."

This section came under consideration in United States v. Paul, 6 Pet. 141, 8 L. ed. 348, and it was held that its provisions referred only to the laws of the states existing at the time of the passage of the act; that is, those which were in force on March 3, 1825. It came also to pass that, in considering the words "whereof is ceded," in the 1st section, it was held that those words limited the operation of the act to places which had been ceded to the United States prior to the enactment of the act of 1825. United States v. Barney, 5 Blatchf. 294, Fed. Cas. No. 14,524.

By the 2d section of the act of April 5, 1866 (chap. 24, 14 Stat. at L. 13, U. S. Comp. Stat. 1901, p. 3651), Congress substantially re-enacted the 3d section of the act of 1825, changing, however, its phraseology so as to cause its provisions to apply not only, as did the act of 1825, to a place ceded to the United States, but to "any place which

has been or shall hereafter be ceded." As thus adopted, the act passed into the Revised Statutes as § 5391 (U. S. Comp. Stat. 1901, p. 3651), and continued in force until the passage of the act of 1898, which, it will be at once observed, makes no substantial change concerning the fundamental scope and purpose of the prior statute, since it simply enlarged the extent of its operation by causing the statute not only to embrace reservations which had been ceded to the United States, but those which had been carved out of the public domain.

If, then, the purpose and intent which led to the enactment of the act of 1825 can be discovered and made plain, it must clearly result, as that act was but the precursor of the act of 1898, that the light generated by the original intent and purpose will afford an efficacious means for discerning 12] *the intent and purpose of the act of 1898. The basis of the 3d section of the act of 1825 was the 11th section of a bill drawn by Mr. Justice Story, and of such 11th section its author said (Life of Justice Story, Boston, 1851, vol. 1, p. 293):

"This is the most important section of the whole bill. The criminal Code of the United States is singularly defective and inefficient . . . Few, very few, of the practical crimes (if I may so say) are now punishable by statutes, and if the courts have no general common-law jurisdiction (which is a vexed question), they are wholly dispunishable. The state courts have no jurisdiction of crimes committed on the high seas, or in places ceded to the United States. Rapes, arsons, batteries, and a host of other crimes may in these places be now committed with impunity. Suppose a conspiracy to commit treason in any of these places, by civil persons, how can the crime be punished? These are cases where the United States have an exclusive local jurisdiction. And can it be less fit that the government should have power to protect itself in all other places where it exercises a legitimate authority? That Congress has power to provide for all crimes against the United States is incontestable."

It is certain that the fundamental purpose thus contemplated by Mr. Justice Story was not overlooked or intended to be departed from by the writer of the act of 1825. There can be no doubt on this subject, in view of the fact that Mr. Webster, the author of that act, in referring to the 3d section of the bill by him drafted and reported to Congress (which section, as we have said, was based upon the 11th section of the bill drawn by Mr. Justice Story), said:

"'As to the 3d section, it must be obvious that, where the jurisdiction of a small place, containing only a few hundreds of people (a navy yard, for instance), was ceded to the United States, some provision was required *for the punishment of of- [13 fenses; and as, from the use to which the place was to be put, some crimes were likely to be more frequently committed than others, the committee had thought it sufficient to provide for these, and then to leave the residue to be punished by the laws of the state in which the yard, etc., might be. He was persuaded that the people would not view it as any hardship that the great class of minor offenses should continue to be punished in the same manner as they had been before the cession.' (Id. 338.)"

The demonstration of the purpose and scope of the act of 1825 is, if possible, made clearer by an amendment to which the act was subjected before it reached its final legislative form. As originally reported, the 4th section provided for the punishment of certain designated crimes by the law of the United States when committed "upon the sea, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States." But this provision was qualified in the passage of the bill, by the adoption of an amendment which added the words, "and out of the jurisdiction of any particular state." This amendment, as finally adopted, was the result in a somewhat modified form of a prior amendment offered by Mr. Wickliffe of Kentucky. Its meaning is not left to doubt, since Mr. Wickliffe, in urging the adoption of the amendment, expressly stated that it was "intended to prevent collisions between the authority of the general and state governments. . . . He conceived the state governments to be entirely competent to inquire into and punish crimes committed within their own jurisdiction, and that, as there was no necessity, there would be no advantage, in giving the United States concurrent power to do the same." Register of Debates in Congress, Gales & Seaton, 1824–1825, vol. 1, p. 154; Id. pp. 157, 165–166, 166–167, 168, 335, 335h, 338.

*Having fixed the meaning of the act [14 of 1898, and, as heretofore stated, there being no law of the United States specifically punishing the offense of criminal libel when committed on a reservation, etc., of the United States, it remains only to determine whether, applying the law of the state of New York, in accordance with the act of 1898, there was power in the grand jury to present the indictment here under consideration, or authority in the courts of the United States to entertain jurisdiction thereof as charging a substantive and distinct offense under the laws of the United States. That is to say, was the

indictment found below consistent with the application of the state law in accordance with the provisions of the act of 1898?

The provisions of the Penal Code of New York on the subject of criminal libel at the date mentioned were as follows (Laws New York, 1881, vol. 3, chap. 8):

"Section 243. A person who publishes a libel is guilty of a misdemeanor.

"Section 245. To sustain a charge of publishing a libel, it is not necessary that the matter complained of should have been seen by another. It is enough that the defendant knowingly displayed it, or parted with its immediate custody, under circumstances which exposed it to be seen or understood by another person than himself."

Sections 249 and 250, in substance, provided that where a person libeled is a resident of the state, the prosecution shall be either in the county of such residence, or the county where the paper is published; and that where the person libeled is a nonresident, the prosecution shall be in the county in which the paper, on its face, purports to be published, or, if it does not so indicate, in any county in which it was circulated.

"Section 251. A person cannot be indicted or tried for the publication of the same libel, against the same person, in more than one county."

15] *Section 138 of the Code of Criminal Procedure (Laws of New York, 1881, vol. 2, p. 43) contains similar provisions as to the place for the prosecution of a libel, and the immunity from liability to prosecution in more than one county. It was further provided:

"Section 139. When an act charged as a crime is within the jurisdiction of another state, territory, or county, as well as within the jurisdiction of this state, a conviction or acquittal thereof in the former is a bar to a prosecution or indictment therefor in this state.

"Section 140. When a crime is within the jurisdiction of two or more counties of this state, a conviction or acquittal thereof in one county is a bar to a prosecution or indictment thereof in another."

In view of the unity between the act of composing and the primary publication of a newspaper containing a libelous article within the state of New York, and of subsequent publications or repetitions thereof by the publisher of the newspaper which are clearly the resultant of the provisions of the laws of New York above quoted and referred to, two propositions are, we think, plainly established: First, that adequate means were afforded for punishing the circulation of the libel on a United States reservation by the state law and in the state courts, without the necessity of resorting to the courts of the United States for redress. Second, that resort could not be had to the courts of the United States to punish the act of publishing a newspaper libel by circulating a copy of the newspaper on the reservation, upon the theory that such publication was an independent offense, separate and distinct from the primary printing and publishing of the libelous article within the state of New York, without disregarding the laws of that state and frustrating the plain purpose of such law, which was that there should be but a single prosecution and conviction.

These propositions being true, it follows in the light *of the construction [16 which we have given the act of 1898, and the court below was right in quashing the indictment as not authorized by that act. No other conclusion we think was possible. As the court could not have sustained the indictment without giving to the statute a meaning directly conflicting with the construction which we have affixed to it. In other words, the court could not have upheld the indictment without deciding that because the statute provided that acts when committed on United States reservations, which were not expressly made criminal by a law of the United States, might be prosecuted and punished in accordance with the state law, therefore a prosecution was authorized which was inconsistent with that law, and in disregard thereof. And, further, albeit that Congress, having regard for the autonomy of the states, had deemed it best not to treat reservations within states as foreign to the states for the purpose of punishing crime unless expressly provided to the contrary, nevertheless the legislation enacted by Congress for this purpose had destroyed the end contemplated, since that legislation, when rightly construed, while applying the state legislation to crimes committed on a reservation as if the territory was not foreign, but domestic, at the same time exacted that the state law when thus applied should be enforced as if the territory was in no respects for the purpose domestic, but, on the contrary, was wholly foreign. The contradiction and confusion to which the contention thus reduces itself is too apparent to require anything but statement. Indeed, we think the misconception just pointed out lies at the basis of all the propositions so ably pressed at bar to secure a reversal, since they all depend upon a construction of the act of 1898 which we hold to be wrong. Great, therefore, as might otherwise be their potency, with the foundation gone upon which they rest, all come to this: that the statute sanctions that which it by necessary implication pro-

hibits, and, moreover, destroys the great 17] public *purpose which its adoption was intended to foster and protect.

The ruling which we now make does not, of course, extend to a subject which is not before us. It follows, therefore, that we do not now intimate that the rule which in this case has controlled our decision would be applicable to a case where an indictment was found in a court of the United States for a crime which was wholly committed on a reservation, disconnected with acts committed within the jurisdiction of the state, and where the prosecution for such crime in the courts of the United States, instead of being in conflict with the applicable state law, was in all respects in harmony therewith.

Affirmed.

ATLANTIC, GULF, & PACIFIC COMPANY, Appt. and Plff. in Err.,
v.
GOVERNMENT OF THE PHILIPPINE ISLANDS.

(See S. C. Reporter's ed. 17-23.)

Public contracts — damage to incompleted structure — who liable.

The contractor for a public work must bear the loss occasioned during a typhoon by the pressure of the rock revetment and the action of wind and waves, although the storm would have done no damage had not the structure been previously weakened by a displacement of bulkhead and revetment by pressure from the inside fill, where the extent of the government's liability under the contract was expressly restricted to paying for the repair of any break caused by pressure resulting from the mud fill, and the contractor's responsibility expressly covered damage to the bulkhead or revetment arising from wave action, or from pressure of the revetment against the timber structure.

[For other cases, see Contracts, VIII.; United States, VI., in Digest Sup. Ct. 1908.]

[No. 64.]

Argued December 6, 1910. Decided December 19, 1910.

APPEAL from and IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which affirmed a judgment of the Court of First Instance of the City of Manila, sustaining a demurrer to and dismissing the complaint in an action to recover from the government of the Philippine Islands the cost of repairing the damage to an incompleted public work. Affirmed.

See same case below, 10 Philippine, 166.

The facts are stated in the opinion.

Mr. **James Russell Soley** argued the cause, and, with Mr. Howard C. Dickinson, filed a brief for appellant and plaintiff in error:

The break of May 1, 1906, due to the pressure of the fill upon the inclosing bulkhead, was the proximate cause of the subsequent injury to the work, for the repair of which compensation is demanded.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 474, 476, 24 L. ed. 256, 258, 259; Ætna F. Ins. Co. v. Boon, 95 U. S. 117, 130, 24 L. ed. 395, 398; The G. R. Booth, 171 U. S. 450, 460, 43 L. ed. 234, 240, 19 Sup. Ct. Rep. 9.

Judicial notice will extend to well-known climatic conditions that may exist in certain localities, that are known by virtue of the fact that they are part of the general history of the land.

McGhee Irrigating Ditch Co. v. Hudson, — Tex. Civ. App. —, 21 S. W. 175.

Even such a matter as the limitations in reference to weather suitable for yachting has been made the subject of judicial notice by this court.

The Conqueror, 166 U. S. 110, 134, 41 L. ed. 937, 947, 17 Sup. Ct. Rep. 510.

The interval of a fortnight or so between the proximate efficient cause and the ultimate result is of no importance.

Ætna F. Ins. Co. v. Boon, 95 U. S. 117, 130, 24 L. ed. 395, 398.

Assistant Attorney General **Denison** argued the cause and filed a brief for appellee and defendant in error:

The division of liability had no relation to any delinquency under the contract, nor to any negligence; and therefore the responsibility for remote consequences as in such delinquencies does not here exist, but only for the particular consequences contracted against, as in cases of insurance.

Holmes, Common Law, pp. 77, 302, 303; Phillips, Ins. p. 1134.

When, at any point in the chain of cause and effect, we reach a consequence actually foreseen and provided for by the parties before the event, the rule of proximate cause must cease, and we are thrown on the agreement of the parties.

Howard F. Ins. Co. v. Norwich & N. Y. Transp. Co. 12 Wall. 194, 20 L. ed. 378; Fuller v. Detroit F. & M. Ins. Co. 1 L.R.A. 801, 36 Fed. 470; Beakes v. Phœnix Ins. Co. 143 N. Y. 402, 26 L.R.A. 267, 38 N. E. 453; Warmcastle v. Scottish Union & Nat.

NOTE.—As to who must bear loss caused by destruction of building or other structure in process of erection—see note to Milske v. Steiner Mantel Co. 5 L.R.A. (N.S.) 1105.

Ins. Co. 201 Pa. 302, 50 Atl. 941; Gilson v. Delaware & H. Canal Co. 36 Am. St. Rep. 807, note; General Mut. Ins. Co. v. Sherwood, 14 How. 351, 14 L. ed. 452, 15 Harvard L. Rev. 541; Dudgeon v. Pembroke, L. R. 2 App. Cas. 297, 46 L. J. Q. B. N. S. 409, 36 L. T. N. S. 382, 25 Week. Rep. 499, 3 Asp. Mar. L. Cas. 393, 14 Eng. Rul. Cas. 105, L. R. 9 Q. B. 585, 43 L. J. Q. B. N. S. 220, 31 L. T. N. S. 31, 22 Week. Rep. 914; Wilson v. The Xantho, L. R. 12 App. Cas. 514, 56 L. J. Prob. N. S. 116, 57 L. T. N. S. 701, 36 Week. Rep. 353, 6 Asp. Mar. L. Cas. 207, 24 Eng. Rul. Cas. 372; Orient Mut. Ins. Co. v. Adams, 123 U. S. 67, 31 L. ed. 63, 8 Sup. Ct. Rep. 68; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 438, 32 L. ed. 788, 791, 9 Sup. Ct. Rep. 469; Northwest Transp. Co. v. Boston M. Ins. Co. 41 Fed. 800; 2 Arnould, Marine Ins. 6th ed. pp. 737, 753; Hildyard, Marine Ins. p. 269; Phillips, Ins §§ 1136, 1137.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action upon a contract for an extension to the Luneta of the city of Manila. Both courts below decided for the government, the defendant, upon demurrer to the complaint. Abridged, the allegations are these: A contract for the work was made on July 24, 1905. On May 1, 1906, about 200 feet of bulkhead and rock revetment were displaced by pressure from the inside fill and moved about 20 feet into the bay of Manila, so that a large quantity of the fill that had been pumped behind the bulkhead escaped into the bay. On May 18, before the break could be repaired, a severe typhoon occurred, and the bulkhead and rock revetment, being without the support of the inside fill, were destroyed for about 1800 feet by the pressure of the rock revetment and the wind and waves from the outside, and a large additional quantity of the inside fill escaped. The question is which party must bear the last-mentioned loss. If the first break had not happened, no damage would have been done by the typhoon. The plaintiff sets forth the cost of repairing the damages of May 18, and seeks to recover it in this suit.

The specifications of the contract contain the following:

"5. The contractor will be responsible for damages to the bulkhead and revetment, arising from wave action or from pressure of the revetment against the timber structure; but if a break is caused by pressure 21] resulting from *the mud fill, the repairs to the structure will be paid for by the government at the prices specified in the contract; provided that the specifications have been fully complied with."

"12. . . . All losses of dredged material from the fills, excepting those due to failure of the bulkheads from pressure of the mud fill, as stated in article 5, will be measured as carefully as conditions will permit, and the computed amounts deducted from the statement for the final payment."

On May 24 a supplemental contract was signed. It recited that the repairs made necessary by the break of May 1 ought to be paid for by the government; that the original project was modified so as to fill the space that had given way with rock, with clay etc., for the interstices; and that the change would either increase or diminish the cost. It then agreed that the plaintiff should make the repairs, and the government would pay the actual and reasonable cost, with certain qualifications, plus 15 per centum, which last was to cover all other items, including profit. This referred to the first damage only. On the next day, May 25, the government director telegraphed to Commissioner Forbes: "for most of typhoon damage I hold contractor responsible; they claim government responsible for all, on account delay repairing first break, but wish to make repairs in manner authorized for first break, leaving settlement of liability to be determined later. Repairs should be made at once, but in view of contract requirement . . . do not see how contractors can be authorized proceed before determination of liability." The answer approved "authorizing contractors to proceed immediately to make repairs on lines indicated, with the understanding that all rights reserved in regard to adjudication of liabilities." These telegrams were communicated to the plaintiff, and it was authorized to proceed to make repairs in the manner outlined in the agreement *of May 24. It did so, and the [22 government now refuses to pay.

It will be understood that this case is in no way concerned with the possible difference in cost between the mode of repair adopted and that which might have been followed under the original contract. The question here is which party is responsible for the repairs, assuming no such difference to exist. We need not consider whether the effect of all that we have recited was or was not to substitute the new mode and new cost for the old, as that which the parties left at risk when they agreed that the plaintiffs should go on and do the work. If the plaintiff should have any claim for the excess alone, if any, over the cost that would have been incurred under the original plan, it is not suing for it here.

Both sides found their case on the divi-

sion of losses made by the specification quoted. On the one hand, the accident would not have happened but for the pressure from the mud fill; on the other, the more immediate cause was wave action and the pressure of the revetment against the timber structure, the effects of which the contractor was to bear. We agree with the court below that the contractor must bear the loss. The question is not whether the responsibility of the government might not have extended to the later consequences had it originally been a wrongdoer, and had it been sued in tort. The question is to what extent did the government assume a risk which, but for the contract, would not have fallen upon it at all. The contract qualified the relation only cautiously and in part. If the break was caused by pressure from the mud fill, the government agreed to pay for repairs to the structure. That was all.

But for the addition in 12, quoted above, it might be doubted whether "structure" meant anything but the bulkhead and revetment. But article 12 extends the government liability to loss of dredged ma-
23] terials due to *such a break. It is suggested that the reason for the government undertaking was that the plan was made by the government engineers. It may have been. But the plaintiff was content to work upon that plan; it, not the government, was doing the work, and it took the risk so far as the contract did not make a change. The government could not be charged by it with negligence or with causing the first break. That was only something for repairing which the government had promised to pay. Whatever the government had not promised to pay for, the contractor had to do, in order to offer the completed work which it had agreed to furnish. The case is stronger for the government than those upon policies of insurance, where courts refuse to look behind the immediate cause to remoter negligence of the insured. General Mut. Ins. Co. v. Sherwood, 14 How. 352, 366, 14 L. ed. 452, 458; Orient Mut. Ins. Co. v. Adams, 123 U. S. 67, 31 L. ed. 63, 8 Sup. Ct. Rep. 68; Dudgeon v. Pembroke, L. R. 2 App. Cas. 284, 295, 14 Eng. Rul. Cas. 105. Here, as we have said, the plaintiff cannot charge the defendant with negligence; the immediate event was one of which the plaintiff took the risk; on general principles of contract it took that risk unless it was agreed otherwise, and it does not matter to the result whether we say that we cannot look farther back than the immediate cause, or that the undertaking of the government did not extend to ulterior consequences, not specified, of the break for repairing which it undertook to pay, but which it did not cause.

Judgment affirmed.

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*TITLE GUARANTY & TRUST COM- [24
PANY OF SCRANTON, PENNSYLVANIA, Plff. in Err.,

v.

CRANE COMPANY, F. R. Bates and T. S. Clark, Copartners as Bates & Clark Company, et al.

(See S. C. Reporter's ed. 24–35.)

Bonds — of public contractor — liability for labor and material.

1. A vessel building for the United States, the title to which passes to the government as fast as paid for, is a "public work" within the meaning of the act of August 13, 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523), as amended by the act of February 24, 1905 (33 Stat. at L. 811, chap. 778, U. S. Comp. Stat. Supp. 1909, p. 948), requiring a bond from the contractor for the protection of persons furnishing labor or materials for the construction of public works.

Parties — in suit on bond of public contractor — action by laborers or materialmen.

2. The objection that the United States should have been made a party cannot avail to defeat the action on the bond of a contractor for a public work, given conformably to the act of August 13, 1894, as amended by the act of February 24, 1905, for the protection of persons furnishing labor and materials, where the suit was begun in the name of the United States, to the real plaintiff's use.

[For other cases, see Parties, 62–66, in Digest Sup. Ct. 1908.]

Bonds — of public contractor — action by laborers or materialmen — affidavit and copy of bond.

3. The failure of plaintiff, in an action on the bond of a contractor for a public work, given conformably to the act of August 13, 1894, as amended by the act of February 24, 1905, for the protection of laborers or materialmen, to apply, as provided in the statute, for a copy of the bond, and furnish an affidavit that labor or materials have been supplied by him for the prosecution of the work, is not fatal to the suit, where no action has been brought by the United States for more than six months from the completion of the work,

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Note.—On the right of subcontractor, materialman, or laborer to maintain action on contractor's bond to owner—see note to Knight & J. Co. v. Castle, 27 L.R.A.(N.S.) 573.

On the assignment of claims against the United States and of government contracts —see note to Greenville Sav. Bank v. Lawrence, 22 C. C. A. 650.

and affidavits are made and copies filed by interveners, since, under the circumstances, the omission is only a formal defect.

Bonds — of public contractor — claims for labor or materials.

4. Claims for cartage and towage to the place where a vessel is building for the United States, and for patterns furnished to the molding department of the builder, are within the obligation of the latter's bond, given conformably to the act of August 13, 1894, as amended by the act of February 24, 1905, for the protection of laborers and materialmen.

Bonds — consideration — seal.

5. Want of consideration cannot be urged to defeat an action on the bond of a public contractor, given conformably to the act of August 13, 1894, as amended by the act of February 24, 1905, for the protection of laborers and materialmen, because it was not executed until ten days after the contract was made,—especially where the bond was under seal.

[For other cases, see Bonds, 21–23, in Digest Sup. Ct. 1908.]

Assignment — claims against public contractor.

6. Claims for labor and materials against a contractor for a public work may be assigned without losing the protection of the bond given conformably to the act of August 13, 1894, as amended by the act of February 24, 1905, for the benefit of laborers and materialmen.

[For other cases, see Assignment, I., in Digest Sup. Ct. 1908.]

Costs — docket fee — consolidated action.

7. Each successful claimant in an action on the bond of a public contractor, given conformably to the act of August 13, 1894, as amended by the act of February 24, 1905, for the protection of laborers and materialmen, may be allowed the docket fee authorized by U. S. Rev. Stat. § 824, U. S. Comp. Stat. 1901, p. 632, since the claims are several, and represent distinct causes of action in different parties, although consolidated in a single suit.

[No. 67.]

Argued and submitted December 6 and 7, 1910. Decided December 19, 1910.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed, with slight modification, a judgment of the Circuit Court for the Western District of Washington in favor of plaintiffs in a suit by laborers and materialmen upon the bond of a contractor for a public work. Affirmed.

See same case below, 89 C. C. A. 618, 163 Fed. 168.

The facts are stated in the opinion.

Mr. James B. Murphy argued the cause, and, with Messrs. C. H. Winders and M. M. Richardson, filed a brief for plaintiff in error:

The unquestioned purpose of Congress was to protect, first, the United States, and, second, to protect laborers and materialmen who had no right of lien by reason of the building or work being upon the property of, or belonging to, the sovereign, by giving them a right of action on such bond; the object of Congress as to materialmen and laborers, as uniformly held by the courts, being to substitute the bond for the building or public work, thus affording to them the same rights as against the bond as they were given by the statutes of the several states under the general mechanic lien laws.

United States use of Hill v. American Surety Co. 200 U. S. 197, 50 L. ed. 437, 26 Sup. Ct. Rep. 168; United States Fidelity & G. Co. v. Golden Pressed & Fire Brick Co. (United States Fidelity & G. Co. v. United States) 191 U. S. 416, 48 L. ed. 242, 24 Sup. Ct. Rep. 142; United States use of Sica v. Kimpland, 93 Fed. 403; American Surety Co. v. Lawrenceville Cement Co. 110 Fed. 717; United States use of Vermont Marble Co. v. Burgdorf, 13 App. D. C. 506; United States use of Standard Oil Co. v. City Trust, S. D. & Secur. Co. 21 App. D. C. 369; 23 Ops. Atty. Gen. 174.

Title to the vessel under the contract did not pass to the government until its completion, delivery, and acceptance.

Clarkson v. Stevens, 106 U. S. 505, 27 L. ed. 139, 1 Sup. Ct. Rep. 200; The John B. Ketcham, 2d, 38 C. C. A. 518, 97 Fed. 872; Benjamin, Sales, 7th ed. p. 298; United States v. Ollinger, 55 Fed. 959; Yukon River S. B. Co. v. Gratto, 136 Cal. 538, 69 Pac. 252; Williams v. Jackman, 16 Gray, 514; Green v. Hall, 1 Houst. (Del.) 506; West Jersey R. Co. v. Trenton Car Works Co. 32 N. J. L. 517; The Etna v. Treat, 15 Ohio, 585; Andrews v. Durant, 11 N. Y. 35, 62 Am. Dec. 55; Hawes v. Wm. R. Trigg Co. 110 Va. 165, 65 S. E. 538.

Defendants in error having a right of lien, being fully protected thereby, are wholly without the scope and intent of the act, outside of any question of estoppel.

United States use of Sabine & E. T. R. Co. v. Hyatt, 34 C. C. A. 445, 63 U. S. App. 767, 92 Fed. 442; American Surety Co. v. Lawrenceville Cement Co. 110 Fed. 717; United States use of Thomas Laughlin Co. v. Morgan, 111 Fed. 474; Thomas Laughlin Co. v. American Surety Co. 51 C. C. A. 247, 114 Fed. 627.

The record shows that the Puget Sound Engine Works, Inc., prior to the institution of this action, was adjudged a bankrupt. Under U. S. Rev. Stat. § 3466, U. S. Comp. Stat. 1091, p. 2314, claims due the United

States in such cases are given preference over all other claims.

Re Stoever, 127 Fed. 394; Lewis v. United States, 92 U. S. 618, 23 L. ed. 513; Re Huddell, 47 Fed. 206; United States v. Barnes, 31 Fed. 705; Re Strassburger, 4 Woods, 558, Fed. Cas. No. 13,526; Bayne v. United States, 93 U. S. 643, 23 L. ed. 998; State v. Foster, 29 L.R.A. 226, note; United States v. McGee, 171 Fed. 209; Title Guaranty & S. Co. v. Guarantee Title & T. Co. 98 C. C. A. 603, 174 Fed. 385.

And the mere fact that the government might hold collateral or security does not require it to resort thereto before enforcing its direct remedy.

Re Stoever, 127 Fed. 396; Chemical Nat. Bank v. Armstrong, 28 L.R.A. 231, 8 C. C. A. 155, 16 U. S. App. 465, 59 Fed. 375; Lewis v. United States, 92 U. S. 618, 23 L. ed. 513; Merrill v. National Bank, 173 U. S. 140, 43 L. ed. 643, 19 Sup. Ct. Rep. 360; Childs v. N. B. Carlstein Co. 76 Fed. 86; Doe v. Northwestern Coal & Transp. Co. 78 Fed. 62; Wheeler v. Walton & W. Co. 72 Fed. 967; Levy v. Chicago Nat. Bank, 158 Ill. 88, 30 L.R.A. 380, 42 N. E. 131; Story, Eq. Jur. § 614.

Further, if the surety pays the debt of the government, it is entitled to be subrogated to its preference right.

Beaston v. Farmers' Bank, 12 Pet. 102, 9 L. ed. 1017; Hunter v. United States, 5 Pet. 173, 8 L. ed. 86; Field v. United States, 9 Pet. 182, 9 L. ed. 94; Re Huddell, 47 Fed. 206; United States v. Barnes, 31 Fed. 705; Re Kirkland, 2 Hughes, 208, Fed. Cas. No. 7,843; Kerr v. Hamilton, 1 Cranch, C. C. 546, Fed. Cas. No. 7,731; The M. M. Caleb, 9 Ben. 159, Fed. Cas. No. 9,682; Wilkinson v. Babbitt, 4 Dill. 207, Fed. Cas. No. 17,668.

The term "public works" includes only fixed works, and does not include a seagoing vessel.

Ellis v. Grand Rapids, 123 Mich. 567, 82 N. W. 244; Winters v. Duluth, 82 Minn. 130, 84 N. W. 788; Penn Iron Co. v. William R. Trigg Co. 106 Va. 557, 56 S. E. 329; 23 Ops. Atty. Gen. 174; 20 Ops. Atty. Gen. 454; 26 Ops. Atty. Gen. 30, 36; Hawes v. Wm. R. Trigg Co. 110 Va. 165, 65 S. E. 538; 23 Am. & Eng. Enc. Law, 2d ed. p. 459; United States v. Ollinger, 55 Fed. 959.

If relator and intervener are without the terms of the statute, the circuit court had no jurisdiction.

North American Transp. & T. Co. v. Morrison, 178 U. S. 262, 44 L. ed. 1061, 20 Sup. Ct. Rep. 869.

But outside of the question of jurisdiction, as upon a common-law obligation, relator and interveners could not maintain this action.

Constable v. National S. S. Co. 154 U. S. 51, 38 L. ed. 903, 14 Sup. Ct. Rep. 1062; Washington use of M'Cue v. Young, 10 Wheat. 406, 6 L. ed. 352; Sayward v. Dexter, H. & Co. 19 C. C. A. 176, 44 U. S. App. 376, 72 Fed. 758; Hennessy v. Bond, 23 C. C. A. 203, 48 U. S. App. 89, 77 Fed. 403; Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195; Armour & Co. v. Western Constr. Co. 36 Wash. 529, 78 Pac. 1106; Northampton v. Elwell, 4 Gray, 81; Penn Iron Co. v. William R. Trigg Co. supra.

Further, the agreement of appellant and plaintiff in error was an agreement under seal; and it is well settled that no one can maintain an action at law upon such a contract who is not a party thereto.

Willard v. Wood, 135 U. S. 309, 34 L. ed. 210, 10 Sup. Ct. Rep. 831; Crowell v. Currier, 27 N. J. Eq. 152; Davis v. Clinton Waterworks Co. 54 Iowa, 60, 37 Am. Rep. 185, 6 N. W. 126; Anderson v. Fitzgerald, 21 Fed. 294; Carmichael v. Moore, 88 N. C. 29; Com. use of Kennet v. Fugate, 1 T. M. Mon. 1; Wright v. Terry, 23 Fla. 160, 2 So. 6; Woodland v. Newhall, 31 Fed. 434; Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. 100; Montgomery v. Rief, 15 Utah, 495, 50 Pac. 623; Parker v. Jeffery, 26 Or. 186, 37 Pac. 712; Com. v. Hatch, 5 Mass. 191; Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195; Jefferson v. Asch, 53 Minn. 446, 25 L.R.A. 257, 39 Am. St. Rep. 618, 55 N. W. 604; Parlin v. Hall, 2 N. D. 473, 52 N. W. 405; Burton v. Larkin, 36 Kan. 246, 59 Am. Rep. 541, 13 Pac. 398; Austin v. Seligman, 21 Blatchf. 506, 18 Fed. 519; State v. St. Louis & S. F. R. Co. 125 Mo. 617, 28 S. W. 1074; Cragin v. Lovell, 109 U. S. 194, 27 L. ed. 903, 3 Sup. Ct. Rep. 132; Keller v. Ashford, 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494.

Before any person has a cause of action upon such a bond as the one in question, such party must apply by affidavit to the proper authorities and procure a certified copy of the bond.

United States use of Hill v. American Surety Co. 200 U. S. 197, 50 L. ed. 437, 26 Sup. Ct. Rep. 168.

A railway and transportation company or carrier has no right of action on such bond for the carriage of goods or material which enter into the work.

United States use of Sabine & E. T. R. Co. v. Hyatt, 34 C. C. A. 445, 63 U. S. App. 767, 92 Fed. 442; United States ex rel. McAllister v. Fidelity & D. Co. 86 App. Div. 475, 83 N. Y. Supp. 752; Thomas Laughlin Co. v. American Surety Co. 51 C. C. A. 247, 114 Fed. 627; United States use of Thomas Laughlin Co. v. Morgan, 111 Fed. 474; American Surety Co. v. Lawrenceville Cement Co. 110 Fed. 717.

The supreme court of the state of Washington has also held that under the mechanics' lien law of that state one is given no lien thereunder for mere cartage charges.

Ryan v. Guilfoil, 13 Wash. 373, 43 Pac. 351; Webster v. Real Estate Improv. Co. 140 Mass. 526, 6 N. E. 71; Wilson v. Nugent, 125 Cal. 280, 57 Pac. 1008.

Personal property which may be acquired for use in the construction of a public building or the carrying on of some public work, which does not actually enter into such work, but which may be used for other purposes, is not such material as would give the furnisher thereof a right of action on the bond.

United States use of Thomas Laughlin Co. v. Morgan, 111 Fed. 474; United States use of Rockland Lake Trap Rock Co. v. Conkling, 68 C. C. A. 20, 135 Fed. 508.

The claims of Eyres Transfer Company and the Chesley Tow Boat Company for cartage and towage, and the claims of Chas. H. Allmond & Company and the Puget Sound Pattern Works for drawings and patterns, are not claims for material or for labor entering into and becoming a part of the public work, and are not such claims as are contemplated by the statute.

United States use of Standard Oil Co. v. City Trust, S. D. & Secur. Co. 21 App. D. C. 369; United States use of Chapman v. City Trust, S. D. & Surety Co. 23 App. D. C. 153; Wells v. Mehl, 25 Kan. 205; Basshor v. Baltimore & O. R. Co. 65 Md. 99, 3 Atl. 285; United States use of Sica v. Kimpland, 93 Fed. 403; United States v. Simon, 38 C. C. A. 659, 98 Fed. 73; Central Trust Co. v. Texas & St. L. R. Co. 27 Fed. 178.

An action upon a contractor's bond by a materialman or laborer is purely statutory, and is given for the benefit of the individual laborer and materialman, and as such is personal to such laborer or materialman. This is true, as we understand the rule, in cases in which rights are purely statutory. This is the construction uniformly given to the mechanics' lien statutes of the several states.

20 Am. & Eng. Enc. Law, 2d ed. p. 471; 1 Jones, Liens, §§ 982, 983, 990; Dexter, H. & Co. v. Sparkman, 2 Wash. 165, 25 Pac. 1070.

The giving of the bond was without consideration.

Brandt, Suretyship & Guaranty, 3d ed. § 764; Lafayette Mut. Bldg. Asso. v. Kleinhoffer, 40 Mo. App. 388; Ring v. Kelly, 10 Mo. App. 411.

Outside of any question as to the correct construction of the Federal statute requiring the defeated party to pay a docket fee, we do not believe it to be a correct construction of this act to tax against a bonding company that cannot, prior to the expiration of one year, satisfy these claims, an attorneys' fee to each individual laborer and materialman. Their several appearances in the circuit court are not brought about by any fault or default on the part of the surety.

Missouri P. R. Co. v. Texas & P. R. Co. 38 Fed. 775; Central Trust Co. v. Wabash, St. L. & P. R. Co. 32 Fed. 684.

The docket fee allowed is the individual property of the attorney or solicitor, and such attorney, although he may appear for a number of intervening claimants, is certainly, under the most broad construction, entitled to have no other fees allowed and taxed than one docket fee.

Barron v. The Mt. Eden, 87 Fed. 483.

Mr. **Ira Bronson** submitted the cause for defendants in error except the Crane Company:

A liberal construction of the act and the amended act by the courts shows that it is broader than the mechanics' lien statutes of the various states.

United States use of Hill v. American Surety Co. 200 U. S. 197, 50 L. ed. 437, 26 Sup. Ct. Rep. 168; United States use of Standard Furniture Co. v. Ætna Indemnity Co. 40 Wash. 87, 82 Pac. 171; United States use of Anniston Pipe & Foundry Co. v. National Surety Co. 34 C. C. A. 526, 92 Fed. 551.

The definitions of the words "public works," as given in the Century Dictionary and the American & English Encyclopedia of Law, second edition, are narrow and not comprehensive.

United States use of Tidewater Steel Co. v. Perth Amboy Shipbuilding & Engineering Co. 137 Fed. 689.

Some of the public works in which the bond has been required are the following: Wing dams and shore protections (United States v. Farley, 91 Fed. 474); a dry dock to be located on the water line of the Brooklyn Navy Yard (United States v. Freel, 92 Fed. 299); a jetty (United States use of Sabine & E. T. R. Co. v. Hyatt, 34 C. C. A. 445, 63 U. S. App. 767, 92 Fed. 442); a wharf and pier (United States use of Sica v. Kimpland, 93 Fed. 403); improvements on lock in river (United States use of Salem-Bedford Stone Co. v. Sheridan, 19 Fed. 236); erection of certain guns at Fisher's Island by Pneumatic Torpedo Co. (United States use of Flaherty v. American Surety Co. 127 Fed. 490); building gun emplacements and a wharf (United States use of Thomas Laughlin Co. v. Morgan, 111 Fed. 476).

The removal of obstructions to navigation in the rivers and harbors of the coun-

try is a part of the public work of the government.

United States v. Jefferson, 60 Fed. 736.

Under the contract of the Puget Sound Engine Works, laborers and materialmen are not protected by state lien laws.

Clarkson v. Stevens, 106 U. S. 505, 27 L. ed. 139, 1 Sup. Ct. Rep. 200; The John B. Ketcham 2d, 38 C. C. A. 518, 97 Fed. 873; The Poconoket, 67 Fed. 262, 17 C. C. A. 309, 28 U. S. App. 600, 70 Fed. 640, 168 U. S. 707, 42 L. ed. 1214, 18 Sup. Ct. Rep. 939.

The contract was within the scope of the act and within its express terms. The materials and labor required were within the terms of the contract. Plaintiff in error entered into the engagement under the statute, and is now estoped to deny liability.

United States use of Standard Furniture Co. v. Ætna Indemnity Co. 40 Wash. 87, 82 Pac. 171.

Is an application by affidavit to the Department under whose direction the work is performed a condition precedent to bringing suit?

United States v. Hegeman, 21 Pa. Super. Ct. 459.

Claims of the Eyres Transfer Company are within the purview of the contract and bond.

American Surety Co. v. Lawrenceville Cement Co. 110 Fed. 717.

The claims of laborers and materialmen are assignable under the act, and the assignment does not defeat a recovery.

United States use of Fidelity Nat. Bank v. Rundle, 40 C. C. A. 450, 100 Fed. 400.

The taxation of costs was proper.

The Oregon, 68 C. C. 603, 133 Fed. 609.

31] *Mr. Justice **Holmes**, delivered the opinion of the court:

This is an action brought under the act of August 13, 1894, chap. 280, 28 Stat. at L. 278, U. S. Comp. Stat. 1901, p. 2523, as amended by the act of February 24, 1905, chap. 778, 33 Stat. at L. 811, U. S. Comp. Stat. Supp. 1909, p. 948, upon a bond given to the United States, as required by that act. The contract to secure which the bond was given was a contract by the Puget Sound Engine Works to build and deliver a single screw wooden steamer for the United States, and the main question in the case is whether the statute applies to a contract for such a chattel. If not, parties like the plaintiffs, who furnished labor or materials for the work, have no standing to maintain the suit. We proceed, as soon as may be, to dispose of that question, leaving details and minor objections to be taken up later in turn. It was raised by demurrer to the declaration, and subsequently by what was entitled an affirmative defense pleaded by the surety and a demurrer by the plaintiffs. The decision was for the plaintiffs, against the surety, in the circuit court of appeals. 89 C. C. A. 618, 163 Fed. 168.

The amended statute requires any person "entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, . . . to execute the usual penal bond . . . with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work." It gives any person who has furnished labor or materials used in the construction or repair of any public work, which have not been paid for, the right to intervene in a suit upon the bond. In short, besides securing the United States, the act is intended to protect persons furnishing materials or labor "for the construction of public works," as the title *declares. The question [32 narrows itself accordingly to whether the steamer was a "public work" within the meaning of the words as used.

As a preliminary to the answer, it is relevant to mention that by article 3 of the contract, partial payments are provided for as the "labor and materials furnished" equal certain percentages of the total, and that by article 4 "the portion of the vessel completed and paid for under said method of partial payments shall become the property of the United States," although the contractor remains responsible for the care of the portion paid for, and by article 2 there is to be a final test of the vessel when completed. The vessel has been built and accepted, and is now in possession of the United States. Notwithstanding these facts, it was argued that the statute did not apply to the contract, because the laborers and materialmen had a lien by the state law; and that, even if the statute applied, they had lost their rights by not asserting them before the delivery of the vessel, as before that, it is said, the title did not pass to the United States. Among other things, this ended the right to subrogation that the surety might have claimed. But the very recent decision in United States v. Ansonia Brass & Copper Co. 218 U. S. 452, 54 L. ed. 1107, 31 Sup. Ct. Rep. 49 [Nov. 28, 1910], establishes that the title to the completed portion of the vessel passed, as provided in article 4, and that the laborers and materialmen could not have asserted the lien supposed to exist.

The case cited shows, therefore, that such claimants are within the policy of the statute. It also contains a strong intimation that they are within the meaning of its words. For it refers to the statute, and says that it was in recognition of the inability of such persons to take liens upon the public property of the United States that Congress passed the act, and adds that, in view of this purpose to provide protection for those who could not protect themselves, the statute has been given liberal construction 33] by this court. *See also United States use of Hill v. American Surety Co. 200 U. S. 197, 50 L. ed. 437, 26 Sup. Ct. Rep. 168. The reference and comment when the attempt was made to enforce a lien under state laws would have had no relevance unless they had been intended to point out the true remedy available in such a case. The argument that the vessel was not a public work loses most of its force when it appears that the title was in the United States as soon as the first payment was made. Of course, public works usually are of a permanent nature, and that fact leads to a certain degree of association between the notion of permanence and the phrase. But the association is only empirical, not one of logic. Whether a work is public or not does not depend upon its being attached to the soil; if it belongs to the representative of the public, it is public, and we do not think that the arbitrary association that we have mentioned amounts to a coalescence of the more limited idea with speech so absolute that we are bound to read "any public work" as confined to work on land. It is not necessary to discuss in detail some opinions from the Attorney General's office in cases where the title to the vessel did not pass that looked rather in the opposite direction. It is enough to say that there has been no such clear and established construction as to cause us to yield our own view. On the other hand, the decision of some other courts has been in accord with the judgment below and with what we now decide. United States use of Tidewater Steel Co. v. Perth Amboy Shipbuilding & Engineering Co. 137 Fed. 689, 693; American Surety Co. v. Lawrenceville Cement Co. 110 Fed. 717, 719; United States use of Standard Furniture Co. v. Ætna Indemnity Co. 40 Wash. 87, 82 Pac. 171.

Another defense, set up in the same manner as the first, is that the United States should have been made a party; and, in connection with this, a further one, that the suit cannot be maintained unless the plaintiff has applied, as provided in the statute, for a copy of the bond, and furnished an affidavit that labor or materials have been 34] supplied *by him for the prosecution of the work. The latter is the more substantial, as, of course, the suit was begun in the name of the United States, to the real plaintiffs' use. But the objection is not serious in either form. No suit had been brought by the United States for more than six months from the completion of the work, affidavits were made and copies filed by interveners, and in the circumstances the omission was only a formal defect. The language of the statute that, after giving the affidavit, the party should be furnished with a certified copy of the contract and bond, "upon which he or they shall have a right of action," etc., may be read as meaning "upon which bond" as easily as "upon doing which," and hardly can be construed as making a condition precedent. The conditions are attached in the form of provisos by later words.

Next it is objected that certain claimants are not entitled to the benefit of the bond, either because they had a lien or because the service was too remote. Of the former class are claims for cartage and towage to the spot where the work was going on. We agree with Judge Putnam in American Surety Co. v. Lawrenceville Cement Co. 110 Fed. 717, that in these smaller matters the objection, if carried to an extreme, would defeat the purpose of the statute, that such liens ordinarily are not insisted upon, and that it would be unreasonable to let the statute 'interfere with the convenience of minor dealings in such methods as the usual practices establish.' Of the other class are the claims for patterns furnished to the molding department of the Puget Sound Engine Works. As was said by the judge below, those who furnish the patterns have as fair a claim to be protected as those who erect the scaffolding upon which the carpenters stand in doing their work upon the ship.

Next it is said that the bond was without consideration because the contract was made on February 17, and the bond not executed until February 27, ten days later. But *the transactions may be regarded as 35] simultaneous in a practical sense, and the bond being under seal, consideration is presumed.

The assignment of some of the claims did not affect the remedy. United States use of Fidelity Nat. Bank v. Rundle, 40 C. C. A. 450, 100 Fed. 400.

The allowance of a docket fee of $10 to each claimant appears to us to be correct. Rev. Stat. § 824, U. S. Comp. Stat. 1901, p. 632. The claims are several and represent distinct causes of action in different parties, although consolidated in a single suit.

Judgment affirmed.

MOBILE, JACKSON, & KANSAS CITY RAILROAD COMPANY, Plff. in Err.,
v.
J. A. TURNIPSEED, Administrator, etc.

(See S. C. Reporter's ed. 35–44.)

Constitutional law — equal protection of the laws — classification of railway employees — police power.

1. The abrogation of the fellow-servant rule as to railway employees, made by Miss. Code 1892, § 3559, does not offend against the equal protection of the laws clause of the Federal Constitution because construed as applying to the foreman of a section crew charged with keeping the track in repair.

[For other cases, see Constitutional Law, 286–291, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — due process of law — statute creating presumption of negligence.

2. Neither the equal protection of the laws nor due process of law is denied by Miss. Code 1906, § 1985, under which, in actions against railway companies for damage done to persons or property, proof of injury inflicted by the running of the locomotives or cars is made prima facie evidence of negligence.

[For other cases, see Constitutional Law, 266–291, 774–778, in Digest Sup. Ct. 1908.]

[No. 59.]

Submitted November 30, 1910. Decided December 19, 1910.

IN ERROR to the Supreme Court of the State of Mississippi to review a judgment which affirmed a judgment of the Circuit Court of Newton County, in that state, in favor of plaintiff in an action to recover damages for a wrongful death. Affirmed.

See same case below, 91 Miss. 273, 124 Am. St. Rep. 679, 46 So. 360.

The facts are stated in the opinion.

Mr. **James N. Flowers** submitted the cause for plaintiff in error:

Since railroad companies have been put in a class by themselves for the purpose of this special legislation, because the business in which they are engaged is peculiarly hazardous, the reason for the classification must be constantly kept in mind. Employees cannot claim the benefit of this special legislation simply because they are employed by railroad companies. Where the reason fails, the classification must fail. The employees sought to be helped are such only as are in need of help. No employee can claim the benefit of the special enactment whose safety is not imperiled by the hazards peculiar to railroading.

Bradford Constr. Co. v. Heflin, 88 Miss. 314, 12 L.R.A.(N.S.) 1040, 42 So. 174, 8 A. & E. Ann. Cas. 1077.

A statute similar to the Mississippi statute has been construed to protect those employees only "who are exposed to the peculiar danger attending the operation of railroads, or what are, for brevity, called 'railroad dangers.'"

Blomquist v. Great Northern R. Co. 65 Minn. 69, 67 N. W. 804.

The Blomquist Case was at the time considered a close or "border" case, and was permitted to pass because of the charge that the plaintiff had to do the work in great haste, in order to avoid danger to trains that were or might be approaching.

Jemming v. Great Northern R. Co. 96 Minn. 302, 1 L.R.A.(N.S.) 702, 104 N. W. 1079; Anderson v. Great Northern R. Co. 74 Minn. 432, 77 N. W. 240.

The Mississippi statute is arbitrary class legislation.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

Mr. **C. H. Alexander** submitted the cause for defendant in error. Mr. Chalmers Alexander was on the brief:

The proper construction of state legislation being a question of local, and not of Federal, law, the decision of a state court thereon is not subject to review by the Federal Supreme Court, on writ of error to that court.

Great Western Teleg. Co. v. Purdy, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810; Lombard v. West Chicago Park, 181 U. S. 33, 45 L. ed. 731, 21 Sup. Ct. Rep. 507; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; Gatewood v. North Carolina, 203 U. S. 531, 51 L. ed. 305, 27 Sup. Ct. Rep. 167.

The construction given by the highest state court to its own Constitution is con-

NOTE.—On the validity of statute abrogating fellow-servant rule—see note to Bradford Constr. Co. v. Heflin, 12 L.R.A.(N.S.) 1040.

As to the power of the legislature to make injury prima facie evidence of negligence—see note to Mobile, J. & K. C. R. Co. v. Turnipseed, 32 L.R.A.(N.S.) 226.

As to the validity of class legislation—see note to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

For a discussion of police power generally—see notes to State v. Marshall, 1 L.R.A. 51; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; State v. Schlemmer, 10 L.R.A. 135; and Barbier v. Connolly, 28 L. ed. U. S. 923.

clusive on the Federal Supreme Court, in determining its validity under the Federal Constitution, on writ of error to such court.

Manley v. Clark, 187 U. S. 547, 47 L. ed. 296, 23 Sup. Ct. Rep. 208; West v. Louisiana, 194 U. S. 258, 48 L. ed. 965, 24 Sup. Ct. Rep. 650; Campbell v. California, 200 U. S. 87, 50 L. ed. 382, 26 Sup. Ct. Rep. 182; Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396.

When a state court decides a case upon two grounds, one Federal and the other non-Federal, this court will not disturb the judgment if the non-Federal ground, fairly construed, sustains the decision.

Berea College v. Kentucky, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33; Murdock v. Memphis, 20 Wall. 590, 636, 22 L. ed. 429, 443; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Giles v. Teasley, 193 U. S. 146, 160, 48 L. ed. 655, 658, 24 Sup. Ct. Rep. 359; Allen v. Arguimbau, 198 U. S. 149, 49 L. ed. 990, 25 Sup. Ct. Rep. 622.

The work in which Hicks was engaged was such as habitually placed him within the hazards contemplated by the Mississippi Constitution.

Keatley v. Illinois C. R. Co. 103 Iowa, 282, 72 N. W. 545; Haden v. Sioux City & P. R. Co. 92 Iowa, 227, 60 N. W. 537; Dunn v. Chicago, R. I. & P. R. Co. 130 Iowa, 580, 6 L.R.A.(N.S.) 452, 107 N. W. 616, 8 A. & E. Ann. Cas. 226; Jemming v. Great Northern R. Co. 96 Minn. 302, 1 L.R.A. (N.S.) 702, 104 N. W. 1079; Williams v. Iowa C. R. Co. 121 Iowa, 270, 96 N. W. 774; Croll v. Atchison, T. & S. F. R. Co. 57 Kan. 548, 46 Pac. 972.

Section 1985 of the Mississippi Code of 1906 is not in conflict with the Federal Constitution.

Georgia R. Co. v. Ivey, 73 Ga. 499; Augusta & S. R. Co. v. Randall, 79 Ga. 305, 4 S. E. 674; 33 Cyc. Law & Proc. p. 1274.

Mr. Justice **Lurton** delivered the opinion of the court:

This was an action in tort for the wrongful killing of Ray Hicks, a section foreman in the service of the railroad company. There was a judgment for the plaintiff in a circuit court of the state of Mississippi, which was affirmed by the supreme court of the state.

The Federal questions asserted, which are supposed to give this court jurisdiction to review the judgment of the supreme court of the state, arise out of the alleged repugnancy of §§ 3559 and 1985 of the Mississippi Code to that clause of the 14th Amendment of the Constitution which guarantees to every person the equal protection of the laws.

*Section 3559 of the Mississippi Code [40 of 1892, being a rescript of § 193 of the Mississippi Constitution of 1890, abrogates, substantially, the common-law fellow-servant rule as to "every employee of a railroad corporation." It is urged that this legislation, applicable only to employees of a railroad company, is arbitrary, and a denial of the equal protection of law, unless it be limited in its effect to employees imperiled by the hazardous business of operating railroad trains or engines, and that the Mississippi supreme court had, in prior cases, so defined and construed this legislation. Ballard v. Mississippi Cotton Oil Co. 81 Miss. 532, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533; Bradford Constr. Co. v. Heflin, 88 Miss. 314, 12 L.R.A.(N.S.) 1040, 42 So. 174, 8 A. & E. Ann. Cas. 1077.

It is now contended that the provision has been construed in the present case as applicable to an employee not subject to any danger or peril peculiar to the operation of railway trains, and that therefore the reason for such special classification fails, and the provision, so construed and applied, is invalid as a denial of the equal protection of the law.

This contention, shortly stated, comes to this: that although a classification of railway employees may be justified from general considerations based upon the hazardous character of the occupation, such classification becomes arbitrary and a denial of the equal protection of the law the moment it is found to embrace employees not exposed to hazards peculiar to railway operation.

But this court has never so construed the limitation imposed by the 14th Amendment upon the power of the state to legislate with reference to particular employments as to render ineffectual a general classification resting upon obvious principles of public policy, because it may happen that the classification includes persons not subject to a uniform degree of danger. The insistence, therefore, that legislation in respect of railway employees generally is repugnant to the clause of the Constitution *guaranteeing the equal protection of [41 the law, merely because it is not limited to those engaged in the actual operation of trains, is without merit.

The intestate of the defendant in error was not engaged in the actual operation of trains. But he was nevertheless engaged in a service which subjected him to dangers from the operation of trains, and brought him plainly within the general legislative purpose. The case in hand illustrates the

fact that such employees, though not directly engaged in the management of trains, are nevertheless within the general line of hazard inherent in the railway business. The deceased was the foreman of a section crew. His business was to keep the track in repair. He stood by the side of the track to let a train pass by; a derailment occurred, and a car fell upon him and crushed out his life.

In the late case of Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676, an Indiana fellow-servant act was held applicable to a member of a railway construction crew who was injured while engaged in the construction of a coal tipple alongside of the railway track. This whole matter of classification was there considered. Nothing more need be said upon the subject, fo rthe case upon this point is fully covered by the decision referred to.

The next error arises upon the constitutionality of § 1985 of the Mississippi Code of 1906. That section reads as follows:

"Injury to persons or property by railroads prima facie evidence of want of skill, etc.—In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employees of railroad companies."

The objection made to this statute is that 42] the railroad *companies are thereby put into a class to themselves, and deprived of the benefit of the general rule of law which places upon one who sues in tort the burden of not only proving an injury, but also that the injury was the consequence of some negligence in respect of a duty owed to the plaintiff.

It is to be primarily observed that the statute is not made applicable to all actions against such companies. Its operation is plainly limited, first, to injuries sustained by passengers or employees of such companies; second, to injuries arising from the actual operation of railway trains or engines; and third, the effect of evidence showing an injury due to the operation of trains or engines is only "prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury."

The law of evidence is full of presumptions either of fact or law. The former are, of course, disputable, and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded. For a discussion of some common-law aspects of the subject, see Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co. 1 L.R.A. (N.S.) 533, 71 C. C. A. 316, 139 Fed. 528 et seq.

Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases, abound, and the decisions upholding them are numerous. A few of the leading ones are Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; People v. Cannon, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759; Horne v. Memphis & O. R. Co. 1 Coldw. 72; Meadowcroft v. People, 163 Ill. 56, 35 L.R.A. 176, 54 Am. St. Rep. 447, 45 N. E. 303; Com. v. Williams, 6 Gray, 1; State v. Thomas, 144 Ala. 77, 2 L.R.A.(N.S.) 1011, 113 Am. St. Rep. 17, 40 So. 271, 6 A. & E. Ann. Cas. 744.

We are not impressed with the argument that the supreme court of Mississippi, in construing the act, has *declared that [43 the effect of the statute is to create a presumption of liability, giving to it, thereby, an effect in excess of a mere temporary inference of fact. The statutory effect of the rule is to provide that evidence of an injury arising from the actual operation of trains shall create an inference of negligence, which is the main fact in issue. The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done the inference is at an end, and the question of negligence is one for the jury, upon all of the evidence. In default of such evidence, the defendant, in a civil case, must lose, for the prima facie case is enough as matter of law.

The statute does not, therefore, deny the equal protection of the law, or otherwise fail in due process of law, because it creates a presumption of liability, since its operation is only to supply an inference of liability in the absence of other evidence contradicting such inference.

That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the

presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.

Tested by these principles, the statute as 44] construed and *applied by the Mississippi court in this case is unobjectionable. It is not an unreasonable inference that a derailment of railway cars is due to some negligence, either in construction or maintenance of the track or trains, or some carelessness in operation.

From the foregoing considerations it must be obvious that the application of the act to injuries resulting from "the running of locomotives and cars" is not an arbitrary classification, but one resting upon considerations of public policy, arising out of the character of the business.

Judgment affirmed.

JULIAN HERENCIA, Plff. in Err.,
v.
FELIX GUZMAN.

(See S. C. Reporter's ed. 44–46.)

Appeal — review of facts.

1. The objections that the verdict in a negligence action was against the weight of evidence, and that the damages allowed were excessive, cannot be considered by the Federal Supreme Court on a writ of error, where there is evidence proper for the consideration of the jury.

[For other cases, see Appeal and Error, 4755–4781, in Digest Sup. Ct. 1908.]

Appeal — question not raised below — admissibility of evidence.

2. No question is presented to an appellate court with respect to the admissibility of the testimony of a physician appointed by the trial court in a negligence action to examine the plaintiff in order to ascertain his present condition, where such appointment was made with the consent of counsel, and the witness subsequently testified without objection.

[For other cases, see Appeal and Error, 4606–4637, in Digest Sup. Ct. 1908.]

Appeal — amending record.

3. There is no error in amending a bill of exceptions, after an appeal bond has been given and approved, so as to conform to the facts, by showing that the court stated when a physician appointed by the court in a negligence action to ascertain plaintiff's present condition was called to testify, that his examination of the plaintiff had been made by consent, and that counsel had agreed that his evidence should be considered as correct, where it does not appear that such statement was unjustified, or that objection to it was made.

[For other cases, see Appeal and Error, 3261–3271, in Digest Sup. Ct. 1908.]

Appeal — excluding expert witness — when not ground for reversal.

4. The refusal to permit a physician called as an expert to testify in a negligence action is not ground for reversal, where the record does not show what testimony the witness was expected to give, or that he was qualified to give any.

[For other cases, see Appeal and Error, 5020–5070, in Digest Sup. Ct. 1908.]

[No. 46.]

Submitted November 29, 1910. Decided December 19, 1910.

IN ERROR to the District Court of the United States for Porto Rico to review a judgment in favor of plaintiff in an action to recover damages for personal injuries. Affirmed.

See same case below on motion for new trial, 3 Porto Rico Fed. Rep. 472.

The facts are stated in the opinion.

Mr. **Willis Sweet** submitted the cause for plaintiff in error.

Mr. **Frederick L. Cornwell** submitted the cause for defendant in error:

This court, on writ of error, will not disturb the verdict of the jury on questions of fact, nor consider any questions of law, unless properly raised in the trial court.

Lawrence v. McCalmont, 2 How. 426, 11 L. ed. 326; Gregg v. Moss, 14 Wall. 564, 20 L. ed. 740; United States Exp. Co. v. Ware, 20 Wall. 543, 22 L. ed. 422.

This court will not determine on writ of error whether the verdict in an action for personal injuries is excessive.

New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, 36 L. ed. 71, 12 Sup. Ct. Rep. 356; Lincoln v. Power, 151 U. S. 437, 38 L. ed. 225, 14 Sup. Ct. Rep. 387.

The right of the court to amend the record to show what actually transpired is inherent.

Gagnon v. United States, 193 U. S. 456, 48 L. ed. 747, 24 Sup. Ct. Rep. 510.

The evidence rejected, or a statement of what it tended to prove, must appear in the bill of exceptions.

Ladd v. Missouri Coal & Min. Co. 14 C. C. A. 246, 32 U. S. App. 93, 66 Fed. 880; Northwestern Union Packet Co. v. Clough, 20 Wall. 528, 22 L. ed. 406; Florida R. Co. v. Smith, 21 Wall. 255, 22 L. ed. 513; Thompson v. First Nat. Bank, 111 U. S. 529, 28 L. ed. 507, 4 Sup. Ct. Rep. 689; Patrick v. Graham, 132 U. S. 627, 33 L.

ed. 460, 10 Sup. Ct. Rep. 194; Lyon v. Batz, 42 Mo. App. 606; Bener v. Edgington, 76 Iowa, 105, 40 N. W. 117.

Mr. Justiee Hughes delivered the opinion of the court:

This action was brought in the district court of the United States for Porto Rico to recover damages for personal injuries resulting from the fall of a portion of the building owned by the plaintiff in error, which it was alleged he had negligently allowed to remain in a dangerous condition. It was tried by a jury, who gave a verdict against plaintiff in error for the sum of $9,000. Judgment was entered aecordingly, and the case comes here on writ of error.

The argument on behalf of the plaintiff in error proceeds upon the assumption that this eourt may review the evidenee as to negligenee and as to the damages reeoverable, and may reverse the judgment if the court is dissatisfied with the findings of the jury. This, however, is not the provinee of the court upon writ of error. As there was evidenee proper for the consideration of the jury, the objeetion that the verdiet was against the weight of evidenee, or that the damages allowed were excessive, cannot be eonsidered. United States Exp. Co. v. Ware, 20 Wall. 543, 22 L. ed. 422; New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, 75, 6 L. ed. 71, 80, 12 Sup. Ct. Rep. 356; Lincoln v. Power, 151 U. S. 436–438, 38 L. ed. 224, 225, 14 Sup. Ct. Rep. 387; Humes v. United States, 170 U. S. 210, 42 L. ed. 1011, 18 Sup. Ct. Rep. 602.

Nor was any exeeption taken by the plaintiff in error to the instructions which the trial eourt gave to the jury. The only questions which are properly before us for review are as to certain rulings upon the admissibility of testimony.

Error is assigned in admitting the testimony of a physician, Dr. Joaquin Martinez Guasp, "as correct, and it is further urged that the eourt "erred in changing the ree-46] ord *relative thereto after the bond on appeal had been given and approved." It appears that the witness was appointed by the court to examine the plaintiff below in order to ascertain his condition at the time of the trial, and that this aetion was taken with the eonsent of the eounsel for the defendant (the plaintiff in error). The examination was made and the witness subsequently testified without objeetion. In faet, the counsel for the plaintiff in error conducted the direet examination, and there was no eross-examination. No question, therefore, is presented with respeet to the admissibility of this testimony. The bill of exeeptions was amended so as to show that the eourt stated, when the testimony was introdueed, not only that the physician's examination had been made by consent, but that counsel had "agreed that his evidence should be considered as correct." This amendment, as the distriet judge states, was to conform the record to the fact. Assuming, as we must, that the statement was made by the eourt, it does not appear that it was unjustified or that it was objeeted to. The exeeption of the plaintiff in error is simply to its inclusion in the record.

It is further insisted that the eourt erred in refusing to allow one Dr. Gonzalez to testify. As to this, the record merely sets forth that eounsel "offered to present the testimony of one Dr. Gonzalez, as an expert, which testimony is not allowed by the eourt, and to whieh ruling of the court counsel for defendant thereupon noted an exeeption." Manifestly, the judgment eannot be set aside because of this ruling, for it does not appear what testimony the witness was expeeted to give, or that he was qualified to give any.

We have examined the other rulings of whieh plaintiff in error complains, with respect to the striking out of certain testimony, and we find no error.

Judgment affirmed.

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*AMERICAN LAND COMPANY [47
v.
LOUIS ZEISS.

(See S. C. Reporter's ed. 47–71.)

Constitutional law — police power — restoring lost records.

1. A state possesses the power to remedy the confusion and uncertainty as to registered titles to land, arising from the loss or destruction of public records by flood, fire, or earthquake.

[Police power generally, see Constitutional Law, IV. c, in Digest Sup. Ct. 1908.]

Note.—For a discusison of police power generally—see notes to State v. Marshall, 1 L.R.A. 51; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; State v. Schlemmer, 10 L.R.A. 135; and Barbier v. Connolly, 28 L. ed. U. S. 923.

As to what eonstitutes due proeess of law —see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On notice and hearing required to constitute due proeess of law—see notes to Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194; Ulman v. Baltimore, 11 L.R.A. 224.

Constitutional law — due process of law — lost records act — notice to unknown claimants.

2. The safeguards afforded unknown claimants or claims by the provisions of Cal. Laws 1906, chap. 59, for the establishment and quieting of title to real property in case of the loss or destruction of public records, by an action *in rem*, to be brought by a person in the actual and peaceable possession of the property against "all persons claiming any interest in or lien upon the real property herein described, or any part thereof," satisfy the due process of law clause of the Federal Constitution, where such statute, as construed by the state courts, requires the plaintiff to designate and serve all known claimants, and those whom, with reasonable diligence, he can ascertain to be such, and calls for constructive service by publication against nonresidents and unknown owners, for the conspicuous posting upon the property of a copy of the summons, and the recording of a *lis pendens*,—especially since, under Cal. Code Civ. Proc. § 473, any person interested and having no actual notice of the decree may come in at any time within a year after its rendition, and, upon showing cause, may have the decree vacated as to him, and be allowed to answer to the merits.

[For other cases, see Constitutional Law, 696–724, in Digest Sup. Ct. 1908.]

[No. 230.]

Argued October 14 and 17, 1910. Decided January 3, 1911.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Ninth Circuit, presenting questions as to the invalidity under the Federal Constitution of the California lost records act and proceedings thereunder. Answered in the negative.

Statement by Mr. Chief Justice White:

As a result of the conditions caused in San Francisco by the great calamity of earthquake and fire which befell that city in April, 1906, an extraordinary session of the legislature of California was convoked. One reason stated for the call was the necessity of providing for restoring the record title to land in San Francisco. An act to [49] accomplish *that purpose became a law upon its approval on June 16, 1906. It is copied on the margin.†

The circuit court of appeals has certified the issues involved in a pending cause, the determination of which rests upon the validity of the statute just referred to. The pertinent facts arising on the record of the cause are stated in the certificate, and are hereafter set forth. The purpose contemplated is to obtain instructions as to *whether the act in question "is viola-[50] tive of the 14th Amendment of the Constitution of the United States," and whether by virtue of a decree rendered by the superior *court of the city and county of San [51] Francisco, referred to in the recital of facts, the American Land Company "has been deprived of its property without due process of law."

*The following are the facts recited [52] in the certificate:

"The appellant, as complainant in the court below, brought its bill in equity against the appellee to remove *a cloud from [53] its title to real property, and to quiet its title thereto. The bill alleges on April 10, 1908, and at all the times prior thereto, referred to in the bill, George H. Lent *and Mary G. Coggeshall were severally [54] the owners in fee simple of two adjacent lots of land in San Francisco, which lots are described in the bill. The lots and others similarly situated are known as city slip and water lots. Under the provisions of an act of the legislature of the state of California, approved March 5, 1851 (Stat. of 1851, p. 764), the state leased this property to the city of San Francisco for the term of ninety-nine years. The appellee is alleged to be the owner of the unexpired portion of this lease as successor in interest of the city's right, and to be entitled to the possession thereof until March 26, 1950. The bill alleges that the appellee has no right whatever other than this right of possession and occupation; that notwithstanding the premises, the appellee claims to be the owner in fee simple of said lands under a judgment and decree of the superior court of the state of California in and for the city and county of San Francisco, made and entered December 19, 1906, in a proceeding entitled 'Louis Zeiss, Plaintiff, vs. All Persons Claiming Any Interest in or Lien upon the Real Property Herein *Described, or Any Part Thereof, De-[55]

†Chapter 59.

An Act to Provide for the Establishment and Quieting of Title to Real Property in Case of the Loss or Destruction of Public Records.

[Approved June 16, 1906.]

The people of the state of California, represented in senate and assembly, do enact as follows:

Sec. 1. Whenever the public records in the office of a county recorder have been, or shall hereafter be, lost or destroyed, in whole or in any material part, by flood, fire, or earthquake, any person who claims an estate of inheritance or for life in, and who is by himself or his tenant or other person holding under him, in the actual and

fendants;' that said proceeding was brought under an act of the legislature of the state of California, entitled, 'An Act to Provide for the Establishment and Quieting of Title to Real Property in Case of the Loss or Destruction of Public Records,' approved June 16, 1906; that said claim of the appellee under said decree is without right, and said decree is void; that in the complaint in that proceeding the appellee, after properly setting forth the destruction of the records, alleged that he was the owner in fee simple, free of encumbrance, of the lands which are described in the bill in this case, and that he prayed for a decree of the superior court adjudging his title to be as set forth by him; that at the time of filing his complaint he filed his affidavit setting forth the character of the estate, the source of his title, his possession, and stating that he had made no conveyance of the land, that there were no liens on it, and that he did not know and that he had never been informed of any other person who claimed or may claim any interest or lien upon the property, or any part there-

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peaceable possession of any real property in such county, may bring and maintain an action *in rem* against all the world, in the superior court for the county in which such real property is situate, to establish his title to such property, and to determine all adverse claims thereto. Any number of separate parcels of land claimed by the plaintiff may be included in the same action.

Sec. 2. The action shall be commenced by the filing of a verified complaint, in which the party so commencing the same shall be named as plaintiff, and the defendants shall be described as "all persons claiming any interest in, or lien upon, the real property herein described, or any part thereof," and shall contain a statement of the facts enumerated in § 1 of this act, a particular description of such real property, and a specification of the estate, title, or interest of the plaintiff therein.

Sec. 3. Upon the filing of the complaint, a summons must be issued under the seal of the court, which shall contain the name of the court and county in which the action is brought, the name of the plaintiff, and a particular description of the real property involved, and shall be directed to "all persons claiming any interest in, or lien upon the real property herein described, or any part thereof," as defendants, and shall be substantially in the following form:

"In the Superior Court of the State of California, in and for the County (or City and County) of ———.

Action No. —.

——— ———, Plaintiff,

vs.

All Persons Claiming Any Interest in, or Lien upon, the Real Property Herein Described, or Any Part Thereof, Defendants.

The People of the State of California, to all persons claiming any interest in, or lien upon, the real property herein described, or any part thereof, defendants, Greetings:

You are hereby required to appear and answer the complaint of ——— ———, plaintiff, filed with the clerk of the above entitled court and county, within three months after the first publication of this summons, and to set forth what interest or lien, if any, you have in or upon that certain real property or any part thereof, situated in the county (or city and county) of ———, state of California, particularly described as follows: (Here insert description.)

And you are hereby notified that, unless you so appear and answer, the plaintiff will apply to the court for the relief demanded in the complaint, to wit: (Here insert a statement of the relief so demanded.)

Witness my hand and the seal of said court, this — day of ———, A. D. ———.

[Seal.] ——— ———, Clerk."

Sec. 4. The summons shall be published in a newspaper of general circulation, published in the county in which the action is brought. The newspaper in which such publication is to be made shall be designated by an order of the court or a judge thereof, to be signed and filed with the clerk. No other order for the publication of the summons shall be necessary, nor shall any affidavit therefor be required, nor need any copy of the complaint be served, except as hereinafter required. The summons shall be published at least once a week for a period of two months, and to each publication thereof shall be appended a memorandum in substance as follows:

"The first publication of this summons was made in ——— (here insert the name) newspaper on the —day of ——— A. D. ———; (inserting the date)."

And if the affidavit provided for in § 5 of this act discloses the name of any person claiming an interest in the property, or a lien thereon adverse to the plaintiff, that fact, together with the name and address (if given), of said person, shall be stated in a memorandum to be appended to the summons in substance as follows:

"The following persons are said to claim an interest in, or lien upon said property adverse to plaintiff (giving their names and addresses as above provided). A copy of the summons, together with a copy of the foregoing memoranda, shall be posted in a conspicuous place on each parcel of the property described in the complaint, within fifteen days after the first publication of the summons."

Sec. 5. At the time of filing the complaint, the plaintiff shall file with the same

of, adversely to him. The affidavit contained no averment that inquiry of any kind had been made to ascertain whether such adverse claim did exist. It is shown in the bill that in said proceeding under said act of the legislature, summons was published in the Law Recorder for the space of two months, and was also posted on the land, and after the period of publication of the summons the appellee herein obtained a decree of the court, as prayed for by him. The bill further alleges that although the appellant's grantors were at all times citizens and residents of California, not seeking to evade, but ready to accept, service of summons, and easily reached for that purpose, no service was made upon them, nor did they in any way receive notice of the pendency of the action, nor did they gain any knowledge of the existence of the decree until more than a year after its entry. A demurrer *was interposed to the bill in [56 the court below for want of equity, which demurrer was sustained by the court and the bill was dismissed."

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his affidavit, fully and explicitly setting forth and showing (1) the character of his estate, right, title, interest, or claim in and possession of the property, during what period the same has existed and from whom obtained; (2) whether or not he has ever made any conveyance of the property, or any part thereof, or any interests therein, and if so, when and to whom; also a statement of any and all subsisting mortgages, deeds of trust, and other liens thereon; (3) that he does not know and has never been informed of any other person who claims or who may claim, any interest in, or lien upon, the property or any part thereof, adversely to him, or, if he does know or has been informed of any such person, then the name and address of such person. If the plaintiff is unable to state any one or more of the matters herein required, he shall set forth and show, fully and explicitly, the reasons for such inability. Such affidavit shall constitute a part of the judgment roll. If the plaintiff be a corporation, the affidavit shall be made by an officer thereof. If the plaintiff be a person under guardianship, the affidavit shall be made by his guardian.

Sec. 6. If the said affidavit discloses the name of any person claiming any interest in, or lien upon, the property adverse to the plaintiff, the summons shall also be personally served upon such person if he can be found within the state, together with a copy of the complaint and a copy of said affidavit during the period of the publications of the summons; and to the copy of the summons delivered to any such person there shall be appended a copy of the memoranda provided for in § 4 hereof.

If such person resides out of this state, a copy of the summons, memoranda, complaint, and affidavit shall be within fifteen days after the first publication of the summons deposited in the United States post-office, inclosed in a sealed envelop, postage prepaid, addressed to such person at the address given in the affidavit, or if no address be given therein, then at the county seat at the county in which the action is brought. If such person resides within this state, and could not, with due diligence, be found within the state, within the period of the publication of the summons, then said copies aforesaid shall be mailed to him as above provided forthwith upon the expiration of said period of publication.

Sec. 7. Upon the completion of the publication and posting of the summons, and its service upon and mailing to the person, if any, upon whom it is hereby directed to be so specially served, the court shall have full and complete jurisdiction over the plaintiff and the said property, and of the person of everyone claiming any estate, right, title, or interest in or to, or lien upon, said property, or any part thereof, and shall be deemed to have obtained the possession and control of said property for the purposes of the action, and shall have full and complete jurisdiction to render the judgment therein which is provided for in this act.

Sec. 8. At any time within three months from the first publication of the summons, or within such further time, not exceeding thirty days, as the court may, for good cause, grant, any person having or claiming any estate, right, title, or interest, in or to, or lien upon, said property, or any part thereof, may appear and make himself a party to the action by pleading to the complaint. All answers must be verified and must specifically set forth the estate, right, title, interest, or lien so claimed.

Sec. 9. The plaintiff must, at the time of filing the complaint, and every defendant claiming any affirmative relief must, at the time of filing his answer, record in the office of the recorder of the county in which the property is situated, a notice of the pendency of the action, containing the object of the action or defense, and a particular description of the property affected thereby; and the recorder shall record the same in a book devoted exclusively to the recordation of such notices, and shall enter, upon a map or plat of the parcels of land, to be kept by him for that purpose, on that part of the map or plat representing the parcel or parcels so described, a reference to the date of the filing of such notice and, when recorded, to the book and page of the record thereof.

Sec. 10. No judgment in any such action shall be given by default; but the court must require proof of the facts alleged in the complaint and other pleadings.

Sec. 11. The judgment shall ascertain and determine all estates, rights, titles, interests, and claims in and to said property and every part thereof, whether the same be legal or equitable, present or future, vested or contingent, or whether the same

Mr. C. Irving Wright argued the cause, and, with Messrs. Samuel Knight, Edward J. McCutchen, and Charles Page, filed a brief for the American Land Company:

To constitute due process of law in judicial proceedings involving adversary rights of property there must be adequate notice, giving a real and substantial, and not merely a formal and illusory, opportunity to controvert the plaintiff's allegations. This is axiomatic.

Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410.

A judgment in such cases can conclude the rights of parties and privies only. This is an "immutable principle of natural justice."

Hollingsworth v. Barbour, 4 Pet. 466, 475, 7 L. ed. 922, 926.

It is *res judicata* after the court has, after argument and consideration, come to a decision on a contested matter.

Jenkins v. Robertson, L. R. 1 H. L. Sc. App. Cas. 117; Tregea v. Modesto Irrig. Dist. 164 U. S. 179, 41 L. ed. 395, 17 Sup. Ct. Rep. 52.

Of course, this means that there must be either an actual trial of contested issues or a default after due notice in a case in which an adversary is disclosed who may be served with notice.

The act is invalid even within the extreme doctrine of Tyler v. Registration Ct. Judges, 175 Mass. 71, 55 N. E. 812; because it does not require any effort to ascertain claimants before concluding the rights of those who are undisclosed, and therefore unnotified.

State ex rel. Monnett v. Guilbert, 56 Ohio St. 575, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 551; People ex rel. Deneen v. Simon, 176 Ill. 165, 44 L.R.A. 801, 68 Am. St. Rep. 175, 52 N. E. 910; State ex rel. Douglas v. Westfall, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175; Dewey v. Kimball, 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704.

Here, without any inquiry whatever, and without any exercise of diligence, even on the part of the petitioner himself, without inquiry even from his immediate grantor, and upon his mere affidavit that he does not know and has never been informed of any other claimant,—facts that inhere "in his own consciousness, and of which he alone can have knowledge,"—the court acquires jurisdiction to proceed to a conclusive decree binding the rights of next-door neighbors, whose claims might, by the slightest inquiry, have been ascertained.

Hoffman v. Superior Court, 151 Cal. 386, 90 Pac. 939.

Of course, if the act contemplated any diligence whatsoever even on the part of the petitioner, it would have required in the

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consist of mortgages or liens of any description, and shall be binding and conclusive upon every person who, at the time of the commencement of the action, had or claimed any estate, right, title, or interest in or to said property, or any part thereof, and upon every person claiming under him by title subsequent to the commencement of the action. A certified copy of the judgment in such action shall be recorded in the office of the recorder of the county in which said action was commenced, and any party or the successor in interest of any party to said action may, at his option, file for record in the office of the recorder of such county the entire judgment roll in said action.

Sec. 12. Except as herein otherwise provided, all the provisions and rules of law relating to evidence, pleading, practice, new trials and appeals, applicable to other civil actions, shall apply to the actions hereby authorized.

At any time after the issuance of the summons, any party to the action may take depositions therein, in conformity to law, upon notice to the adverse party sought to be bound by such depositions, and who have appeared in the action (if any), and upon notice filed with the clerk. The depositions may be used by any party against any other party giving or receiving the notice (except the clerk), subject to all just exceptions.

Sec. 13. The clerk shall number consecutively, in a distinct series, all actions hereby authorized, and shall keep an index and register thereof devoted exclusively to such actions.

Sec. 14. Whenever judgment in an action hereby authorized shall have been entered as to any real property, no other action relative to the same property or any part thereof, maintained under this act, shall be tried until proof shall first have been made to the court that all persons who appeared in the first action, or their successors in interest, have been personally served with the papers mentioned in § 6 of this act, either within or without this state, more than one month before the time to plead expired.

Sec. 15. An executor, administrator, or guardian, or other person holding the possession of property in the right of another, may maintain as plaintiff, and may appear and defend in, the action herein provided for.

Sec. 16. The word "county," whenever used in this act, includes and applies to a consolidated city and county.

Sec. 17. The remedies provided for by this act shall be deemed cumulative, and in addition to any other remedy now or hereafter provided by law for quieting or establishing title to real property.

Sec. 18. All actions authorized hereby must be commenced before July 1st, 1909.

Sec. 19. This act shall be in force thirty days after its passage.

affidavit a statement of the facts showing diligence.

Forbes v. Hyde, 31 Cal. 354.

The rule of the Massachusetts case, notwithstanding its safeguards, is not sustainable as providing due process in a case in which the citizen has, as here, been deprived of his property without effectual notice.

Tyler v. Registration Ct. Judges, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410.

In proceedings termed quasi *in rem*, there is a suit against a personal defendant by name (The Hine v. Trevor, 4 Wall. 571, 572, 18 L. ed. 456), and such actions differ, among other things, from actions which are strictly *in rem*, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that the judgment therein is conclusive only between the parties (Freeman v. Alderson, 119 U. S. 185, 30 L. ed. 372, 7 Sup. Ct. Rep. 165).

Proceedings under the McEnerney act cannot, without violation of the principles of natural justice, be brought within the class of cases where constructive service is permissible.

The Hine v. Trevor, 4 Wall. 571, 572, 18 L. ed. 456; Freeman v. Alderson, 119 U. S. 185, 30 L. ed. 372, 7 Sup. Ct. Rep. 165; London v. London Joint Stock Bank, L. R. 6 App. Cas. 399; Fisher v. Lane, 3 Wils. 297, 2 W. Bl. 834; Bruce v. Wait, 1 Mann. & G. 1; London v. Cox, L. R. 2 H. L. 239; Hart v. Samsom, 110 U. S. 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 596; Meyer v. Kuhn, 13 C. C. A. 298, 25 U. S. App. 174, 65 Fed. 705; Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; Remer v. McKay, 54 Fed. 432.

The McEnerney act does not provide reasonable constructive service upon claimants who have not been ascertained, even if it could be conceived that it does require any precautions to ascertain claimants.

Roller v. Holly, 176 U. S. 398, 409, 44 L. ed. 520, 524, 20 Sup. Ct. Rep. 410.

No reasonable notice can be imparted by a publication not naming or describing the person to be cited, and not making any allegation against him.

Pennsylvania Co. v. Sears, 136 Ind. 460, 34 N. E. 15, 36 N. E. 353; Fanning v. Krapfl, 61 Iowa, 417, 14 N. W. 727, 16 N. W. 293; Skelton v. Sackett, 91 Mo. 377, 3 S. W. 874; Corrigan v. Schmidt, 126 Mo. 304, 28 S. W. 874; Detroit v. Detroit City R. Co. 54 Fed. 1; Meyer v. Kuhn, 13 C. C. A. 298, 25 U. S. App. 174, 65 Fed. 705; Netzorg v. Geren, 26 Tex. Civ. App. 119, 62 S. W. 789; Ohlmann v. Clarkson Saw Mill Co. 222 Mo. 62, 28 L.R.A.(N.S.) 432, 133 Am. St. Rep. 506, 120 S. W. 1155.

The "decree," so-called, rendered under the provisions of the act, was not rendered in a judicial proceeding. It was a mere declaration of right upon an *ex parte* application. To make such declaration is not the exercise of judicial power, which alone, under the Constitution, is due process of law, potent to transfer property from one citizen to another.

Austin, Jurisprudence, § 1036; Voluntary Jurisdiction, Bouvier, Law Dict.; Cushing v. Laird, 107 U. S. 69, 27 L. ed. 391, 2 Sup. Ct. Rep. 196; Blagge v. Moore, 6 Tex. Civ. App. 359, 23 S. W. 470; Third Street & Suburban R. Co. v. Lewis, 173 U. S. 457, 43 L. ed. 766, 19 Sup. Ct. Rep. 451; Atty. Gen. v. Avon, 3 De G. J. & S. 637, 33 L. J. Ch. N. S. 172; Bradstreet v. Neptune Ins. Co. 3 Sumn. 600, Fed. Cas. No. 1,793.

It is practically an *ex parte* application for the determination of a question which may never in fact arise. A mere barren right,—a purely moot question.

Tregea v. Modesto Irrig. Dist. 164 U. S. 179, 41 L. ed. 395, 17 Sup. Ct. Rep. 52.

The complaint alleges no violation, or threatened violation, of right; discloses no controversy; designates no defendant.

That is judicial power which, in a controversy, decides the right to property between citizens or proper parties.

Miller, Const. p. 348; Re Prohibitions Del Roy, 12 Coke, 63; Bl. Com. Bk. 3, p. 25.

Judicial power requires a case of private rights or private property infringed, or in danger of actual or threatened infringement.

Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721; DeCamp v. Archibald, 50 Ohio St. 618, 40 Am. St. Rep. 692, 35 N. E. 1058; Canada Northern R. Co. v. International Bridge Co. 7 Fed. 653; Brewington v. Lowe, 1 Ind. 21, 48 Am. Dec. 349; Fuller v. Colfax County, 4 McCrary, 535, 14 Fed. 178; Magistrates of Edinburgh, 1 S. C. Sess. Cas. 3d Series, 892; Cashman v. Cashman, 123 Mo. 647, 27 S. W. 549; Blagge v. Moore, 6 Tex. Civ. App. 359, 23 S. W. 470; Tyler v. Registration Ct. Judges, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; Harvey v. Harvey, 73 N. H. 106, 59 Atl. 621.

Therefore courts have no jurisdiction of fictitious controversies.

Lord v. Veazie, 8 How. 255, 12 L. ed. 1069; Livingston v. D'Orgenoy, 108 Fed. 469.

They lose jurisdiction of suits where the controversy has been settled.

Dunn v. State, 163 Ind. 317, 71 N. E. 890; Cox v. Hakes, L. R. 15 App. Cas. 506, 60 L. J. Q. B. N. S. 89, 63 L. T. N. S. 392,

39 Week. Rep. 145, 17 Cox, C. C. 158, 54 J. P. 820.

They refuse to give opinions on moot questions.

Taylor v. Place, 4 R. I. 362; Opinion of Justices, 126 Mass. 567; Re Priority of Legislative Appropriations, 19 Colo. 58, 34 Pac. 278; Re Constitutionality of Senate Bill No. 65, 12 Colo. 470, 21 Pac. 478; State ex rel. Breckenridge v. Fleming, 70 Neb. 523, 97 N. W. 1063; Ex parte County Council [1891] 1 Q. B. 725.

And if an opinion is unnecessary to the determination of the controversy, such opinion is *obiter dictum*, not a decision.

Carroll v. Carroll, 16 How. 275, 286, 287, 41 L. ed. 936, 941.

A sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled; in order to make a sentence there must be a real interest, a real argument, a real prosecution, a real defense, a real decision.

Bandon v. Becher, 3 Clark & F. 511.

There must be a litigation upon actual transactions between real parties, growing out of a controversy affecting legal or equitable rights as to person or property.

Marye v. Parsons, 114 U. S. 325, 29 L. ed. 205, 5 Sup. Ct. Rep. 932, 962.

The so-called "decree" relied upon by appellee was rendered upon an *ex parte* application which disclosed no adversary, and cannot, therefore, be admitted as *res judicata*.

Jenkins v. Robertson, L. R. 1 H. L. Sc. App. Cas. 117; Duchess of Kingston's Case, 20 How. St. Tr. 478; Bandon v. Becher, 3 Clark & F. 511; Carroll v. Carroll, 16 How. 275, 286, 14 L. ed. 936, 941; Tregea v. Modesto Irrig. Dist. 164 U. S. 179, 41 L. ed. 395, 17 Sup. Ct. Rep. 52; Cushing v. Laird, 107 U. S. 69, 27 L. ed. 391, 2 Sup. Ct. Rep. 196; Re Howard, 9 Wall. 175, 19 L. ed. 634.

A "decree" by an admiralty court for the sale of a ship on the master's petition is not conclusive upon the owner or third persons, because it is made upon the application of the master, and not in an adverse proceeding. The proceeding, being *ex parte*, cannot be deemed conclusive in favor of the party promoting it.

The Tilton, 5 Mason, 474, Fed. Cas. No. 14,054.

It was never intended, and cannot be tolerated, that a state should have power to create an action whereby ordinary rights of property may be devested and transferred to another citizen, which action, where diversity of citizenship is presented, cannot be entertained by the Federal courts.

Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 249, 253, 49 L. ed. 462, 466, 468, 25 Sup. Ct. Rep. 251.

If the act had expressly provided that no case arising thereunder should, under any circumstances, be triable in the Federal courts, it cannot be doubted that it would be declared void. It is the necessary effect of a statute that determines its constitutionality,—not what it expresses.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678.

The Federal courts can have no jurisdiction even of a contest between parties if the effect of the judgment is to conclude the rights of persons not parties. Such power would not properly be exerted in an ordinary suit *inter partes*.

Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 50 L. ed. 101, 25 Sup. Ct. Rep. 727.

The act cannot be sustained as analogous to the common-law fine.

McGregor v. Comstock, 17 N. Y. 169; 2 Bl. Com. 355, note (k), 356, 357; Portsmouth v. Vincent, 1 Sch. & Lef. 380; Smith v. Packhurst, 3 Atk. 135, 2 Strange, 1105; Brereton v. Gamul, 2 Atk. 240; Pomfret v. Windsor, 2 Ves. Sr. 472.

The act cannot be sustained as a statute of limitations.

The proceeding provided for by the act is not an action *in rem* in the sense that it may constitutionally conclude the rights of third parties.

Black, Judgm. § 793; Mankin v. Chandler, 2 Brock. 125, Fed. Cas. No. 9,030, Freeman v. Alderson, 119 U. S. 185, 30 L. ed. 372, 7 Sup. Ct. Rep. 165; Hill v. Henry, 66 N. J. Eq. 150, 57 Atl. 554; Cole v. The Brandt, 1 Betts, D. C. Ms. 36, Fed. Cas. No. 2,978; The Heinrich Bjorn, L. R. 10 Prob. Div. 44, L. R. 11 App. Cas. 270, 55 L. J. Prob. N. S. 80, 55 L. T. N. S. 66, 6 Asp. Mar. L. Cas. 1, 24 Eng. Rul. Cas. 608; State ex rel. Monnett v. Guilbert, 56 Ohio St. 575, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 551; Bear Lake County v. Budge, 9 Idaho, 703, 108 Am. St. Rep. 179, 75 Pac. 614; Atlantic Works v. The Glide, 157 Mass. 525, 34 Am. St. Rep. 305, 33 N. E. 163, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930; Vandewater v. Mills, 19 How. 82, 89, 15 L. ed. 554, 556; The Hine v. Trevor, 4 Wall. 571, 572, 18 L. ed. 456; Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390.

The infinite conclusive effect of a real judgment *in rem* is the very respect in which it differs *toto cœlo* from a judgment quasi *in rem*.

Black, Judgm. § 793; Hill v. Henry, 66 N. J. Eq. 150, 57 Atl. 554; Cole v. Brandt, Fed. Cas. No. 2,978; The Heinrich Bjorn, L. R. 10 Prob. Div. 44, L. R. 11 App. Cas. 270, 55 L. J. Prob. N. S. 80, 55 L. T. N. S. 66, 6 Asp. Mar. L. Cas. 1, 24 Eng. Rul. Cas.

608; State ex rel. Monnett v. Guilbert, 56 Ohio St. 575, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 551; Bear Lake County v. Budge, 9 Idaho, 703, 108 Am. St. Rep. 179, 75 Pac. 614.

In determining the question whether a given statute violates the dictates of natural justice, or, as in the present case, more specifically, whether the notice provided by the statute is a substantial notice, giving a real, and not merely an illusory, opportunity to defend the action, it is prudent to take into careful consideration the procedure sanctioned by usage.

Cunnius v. Reading School Dist. 198 U. S. 458, 49 L. ed. 1125, 25 Sup. Ct. Rep. 721, 3 A. & E. Ann. Cas. 1121.

Unless notice of the action *in rem* be, at the least, so given as normally to come to the notice of an agent representative of all persons to be affected by the decree, the sentence of the court will be *ex parte*, and not to be regarded.

The Nautik, 7 Asp. Mar. L. Cas. 591, 64 L. J. Prob. N. S. 61 [1895] P. 121, 11 Reports, 716, 72 T. L. N. S. 21, 43 Week. Rep. 703; Rose v. Himely, 4 Cranch, 241, 277, 278, 2 L. ed. 608, 619, 620.

The circumstance that alone saves a judgment *in rem* from being "manifestly contrary to natural justice" is the fact that there is, in all such proceedings, a substantial notice to the persons to be affected, who have, therefore, a real, and not merely an illusory, opportunity of protecting their interests.

The Parlement Belge, 4 Asp. Mar. L. Cas. 234, L. R. 5 Prob. Div. 197, 42 L. T. N. S. 273, 28 Week. Rep. 642; Pennoyer v. Neff, 95 U. S. 714, 725, 24 L. ed. 565, 570.

Since the 14th Amendment, the legislature cannot create a valid procedure against natural justice, nor except a case out of the general rule required by natural justice.

Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410.

The distinction between proceedings *in rem* and proceedings *in personam* is substantial, and not to be destroyed by the legislature without evasion of the constitutional rights of the parties.

McNamara v. Casserly, 61 Minn. 335, 63 N. W. 880; Kundinger v. Saginaw, 59 Mich. 355, 26 N. W. 634; State ex rel. Flint v. Fond du Lac, 42 Wis. 287; Re Smith, 9 Wash. 85, 37 Pac. 311, 494.

Mr. Otto tum Suden argued the cause and filed a brief for Louis Zeiss:

The state has the power to regulate the tenure of immovable property within its limits, the conditions of its ownership, and the modes of establishing the same, whether the owner be stranger or citizen.

United States v. Fox, 94 U. S. 315, 24 L. ed. 192; Arndt v. Griggs, 134 U. S. 317, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; Hamilton v. Brown, 161 U. S. 265, 40 L. ed. 696, 16 Sup. Ct. Rep. 585; Lynch v. Murphy, 161 U. S. 247, 251, 40 L. ed. 688, 689, 16 Sup. Ct. Rep. 523; Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; Bennett v. Fenton, 10 L.R.A. 500, 41 Fed. 283; Gormley v. Clark, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; Tyler v. Registration Ct. Judges, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812.

And in that behalf the state may establish any procedure adequate for the purpose, so long as the constitutional guaranties of due process of law are not infringed upon. It may establish new remedies or alter common-law remedies.

Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701–707, 28 L. ed. 569–572, 4 Sup. Ct. Rep. 663; Kennard v. Louisiana, 92 U. S. 480, 23 L. ed. 478; People ex rel. Witherbee v. Essex County, 70 N. Y. 228; Tyler v. Registration Ct. Judges, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812.

Judicial action does not require that a party seeking the remedy proceed against any particular adversary.

People ex rel. Deneen v. Simon, 176 Ill. 165, 44 L.R.A. 801, 68 Am. St. Rep. 175, 52 N. E. 910; Badger v. Gilmore, 37 N. H. 457; Hall v. Decker, 48 Me. 255; People ex rel. Bendon v. County Judge, 13 How. Pr. 398; Harris v. Phœnix Ins. Co. 35 Conn. 310; Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257.

If the McEnerney act gives a remedy, then the proceeding in accordance with its provisions by one coming within their terms is an action or suit.

Harris v. Phœnix Ins. Co. 35 Conn. 310.

Nor is the scope and exact nature of the procedure a matter of inquiry here.

Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; State ex rel. Newell v. Newell, 13 Mont. 302, 34 Pac. 28; Martin v. Simpkins, 20 Colo. 438, 38 Pac. 1092; Hoffman v. Superior Court, 151 Cal. 386, 90 Pac. 939; Robinson v. Kerrigan, 151 Cal. 40, 121 Am. St. Rep. 90, 90 Pac. 129, 12 A. & E. Ann. Cas. 829; Robbins v. Chicago, 4 Wall. 657, 18 L. ed. 427; Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 8 L.R.A. (N.S.) 682, 119 Am. St. Rep. 199, 88 Pac. 356.

The proceeding in question, under the organic law of the state, is a judicial one, and

properly maintainable in the courts of the state, under the grant of judicial power by the Constitution of the state.

Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 8 L.R.A.(N.S.) 682, 19 Am. St. Rep. 199, 88 Pac. 356.

It was for the legislature of the state to judge of the necessity for a remedy.

Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 54 L. ed. 515, 30 Sup. Ct. Rep. 301.

The Federal Constitution does not and cannot control a state in the exercise of its governmental and administrative powers, nor in the character of the particular agencies through which it chooses to exert them. If its own court of last resort has declared them not to violate the fundamental law of the state, this court will not question that conclusion, but confine itself wholly to the inquiry whether or not, in the procedure adopted by the state, irrespective of the question whether the proceeding is judicial, legislative, or administrative, due regard has been paid to the provisions of the 14th Amendment.

Norton v. Shelby County, 118 U. S. 425–439, 30 L. ed. 178–185, 6 Sup. Ct. Rep. 1121; Ridings v. Johnson, 128 U. S. 212, 32 L. ed. 401, 9 Sup. Ct. Rep. 72; Bacon v. Northwestern Mut. L. Ins. Co. 131 U. S. 258, 33 L. ed. 128, 9 Sup. Ct. Rep. 787; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 468, 16 Sup. Ct. Rep. 344.

So far as a substituted instead of personal service is concerned, it is primarily for the legislature to judge of the necessity which will warrant a substituted instead of a personal service of process, and of the degree and character of the proof by which this necessity is to be established. It has determined that such necessity exists under the circumstances authorizing the proceedings under the act in question.

Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 54 L. ed. 515, 30 Sup. Ct. Rep. 301.

And when, therefore, these circumstances are alleged and proven to exist, as they were alleged by the appellee, substituted service to persons out of reach of personal process, and to unknown owners, became proper.

Hoffman v. Superior Court, 151 Cal. 386, 90 Pac. 939.

The state has a direct and substantial interest in knowing who is the owner of lands within its borders.

Huling v. Kaw Valley R. & Improv. Co. 130 U. S. 564, 32 L. ed. 1048, 9 Sup. Ct. Rep. 603.

Ownership of property implies two things: First, attention to it; and second, a discharge of all obligations of taxation or otherwise to the state which protects it.

Underwood v. Dugan, 139 U. S. 380, 35 L. ed. 197, 11 Sup. Ct. Rep. 618.

The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem*.

Broderick's Will (Kieley v. McGlynn) 21 Wall. 519, 22 L. ed. 605.

The McEnerney act does provide due process of law to unknown owners.

Title & Document Restoration Co. v. Kerrigan, 150 Cal. 312, 8 L.R.A.(N.S.) 682, 119 Am. St. Rep. 199, 88 Pac. 356.

He who asserts the unconstitutionality of a statute must show it to be so beyond a reasonable doubt.

Re Wellington, 16 Pick. 87, 26 Am. Dec. 631; Falconer v. Robinson, 46 Ala. 340; State ex rel. Bragg v. Rogers, 107 Ala. 444, 32 L.R.A. 520, 19 So. 909.

Mr. Garret W. McEnerney argued the cause, and, with Mr. Walter Rothchild, filed a brief as *amici curiæ* in support of the validity of the McEnerney act:

The state is sovereign over land lying within its boundaries, by whatever persons owned; and may make an adjudication as to the title to such land binding and conclusive upon all persons.

Hamilton v. Brown, 161 U. S. 256, 40 L. ed. 691, 16 Sup. Ct. Rep. 585; Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; Harris v. Palmore, 74 Ga. 273; Perkins v. Wakeham, 86 Cal. 580, 21 Am. St. Rep. 67, 25 Pac. 51; Bennett v. Fenton, 10 L.R.A. 500, 41 Fed. 283; Tyler v. Registration Ct. Judges, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812; State ex rel. Douglas v. Westfall, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175; Quarl v. Abbett, 102 Ind. 233, 52 Am. Rep. 662, 1 N. E. 476; Mason v. Messenger, 17 Iowa, 261; Venable v. Dutch, 37 Kan. 515, 1 Am. St. Rep. 262, 15 Pac. 520; Dillon v. Heller, 39 Kan. 599, 18 Pac. 693; Covington & L. R. Co. v. Bowler, 9 Bush, 468; Loring v. Hildreth, 170 Mass. 328, 40 L. R.A. 127, 64 Am. St. Rep. 301, 49 N. E. 652; Ormsby v. Ottman, 29 C. C. A. 295, 56 U. S. App. 510, 85 Fed. 492; United States v. Fox, 94 U. S. 315, 24 L. ed. 192; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565.

The question whether a particular proceeding amounts to due process of law is not to be determined by a consideration of its novelty.

Martin v. Hunter, 1 Wheat. 326, 4 L. ed. 102; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Brown v. New Jersey, 175 U. S. 172, 176, 44 L. ed. 119, 121, 20 Sup. Ct. Rep. 77; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43

L. ed. 552, 19 Sup. Ct. Rep. 281; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Tyler v. Registration Ct. Judges, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 235, 41 L. ed. 984, 17 Sup. Ct. Rep. 581; Kennard v. Louisiana, 92 U. S. 480, 23 L. ed. 478; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; People ex rel. Witherbee v. Essex County, 70 N. Y. 228; Taylor v. Beckham, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890, 1009; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Ex parte Wall, 107 U. S. 265, 289, 27 L. ed. 552, 562, 2 Sup. Ct. Rep. 569.

The failure of a party in a particular case to receive actual notice, where constructive notice to him is constitutionally permissible, cannot affect the validity of such constructive notice, as affording due process of law.

Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 620; Re Empire City Bank, 18 N. Y. 199; Bertrand v. Taylor, 87 Ill. 235; Underwood v. Dugan, 139 U. S. 380, 384, 35 L. ed. 197, 199, 11 Sup. Ct. Rep. 618; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 465, 33 L. ed. 984, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Broderick's Will (Kieley v. McGlynn) 21 Wall. 519, 22 L. ed. 605; Huling v. Kaw Valley R. & Improv. Co. 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 603.

It is within the power of a state to provide a proceeding strictly *in rem* to establish and quiet title to real property within its limits.

Missouri v. Lewis, 101 U. S. 22, 31, 25 L. ed. 989, 992; Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; Tyler v. Registration Ct. Judges, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812; Gormley v. Clark, 134 U. S. 338, 346, 347, 33 L. ed. 909, 913, 10 Sup. Ct. Rep. 554; Cunnius v. Reading School Dist. 198 U. S. 458, 49 L. ed. 1125, 25 Sup. Ct. Rep. 721, 3 A. & E. Ann. Cas. 1121, affirming 206 Pa. 469, 98 Am. St. Rep. 796, 56 Atl. 16; Hamilton v. Brown, 161 U. S. 256, 274, 40 L. ed. 691, 699, 16 Sup. Ct. Rep. 585.

The proceeding prescribed by the statute is one strictly *in rem*.

Martin v. King, 72 Ala. 354; State v. McMurry, 61 Kan. 87, 58 Pac. 962; Ex parte Kenmore Shoe Co. 50 S. C. 140, 27 S. E. 682; Freeman, Judgm. § 606; Tyler v. Registration Ct. Judges, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812; Corson v. Shoemaker, 55 Minn. 386, 57 N. W. 134; 55 L. ed.

Cooper v. Reynolds, 10 Wall. 308, 19 L. ed. 931, Rose's Notes (U. S.) 321; Bennett v. Fenton, 10 L.R.A. 500, 41 Fed. 283; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Roller v. Holly, 176 U. S. 398, 406, 44 L. ed. 520, 523, 20 Sup. Ct. Rep. 410; Overby v. Gordon, 177 U. S. 214, 221, 44 L. ed. 741, 744, 20 Sup. Ct. Rep. 603; Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390; Heidritter v. Elizabeth Oil Cloth Co. 112 U. S. 294, 28 L. ed. 729, 5 Sup. Ct. Rep. 135.

Whether or not the proceeding authorized by the act is one strictly *in rem* or substantially *in rem* is immaterial. In both jurisdiction rests upon the same basis, and the decrees in both have equal potency as to the *res*.

Johnson v. Hunter, 127 Fed. 219; Shepherd v. Ware, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773; Corson v. Shoemaker, 55 Minn. 386, 57 N. W. 134; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; Boswell v. Otis, 9 How. 336, 13 L. ed. 164; Parker v. Overman, 18 How. 137, 15 L. ed. 318; Huling v. Kaw Valley R. & Improv. Co. 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 605; Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 33 L. ed. 178, 9 Sup. Ct. Rep. 781; Dick v. Foraker, 155 U. S. 404, 39 L. ed. 201, 15 Sup. Ct. Rep. 124; Lynch v. Murphy, 161 U. S. 247, 40 L. ed. 688, 16 Sup. Ct. Rep. 523; Hamilton v. Brown, 161 U. S. 256, 40 L. ed. 691, 16 Sup. Ct. Rep. 585; Huling v. Kaw Valley R. & Improv. Co. 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 603; Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; Overby v. Gordon, 177 U. S. 221, 44 L. ed. 744, 20 Sup. Ct. Rep. 603; Ormsby v. Ottman, 29 C. C. A. 295, 56 U. S. App. 510, 85 Fed. 493; Meyer v. Kuhn, 13 C. C. A. 298, 25 U. S. App. 174, 65 Fed. 705; Bennett v. Fenton, 10 L.R.A. 500, 41 Fed. 283; Porter Land & Water Co. v. Baskin, 43 Fed. 323; Morris v. Graham, 51 Fed. 53; Morrison v. Marker, 93 Fed. 692; York County Sav. Bank v. Abbot, 131 Fed. 984; Connor v. Tennessee C. R. Co. 54 L.R.A. 687, 48 C. C. A. 730, 109 Fed. 931; Johnson v. Hunter, 127 Fed. 219; Perkins v. Wakeham, 86 Cal. 580, 21 Am. St. Rep. 67, 25 Pac. 51; Quarl v. Abbett, 102 Ind. 233, 52 Am. Rep. 662, 1 N. E. 476; Dillon v. Heller, 39 Kan. 599, 18 Pac. 693; Lane v. Innes, 43 Minn. 137, 45 N. W. 4; State ex rel. Douglas v. Westfall, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175; McClymond v. Noble, 84 Minn. 329, 87 Am. St. Rep. 354, 87 N. W. 838; Lantry v. Parker, 37 Neb. 353, 55 N. W. 962; Sloane v. Martin, 145 N. Y. 524, 28 L.R.A.

347, 45 Am. St. Rep. 630, 40 N. E. 217; McLaughlin v. McCrory, 55 Ark. 442, 29 Am. St. Rep. 56, 18 S. W. 762; Hanseom v. Hanseom, 6 Colo. App. 97, 39 Pac. 885; Harris v. Palmore, 74 Ga. 273; Otis v. De Boer, 116 Ind. 531, 19 N. E. 317; State ex rel. Michener v. Scanlon, 2 Ind. App. 320, 28 N. E. 426, 430; Williams v. Westcott, 77 Iowa, 332, 14 Am. St. Rep. 287, 42 N. W. 314; Venable v. Dutch, 37 Kan. 515, 1 Am. St. Rep. 262, 15 Pac. 520; Wunstel v. Landry, 39 La. Ann. 312, 1 So. 893; Young v. Upshur, 42 La. Ann. 362, 21 Am. St. Rep. 381, 7 So. 557; Cousins v. Alworth, 44 Minn. 505, 10 L.R.A. 504, 47 N. W. 169; Peters v. Dunnells, 5 Neb. 460; Keene v. Sallenbach, 15 Neb. 200, 18 N. W. 75; Watson v. Ulbrich, 18 Neb. 186, 24 N. W. 732; Sandiford v. Hempstead, 97 App. Div. 163, 90 N. Y. Supp. 79; Bernhardt v. Brown, 118 N. C. 700, 36 L.R.A. 402, 24 S. E. 527, 715; American Bldg. & L. Asso. v. Mathews, 13 Tex. Civ. App. 425, 35 S. W. 690; Roller v. Holley, 13 Tex. Civ. App. 636, 35 S. W. 1074; Martin v. Pond, 30 Fed. 15; Scarborough v. Myrick, 47 Neb. 794, 66 N. W. 867; Fowler v. Brown, 51 Neb. 414, 71 N. W. 54; Pool v. Lamon, — Tex. Civ. App. —, 28 S. W. 363.

Proceedings to determine the rights of unknown claimants are constitutional, and the rights of such claimants may be foreclosed in proceedings either strictly or substantially *in rem*.

Title & Document Restoration Co. v. Kerrigan, 150 Cal. 313, 8 L.R.A.(N.S.) 682, 119 Am. St. Rep. 199, 88 Pac. 356; Tyler v. Registration Ct. Judges, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812; Robinson v. Kerrigan, 151 Cal. 40, 121 Am. St. Rep. 90, 90 Pac. 129, 12 A. & E. Ann. Cas. 829; People ex rel. Smith v. Crissman, 41 Colo. 450, 92 Pac. 949, 23 Cyc. Law & Proc. p. 1241; Shepherd v. Ware, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773; Boswell v. Otis, 9 How. 348, 350, 13 L. ed. 169, 170; McClymond v. Noble, 84 Minn. 329, 87 Am. St. Rep. 354, 87 N. W. 838; State ex rel. Douglas v. Westfall, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175; Hardy v. Beaty, 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778; Belcher v. Mhoon, 47 Miss. 613; Sloan v. Thompson, 4 Tex. Civ. App. 419, 23 S. W. 613; 30 Cyc. Law & Proc. p. 206; Mason v. Messenger, 17 Iowa, 261; Sullivant v. Weaver, 10 Ohio, 275; People ex rel. Deneen v. Simon, 176 Ill. 165, 44 L.R.A. 801, 68 Am. St. Rep. 175, 52 N. E. 910; Hamilton v. Brown, 161 U. S. 256, 40 L. ed. 691, 16 Sup. Ct. Rep. 585; Hall v. Melvin, 62 Ark. 439, 54 Am. St. Rep. 301, 33 S. W. 1109; McMahan v. Smith, 69 Ark. 591, 65 S. W. 459; Johnson v. Thomas, 23 App. D. C. 141; Gwin v. Brown, 21 App. D. C. 312; Simmons v. Fry, 8 Mackey, 472; People's Nat. Bank v. Cleveland, 117 Ga. 908, 44 S. E. 20; Pile v. McBratney, 15 Ill. 314; Mulvey v. Gibbons, 87 Ill. 367; Bertrand v. Taylor, 87 Ill. 235; Heacock v. Lubuke, 107 Ill. 396; Gage v. Caraher, 125 Ill. 447, 17 N. E. 777; Smith v. Gage, 11 Biss. 217, 12 Fed. 32; Glos v. Mulcahy, 210 Ill. 639, 71 N. E. 629; Gormley v. Clark, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; Thornton v. Houtze, 91 Ill. 199; Burton v. Perry, 146 Ill. 71, 34 N. E. 60; Dickey v. Chicago, 152 Ill. 468, 38 N. E. 932; Walker v. Ogden, 192 Ill. 314, 61 N. E. 403; Whitney v. Kimball, 4 Ind. 546, 58 Am. Dec. 638; Otis v. DeBoer, 116 Ind. 531, 19 N. E. 317; Guise v. Early, 72 Iowa, 283, 33 N. W. 683; Shirley v. Mitchell, 3 J. J. Marsh, 684; Benningfield v. Reed, 8 B. Mon. 102; Hynes v. Oldham, 3 T. B. Mon. 266; Taylor v. Bate, 4 T. B. Mon. 267; Blight v. Banks, 6 T. B. Mon. 192, 17 Am. Dec. 136; Tevis v. Richardson, 7 T. B. Mon. 657; Jeffrey v. Hand, 7 Dana, 89; Thurston v. Masterson, 9 Dana, 228; Foxcroft v. Barnes, 29 Me. 128; Coombs v. Persons Unknown, 82 Me. 326, 19 Atl. 826; Cook v. Allen, 2 Mass. 462; Foster v. Abbot, 8 Met. 596; Loring v. Hildreth, 170 Mass. 328, 40 L.R.A. 127, 64 Am. St. Rep. 301, 49 N. E. 652; Ware v. Easton, 46 Minn. 180, 48 N. W. 775; Inglee v. Welles, 53 Minn. 197, 55 N. W. 117; Dewey v. Kimball, 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704; State ex rel. Petts v. Staley, 76 Mo. 158; Charles v. Morrow, 99 Mo. 638, 12 S. W. 903; Coombs v. Crabtree, 105 Mo. 292, 16 S. W. 830; Myers v. McRay, 114 Mo. 377, 21 S. W. 730; Rohrer v. Oder, 124 Mo. 24, 27 S. W. 606; Cole v. Hall, 2 Hill, 625; Denning v. Corwin, 11 Wend, 647; Allen v. Allen, 11 How. Pr. 277; Moran v. Conoma, 27 Jones & S. 101, 13 N. Y. Supp. 625; Wheeler v. Scully, 50 N. Y. 667; People ex rel. Griffin v. Ryder, 65 Hun, 175, 19 N. Y. Supp. 977; Guyer v. Raymond, 8 Misc. 606, 29 N. Y. Supp. 395; Rogers v. Tucker, 7 Ohio St. 417; Harris v. Daugherty, 74 Tex. 1, 15 Am. St. Rep. 812, 11 S. W. 921; Byrnes v. Sampson, 74 Tex. 79, 11 S. W. 1073; Taliaferro v. Butler, 77 Tex. 578, 14 S. W. 191; Pool v. Lamon, — Tex. Civ. App. —, 28 S. W. 363; Bassett v. Sherrod, 13 Tex. Civ. App. 327, 35 S. W. 312; American Bldg. & L. Asso. v. Mathews, 13 Tex. Civ. App. 425, 35 S. W. 690; Kilmer v. Brown, 28 Tex. Civ. App. 420, 67 S. W. 1090; Kane v. Rock River Canal Co. 15 Wis. 179; Nash v. Church, 10 Wis. 303, 78 Am. Dec. 678; Truesdell v. Rhodes, 26 Wis. 215; Gray v. Gates, 37 Wis. 614; Meyer v. Kuhn, 13 C. C. A. 298, 25 U. S. App. 174, 65 Fed. 705; Brickell v. Farrell, 82 Fed. 220; Bryan v. Kennett, 113 U. S.

179, 28 L. ed. 908, 5 Sup. Ct. Rep. 407; Huling v. Kaw Valley R. & Improv. Co. 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 603; Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390, 4 Harvard L. Rev. 280; Carino v. Insular Government, 212 U. S. 449, 53 L. ed. 594, 29 Sup. Ct. Rep. 334; Lawrence v. Hardy, 151 N. C. 123, 134 Am. St. Rep. 976, 65 S. E. 766; Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 Sup. Ct. Rep. 261; Savage v. Gray, 96 Me. 557, 53 Atl. 61; Hess v. Webb, — Tex. Civ. App. —, 113 S. W. 618; Winn v. Campbell, 94 Ark. 338, 126 S. W. 1059; Nunley v. Blanton, — Tex. —, 126 S. W. 1110; Howell v. Garton, 82 Kan. 495, 108 Pac. 844; Kircher v. M. Keating & Sons Co. 145 Ill. App. 1; Sellers v. Simpson, — Tex. Civ. App. —, 115 S. W. 888; Parks v. Crockett, 61 Me. 489; Sheridan v. Ireland, 61 Me. 486.

The notice to unknown claimants is not only as full as could be devised, but is of the same efficacy as that afforded by any proceeding in which the rights of such persons may be concluded.

Tyler v. Registration Ct. Judges, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812; State ex rel. Douglas v. Westfall, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175; People ex rel. Deucen v. Simon, 176 Ill. 165, 44 L.R.A. 801, 68 Am. St. Rep. 175, 52 N. E. 910; People ex rel. Smith v. Crissman, 41 Colo. 450, 92 Pac. 949; Robinson v. Kerrigan, 151 Cal. 40, 121 Am. St. Rep. 90, 90 Pac. 129, 12 A. & E. Ann. Cas. 829; McGehee, Due Process of Law, p. 117.

The proceeding prescribed by the act is conclusive upon unknown claimants not only as a judicial and binding determination of their rights, but as a statute of limitations.

Gormley v. Clark, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; Bertrand v. Taylor, 87 Ill. 235, 238.

The suggestion that the proceeding prescribed by the act is not judicial concerns only the right of the legislature, under the state Constitution, to confer jurisdiction over such proceedings upon the courts of the state. The decision of the state supreme court that the proceeding is strictly judicial is decisive of this question.

Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; Dreyer v. Illinois, 187 U. S. 71, 83, 47 L. ed. 79, 85, 23 Sup. Ct. Rep. 32, 15 Am. Crim. Rep. 253.

The contention that the proceeding prescribed by the act is nonjudicial rests upon no claim that any element or essential of due process of law is denied a party, but upon the suggestion that the legislature has no right to create a cause of action for the discovery and settlement of unknown claims to real property.

Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Tyler v. Registration Ct. Judges, 179 U. S. 405, 409, 410, 45 L. ed. 252, 254, 255, 21 Sup. Ct. Rep. 206.

The 14th Amendment does not control the power of a state to prescribe the basis of relief in its courts, or the forms of procedure therein.

Hooker v. Los Angeles, 188 U. S. 314, 47 L. ed. 487, 63 L.R.A. 471, 23 Sup. Ct. Rep. 397; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 393, 40 L. ed. 467, 469, 16 Sup. Ct. Rep. 344; Leeper v. Texas, 139 U. S. 462, 468, 35 L. ed. 225, 227, 11 Sup. Ct. Rep. 579.

The opinions rendered by the supreme court of California show that the proceeding prescribed by the act is unquestionably judicial.

Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 8 L.R.A.(N.S.) 682, 119 Am. St. Rep. 199, 88 Pac. 356; Robinson v. Kerrigan, 151 Cal. 46, 121 Am. St. Rep. 90, 90 Pac. 129, 12 A. & E. Ann. Cas. 829; Hoffman v. Superior Court, 151 Cal. 386, 90 Pac. 939.

Mr. Garret W. McEnerney also filed a separate brief as *amicus curiæ:*

The act, as construed by the supreme court of California, does require that the plaintiff make inquiry and exercise diligence to ascertain the identity of all who may claim an interest in or lien upon the property described in his complaint.

Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 8 L.R.A.(N.S.) 682, 119 Am. St. Rep. 199, 88 Pac. 356; Hoffman v. Superior Ct. 151 Cal. 386, 90 Pac. 939.

But, even if the supreme court of California had not already determined the question, there could be no doubt of the meaning of the statute. Under all statutes providing for service of process upon unknown claimants, it is held that no person is such whose claims can by diligence be discovered.

Leigh v. Green, 64 Neb. 533, 101 Am. St. Rep. 592, 90 N. W. 255; Shepherd v. Ware, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773; Mulvey v. Gibbons, 87 Ill. 377; Nunley v. Blanton, — Tex. —, 126 S. W. 1110.

So, where these statutes do not (as does the one here involved) require the plaintiff to be in actual possession before he may begin an action against unknown owners, it is held that a party in possession cannot be an "unknown," since due diligence would discover him.

State ex rel. Douglas v. Westfall, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175; Sellers v. Simpson, — Tex. Civ. App. —, 115 S. W. 888.

The words "known" and "unknown," so employed, are always held to refer to persons or things capable of being known with the exercise of reasonable diligence. The phrase "known property" means "property which, by use of ordinary diligence, might have been known."

Tucker v. Wells, 12 Vt. 240; Farnham v. Thomas, 56 Vt. 33; Moore v. Quint, 44 Vt. 97.

The means of knowledge are in effect the same thing as knowledge itself.

Wood v. Carpenter, 101 U. S. 143, 25 L. ed. 809.

Due process of law depends upon reasonable notice and an opportunity to be heard; not upon the requirement or form of an affidavit preliminary to publication, or any particular form of procedure.

Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Twining v. New Jersey, 211 U. S. 78, 110, 111, 53 L. ed. 97, 110, 111, 29 Sup. Ct. Rep. 14.

Mr. Chief Justice White, after making the foregoing statement, delivered the opinion of the court:

Although not objecting to an answer to the questions, nevertheless the American Land Company, which was the appellant below, suggests at bar a want of power to reply to the questions for a twofold reason: 59]First, because *the certificate on its face indicates that the court below was not in a state of mind which required the instruction of this court, but was merely desirous of provoking a direct decision by this court, to avoid the delay and the public inconvenience which otherwise might result. Second, because the certificate is so broad as simply to refer the whole case to this court for decision, instead of presenting definite propositions of law for solution. While it may be that these suggestions find possible support, considering the record in a detached way, we think when the certificate is considered as a whole, and the subject with which it deals is properly weighed, the suggestions are without merit. We therefore pass to a consideration of the questions propounded.

It is apparent that the substantial considerations involved in the questions certified are embraced in the following: (a) the authority of the state to deal with the subject with which the statute is concerned; (b) upon the hypothesis of the existence of power, the sufficiency of the safeguards provided in the statute; (c) upon the like hypothesis the adequacy of the proceedings had in the particular cause with which the certificate deals. We shall consider these subjects separately.

As to the power of the state.

The conditions which led to the legislation in question were stated by the supreme court of California in Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 8 L.R.A.(N.S.) 682, 119 Am. St. Rep. 199, 88 Pac. 356. The court said:

"It is also matter of common knowledge that in the city and county of San Francisco, at least, if not in other counties, the disaster of April last worked so great a destruction of the public records as to make it impossible to trace any title with completeness or certainty. That some provision was necessary to enable the holders and owners of real estate in this city to secure to themselves such evidence of title as would enable them not only to *defend[60 their possession, but to enjoy and exercise the equally important right of disposition, is clear."

As it is indisputable that the general welfare of society is involved in the security of the titles to real estate and in the public registry of such titles, it is obvious that the power to legislate as to such subjects inheres in the very nature of government. This being true, it follows that government possesses the power to remedy the confusion and uncertainty as to registered titles arising from a disaster like that described by the court below. We might well pursue no further the subject of the power of the state to enact the law in question, and thus leave its authority to depend upon the demonstration necessarily resulting from the obvious considerations just stated. As, however, the question of power is intimately interwoven with the sufficiency of the procedure adopted, and as a clear comprehension of the scope of the power will serve to elucidate the question of procedure, we shall briefly refer to some of the leading cases by which the elementary doctrine of power over the subject of titles to real estate, and the application of that doctrine to a case like the one in hand, is settled beyond question. That a state has the power, generally speaking, to provide for and protect individual rights to the soil within its confines, and declare what shall form a cloud on the title to such soil, was recognized in Clark v. Smith, 13 Pet. 195, 10 L. ed. 123. So, also, it is conclusively established that when the public interests demand, the law may require even a party in actual possession of land, and claiming a perfect title, to appear before a properly constituted tribunal, and establish that title

by a judicial proceeding. Such was the method employed by the United States in settling, as between itself and claimants under Mexican grants, the title to property in California. Barker v. Harvey, 181 U. S. 481, 45 L. ed. 963, 21 Sup. Ct. Rep. 690; Mitchell v. Furman, 180 U. S. 402, 45 L. ed. 596, 21 Sup. Ct. Rep. 430; Botiller v. Dominguez, 130 U. S. 238, 32 L. ed. 926, 9 Sup. Ct. Rep. 525; More v. Steinbach, 127 U. S. 70, 32 L. ed. 51, 8 Sup. Ct. Rep. 1067.

61] *The question of what authority a state possesses over titles to real estate, and what jurisdiction over the subject it may confer upon its courts, received much consideration in Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557. It was there held that, even as to ordinary controversies respecting title to land, arising between rival claimants, the state possessed the power to provide for the adjudication of titles to real estate not only as against residents, but as against nonresidents, who might be brought into court by publication. In the course of the opinion the court said (p. 320):

"It [the state] has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits,—its process goes not out beyond its borders,—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title to real estate therein shall be secured, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the state; and as this duty is one of the state, the manner of discharging it must be determined by the state, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice."

Manifestly, under circumstances like those here presented, the principle applies with equal force in the case of unknown claimants. Undisclosed and unknown claim-

62] ants *are, to say the least, as dangerous to the stability of titles as other classes. This principle received recognition and was applied in Hamilton v. Brown, 161 U. S. 256, 40 L. ed. 691, 16 Sup. Ct. Rep. 585, where it was held to be competent for a state to make provision for promptly ascertaining, by appropriate judicial proceedings, who has succeeded to property upon the death of a person leaving such property within the state. It was said (p. 275):

"If such proceedings are had, after actual notice by service of summons to all known claimants, and constructive notice by publication to all possible claimants who are unknown, the final determination of the right of succession, either among private persons, as in the ordinary administration of estates, or between all persons and the state, as by inquest of office or similar process to determine whether the estate has escheated to the public, is due process of law; and a statute providing for such proceedings and determination does not impair the obligation of any contract contained in the grant under which the former owner held, whether that grant was from the state or from a private person."

The application of the doctrine of governmental power, as just stated, to a condition like the one here in question, was aptly pointed out by the supreme court of Illinois in Bertrand v. Taylor, 87 Ill. 235, where, in considering the Illinois burnt record act, the court said:

"It was demanded as a matter of safety in a great emergency. It was not calculated to take any reasonable being by surprise. It was known throughout the civilized world that a large part of the city of Chicago had been destroyed by fire, and that the records of the courts and the records of deeds were all destroyed. This naturally commanded the attention of all reasonable persons everywhere, and called upon them to attend and see what means would be adopted to mitigate the evils and dangers incident to the destruction. This legislation was not done *in a corner,[63 but before the observation of the civilized world. We cannot doubt the power of the general assembly to pass the act."

The supreme court of California, in the Kerrigan Case, supra, addressing itself to the same subject, pertinently observed:

"Applying the principles which have led the courts in cases like Arndt v. Griggs and Perkins v. Wakeham, 86 Cal. 580, 21 Am. St. Rep. 67, 25 Pac. 51, to sustain judgments quieting titles against nonresidents upon substituted service, why should not the legislature have power to give similar effect to such judgments against unknown claimants where the notice is reasonably full and complete? The validity of such

judgments against known residents is based upon the grounds that the state has power to provide for the determination of titles to real estate within its borders, and that, as against nonresident defendants or others, who cannot be served in the state, a substituted service is permissible, as being the only service possible. These grounds apply with equal force to unknown claimants. The power of the state as to titles should not be limited to settling them as against persons named. In order to exercise this power to its fullest extent, it is necessary that it should be made to operate on all interests, known and unknown. As was said by Holmes, Ch. J., in Tyler v. Registration Ct. Judges, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812, in speaking of a statute which, in the particular under discussion, was similar to ours: 'If it does not satisfy the Constitution a judicial proceeding to clear titles against all the world hardly is possible; for the very meaning of such a proceeding is to get rid of unknown as well as known claimants—indeed, certainty against the unknown may be said to be its chief end,—and unknown claimants cannot be dealt with by personal service upon the claimant.'"

The power exerted by the act being, then, 64]clearly within *the legislative authority, we are brought to consider whether the lawful power was manifested in such a manner as to cause the act to be repugnant to the 14th Amendment. And this brings us to the second proposition heretofore stated, *viz.:*

The adequacy of the safeguards which the statute provides.

As no complaint is made concerning the provisions of the statute relating to the designation of and notice to known claimants, we put that subject out of view and address ourselves to the provisions relating to unknown claimants or claims. The action which the statute authorizes may be brought by "any person who claims an estate of inheritance or for life in, and who is by himself or his tenant, or other person holding under him, in the actual and peaceable possession of any real property" situated in a county where "the public records in the office of a county recorder have been lost or destroyed, in whole or in any material part, by flood, fire, or earthquake." In the caption of the complaint the statute requires that the defendants shall be described as "all persons claiming any interest in or lien upon the real property herein described, or any part thereof." The summons is required to contain a description of the property affected by the suit, and to be directed to "all persons claiming an interest in or lien upon the real property herein described, or any part thereof." The summons is to be published at least once a week for two months, and the defendants are commanded to appear and answer within three months after the first publication of the summons. A copy of the summons is required to be posted in a conspicuous place on each separate parcel of the property described in the complaint within fifteen days after the first publication of the summons. At the time of filing the complaint a notice of the pendency of the action, giving, among other things, a particular description of the property affected thereby, must be recorded *in the office of the recorder of the coun-[65 ty in which the property is situated, and it is made the duty of the recorder to enter, "upon a map or plat of the parcels of land, to be kept by him for that purpose, on that part of the map or plat representing the parcel or parcels so described, a reference to the date of the filing of such notice, and, when recorded, to the book and page of the record thereof." In considering the statute, we are bound by the construction affixed to it by the supreme court of the state, and therefore treat as embraced within its terms that which the highest court of the state has declared the statute exacts, either expressly or by necessary implication. In the Kerrigan Case, supra, it was held that the result of the provisions of the statute was "to require the complainant to designate and to serve as known claimants all whom, with reasonable diligence, he could ascertain to be claimants,"—a construction which in effect declared that the statute prohibited the omission of a known claim or claimant, upon the conception that the rights of such claim or claimant would be foreclosed by the general designation and notice prescribed for unknown claimants. And in Hoffman v. Superior Court, 151 Cal. 386, 90 Pac. 939, where the doctrine of the Kerrigan Case was reiterated and applied, the court, after holding that the statute requires the plaintiff in his affidavit to allege in terms "that he does not know and has never been informed" of any adverse claimants whom he has not specifically named, pointed out that failure of the plaintiff to make inquiry or to avail himself of knowledge which would be imputed to him because of facts sufficient to put him on inquiry as to the existence of adverse claims would be available "in any subsequent attack upon the decree, upon the ground that there was extraneous fraud of the plaintiff in making a false affidavit to obtain jurisdiction."

It is to be borne in mind that it has been settled (Griffith v. Connecticut, 218

U. S. 563, 54 L. ed. 1151, 31 Sup. Ct. Rep. 132, 66]and cases cited) that *the 14th Amendment does not operate to deprive the states of their lawful power, and of the right, in the exercise of such power, to resort to reasonable methods inherently belonging to the power exerted. On the contrary, the provisions of the due process clause only restrain those arbitrary and unreasonable exertions of power which are not really within lawful state power, since they are so unreasonable and unjust as to impair or destroy fundamental rights.

It is to be observed that the statute not only requires a disclosure by the plaintiff of all known claimants, but moreover, at the very outset, contains words of limitation that no one not in the actual and peaceable possession of property can maintain the action which it authorizes. No person can therefore be deprived of his property under the statute unless he had not only gone out of possession of such property and allowed another to acquire possession, or, if he had a claim to such property or an interest therein, had so entirely failed to disclose that fact as to enable a possessor to truthfully make the affidavit which the statute exacts of a want of all knowledge of the existence of other claimants than as disclosed in his affidavit. Besides, it is to be considered that the statute, as construed by the California court, imposed upon the one in possession seeking the establishment of an alleged title the duty to make diligent inquiry to ascertain the names of all claimants. Instead, therefore, of the statute amounting to the exertion of a purely unreasonable and arbitrary power, its provisions leave no room for that contention. On the contrary, we think the statute manifests the careful purpose of the legislature to provide every reasonable safeguard for the protection of the rights of unknown claimants, and to give such notice as, under the circumstances, would be reasonably likely to bring the fact of the pendency and the purpose of the proceeding to the attention of those interested. To argue that the provisions 67]*of the statute are repugnant to the due process clause because a case may be conceived where rights in and to property would be adversely affected without notice being actually conveyed by the proceedings is in effect to deny the power of the state to deal with the subject. The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals. The doctrine on this subject was clearly expressed by the court of appeals of New York in Re Empire City Bank, 18 N. Y. 199, where, speaking of the right of a state to prescribe in a suitable case for constructive service, it was said:

"Various prudential regulations are made with respect to these remedies, but it may possibly happen, notwithstanding all these precautions, that a citizen who owes nothing, and has done none of the acts mentioned in the statute, may be deprived of his estate without any actual knowledge of the process by which it has been taken from him. If we hold, as we must, in order to sustain this legislation, that the Constitution does not positively require personal notice in order to constitute a legal proceeding due process of law, it then belongs to the legislature to determine in the particular instance whether the case calls for this kind of exceptional legislation, and what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against of the legal steps which are taken against him."

And in accordance with this view, the supreme court of California, in the Kerrigan Case, pointed out that the statute furnished all the safeguards for which, in reason, it could have been expected to provide consistently with the condition dealt with. The court said:

"Where, as here, the summons describing the nature of the action, the property involved, the name of the plaintiff, and the relief sought, is posted upon the property, *and is published in a newspaper for[68 two months, and a *lis pendens* containing the same particulars is recorded in the recorder's office and entered upon the recorder's map of the property, we cannot doubt that, so far as concerns the possible claimants who are not known to the plaintiff, the notice prescribed by the act is as complete and full as, from the nature of the case, could reasonably be expected."

The case of Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 Sup. Ct. Rep. 261, is instructive on this feature of the case. In that case a judgment of the circuit court of Arkansas was affirmed which sustained the validity of a sale of lands for levee taxes. The Arkansas statute authorized the proceedings which had resulted in the sale, upon constructive publication against nonresidents and unknown owners. Lands of Josephine Ballard were sold under the statutory proceeding, she not having knowledge of the existence of the suit or of the fact that the taxes had been assessed against her property. In the course of the opinion the court, speaking through Mr. Justice McKenna, said (p. 261):

"It is said, however, that Josephine Ballard was not made a defendant in the suit, though the records of the county showed

that she was an owner thereof. But the statute provided against such an omission. It provided that the proceedings and judgment should be in the nature of proceedings *in rem*, and that it should be immaterial that the ownership of the lands might be incorrectly alleged in the proceedings. We see no want of due process in that requirement, or what was done under it. It is manifest that any criticism of either is answered by the cases we have cited. The proceedings were appropriate to the nature of the case.

"It should be kept in mind that the laws of a state come under the prohibition of the 14th Amendment only when they infringe fundamental rights. A law must be framed and judged of in consideration of 69]the practical *affairs of man. The law cannot give personal notice of its provisions or proceedings to everyone. It charges everyone with knowledge of its provisions; of its proceedings it must, at times, adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns or may concern their real estate, men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises. This was pointed out in Huling v. Kaw Valley R. & Improv. Co. 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 603, where it was declared to be the 'duty of the owner of real estate, who is a nonresident, to take measures that in some way he shall be represented when his property is called into requisition; and if he fails to get notice by the ordinary publications which have been usually required in such cases, it is his misfortune, and he must abide the consequences.' It makes no difference, therefore, that plaintiffs in error did not have personal notice of the suit to collect the taxes on their lands, or that taxes had been levied, or knowledge of the law under which the taxes had been levied."

While we are of opinion that the views just stated demonstrate the want of merit in the contention that the statute, because of the insufficiency of its requirements, was repugnant to the 14th Amendment, a consideration of a provision of the general law of California, which, by the construction of the supreme court of California, is incorporated into the statute under consideration, would lead to the same result. Thus, in the Hoffman Case, the court said:

"In this connection it is proper to say that, in determining whether or not due process of law is afforded, other statutes applicable to the proceeding may be considered. The provisions of § 473 of the Code of Civil Procedure *apply in such cases.[70 Any person interested in the property, and having no actual notice of the decree, may come in at any time within a year after its rendition, and by showing that he has not been personally served with process, and stating facts constituting a good defense to the proceeding,—that is, facts sufficient to show that he has a valid adverse interest in the property,—he may have the decree vacated as to him, and be allowed to answer to the merits."

The right conferred by § 473 of the Code, it is to be observed, is an absolute right, although the section declares that the court may impose "such terms as may be just." Holiness Church v. Metropolitan Church Asso. 12 Cal. App. 445, 107 Pac. 635; Gray v. Lawlor, 151 Cal. 352, 90 Pac. 691, 12 A. & E. Ann. Cas. 990.

Under this construction it might well be held, if it were necessary to do so, as establishing a rule of limitation which it was in the power of the state to prescribe, in view of the circumstances to which the limitation was made applicable. See Tyler v. Registration Ct. Judges, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812, and State ex rel. Douglas v. Westfall, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175. See also Illinois cases concerning the power to fix a short period of limitation to meet a disaster like the one to which the statute in question relates, collected in Gormley v. Clark, 134 U. S. 346, 347, 33 L. ed. 913, 10 Sup. Ct. Rep. 554.

These views dispose of all the contentions concerning the repugnancy of the statute to the 14th Amendment which we think it necessary to separately consider. In saying this we are not unmindful of a multitude of subordinate propositions pressed in the voluminous brief of counsel, and which were all in effect urged upon the supreme court of California in the Kerrigan and Hoffman Cases, and were in those cases adversely disposed of, and which we also find to be without merit. Some of them we briefly refer to. We do not think it is important to determine the precise nature of the action authorized by *the statute,[71 since the method of procedure which was prescribed was within the legislative competency. So, also, we do not deem it important to discuss what constitutes a judicial proceeding, since the statutory proceeding provided by the act was within the authority of the state to enact, and that it was judicial in character has been expressly determined by the court of last resort of the state. Indeed, not only these, but

all the contentions proceed upon a misconception as to the legislative authority of the state and the effect thereon of the due process clause of the Constitution of the United States. The error which all the propositions involve was pointed out in Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14, where, speaking by Mr. Justice Moody, the court said:

"Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction [citing cases], and that there shall be notice and opportunity for hearing given the parties [citing cases]. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence, and methods of trials, and held them to be consistent with due process of law."

3. *The adequacy of the proceedings pursued in the case referred to in the certificate.*

As there is no claim that fraud, actual or constructive, was employed by Zeiss in obtaining the judgment complained of, and the proceedings conformed to the California statute, the considerations previously stated entirely dispose of this question.

It follows that both of the questions certified must be answered in the negative.

And it is so ordered.

72] *UNITED STATES, Plff. in Err.,
v.
JAMES T. BARBER, Sumner G. Moon, et al.

(See S. C. Reporter's ed. 72-79.)

Appeal — by government in criminal case — judgment below sustaining plea in bar.

1. The judgment actually entered below, and not the terms of a stipulation of counsel previously made and filed, controls the Federal Supreme Court in determining whether such judgment is reviewable on writ of error under the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1909, p. 220), as one sustaining a special plea in bar when the defendant has not been put in jeopardy.

[For other cases, see Appeal and Error, I. e, in Digest Sup. Ct. 1908.]

Appeal — by government in criminal case — judgment below sustaining plea to statute of limitations.

2. A judgment of a Federal district court purporting to dismiss an indictment upon the ground that the statute of limitations was a bar to the prosecution is one sustaining a special plea in bar within the meaning of the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564), governing the right of the government to a review in a criminal case, although the plea of the statute of limitations filed and heard by consent and stipulation was denominated a plea in abatement.

[For other cases, see Appeal and Error, I. e, in Digest Sup. Ct. 1908.]

Criminal law — pleading statute of limitations.

3. The averment of an indictment charging a continuing conspiracy to defraud the United States, that such conspiracy continued to the date of the filing of the indictment, must be denied under the general issue, and not by a special plea of the statute of limitations.

[For other cases, see Criminal Law, II. d, in Digest Sup. Ct. 1908.]

Appeal — by government in criminal case — scope of review.

4. The Federal Supreme Court when reviewing, under the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564), the act of the trial court sustaining a plea in bar of the statute of limitations to an indictment charging a continuing conspiracy, is not concerned with the technical sufficiency or redundancy of the indictment, or even with any consideration of the nature of the overt acts alleged.

[For other cases, see Appeal and Error, I. e, in Digest Sup. Ct. 1908.]

[No. 444.]

Argued October 17, 18, 1910. Decided January 3, 1911.

IN ERROR to the District Court of the United States for the District of Idaho to review a judgment sustaining a plea of the statute of limitations to an indictment for a conspiracy to defraud the United States. Reversed.

The facts are stated in the opinion.

Assistant Attorney General **Fowler** argued the cause and filed a brief for plaintiff in error.

Mr. **C. T. Bundy** argued the cause, and, with Messrs. James H. Hawley, A. A. Fraser, N. H. Clapp, A. E. McCartney, Joseph G. Dudley, and Roy P. Wilcox, filed a brief for defendants in error.

Mr. Chief Justice **White** delivered the opinion of the court:

On April 14, 1908, in the district court of the United States for the district of Idaho, an indictment was returned, *which,[73 in four counts, charged James T. Barber, Sumner G. Moon, Frank Martin, and Albert E. Palmer with having violated the

NOTE.—On review by government in criminal case under the act March 2, 1907—see note to United States v. Stevenson, 54 L. ed. U. S. 153.

conspiracy section of the Revised Statutes, *viz.*, § 5440 (U. S. Comp. Stat. 1901, p. 3676). In the court below, Frank Martin was dismissed from the indictment. Palmer made no appearance, presumably not having been arrested.

The final judgment, to reverse which this writ of error was sued out, is as follows:

"Now came the attorneys for the respective parties herein, and thereupon the demurrer to the third count in the indictment herein is withdrawn by the defendants. The demurrer to the second count of the indictment is confessed by complainant, and it is ordered that the demurrer and plea in abatement to the first count of the indictment be and is hereby overruled and denied. It is further ordered that plea in abatement to the fourth count of the indictment be and is hereby sustained. Thereupon counsel for the government moved and asked that the three first counts of the indictment in the above-entitled action be nollied; thereupon said motion was granted and the cause dismissed; all in accordance with the direction of Hon. Robert S. Bean, district judge, who heretofore heard and took under advisement said demurrer and plea in abatement."

As by this judgment the first, second, and third counts of the indictment were dismissed by the court at the request of the United States, only the action of the court on the fourth count is open for consideration. It is for the purpose of correcting such action that the United States has prosecuted this writ, doing so upon the assumption that the judgment complained of is embraced within the third class of judgments which it is provided by the act of March 2, 1907 (chap. 2564, 34 Stat. at L. 1246, U. S. Comp. Stat. Supp. 1909, p. 220), may be removed to this court by writ of error, *viz.*, a judgment "sustaining a special plea in bar when the defendant has not been put in jeopardy."

74] *It is at once to be observed that the text of the judgment purports to sustain a plea in abatement to the fourth count of the indictment, and as the act of 1907 contains no provision authorizing the review of a judgment sustaining a plea in abatement, counsel for defendants in error now urge that we are without jurisdiction, because each of the pleas upon which the judgment dismissing the indictment was based was filed as a plea in abatement and was argued as such, and the judgment "is an abatement and dismissal of the pending cause only."

Briefly the state of the record on the subject is this: By the fourth count of the indictment it was charged as follows:

"And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said James T. Barber, Sumner G. Moon, Albert E. Palmer, and Frank Martin, in the state and district of Idaho, and within the jurisdiction of this court, heretofore, to wit, on the 1st day of September, in the year 1901, and at the time of the committing of the several overt acts hereinafter in this indictment set forth, and continuously at all times between said 1st day of September, in the year 1901, and the day of the presenting and filing of this indictment, did unlawfully conspire, combine, confederate, and agree together and with Frank Steunenberg, William Sweet, John Kinkaid, Louis M. Pritchard, John I. Wells, Patrick Downs, and divers other persons whose names are to the grand jurors unknown, knowingly, wickedly, falsely, and corruptly to defraud the United States of America out of the possession and use of and title to divers large tracts of timber lands of the United States situate in township 6 north, ranges 4, 5, 6, 7, and 8 east of the Boisé meridian, township 7 north, ranges 4, 5, 6, 7, and 8 east of the Boisé meridian, and township 8 north, range 5 east of the Boisé meridian, in the county *of Boisé, in the state[75 of Idaho, and within the Boisé, Idaho, land district of the United States, all of which lands were then and there public lands of the United States, with the intent and purpose unlawfully to obtain the title to said lands for the use, benefit, and profit of themselves and a certain corporation thereafter to be organized, and organized, to wit, the Barber Lumber Company, a corporation organized under the laws of the state of Wisconsin, and doing business in the state of Idaho, with an office and agent at the city of Boisé in said state, and ultimately to obtain the transfer of the title to said lands to said corporation. . . ."

The count next averred in substance that the object of the conspiracy was to be accomplished by unlawfully, etc., procuring a large number of persons to apply for and enter lands under the timber laws of the United States, for the use and benefit of the conspirators, upon the following understandings and agreements to be had with the proposed applicants prior to and at the time of the first application to enter the lands: (a) that the title to lands to be applied for, when acquired, should inure to the use and benefit of the conspirators and the corporation; (b) that the conspirators should select the land, furnish a description of the same to each applicant, prepare all necessary papers in connection with each application, and represent the applicants before the Land Department; and (c) that the conspirators should advance

any money needed to make a final payment, and without expense to the applicants should prepare the necessary conveyances to vest a record title to the land acquired in the conspirators and the corporation. The remainder of the count dealt with the overt acts charged to have been done in furtherance of the conspiracy. Some of the overt acts were alleged to have been committed upon dates more than three years before and others upon dates within three years of the filing of the indictment.

76] *Barber and Moon demurred to the count, on the ground that it did not state facts sufficient to constitute an offense against or under the laws of the United States. The demurrer was argued, and at the close of the hearing leave was given "to file plea in abatement and motion to quash the indictment on account of duplicity." Each defendant thereupon filed what was denominated a "plea in abatement," which concluded with the prayer that the particular defendant might be "dismissed and discharged . . . from the premises" as to such count. The ground upon which it was insisted that the United States ought not to further prosecute was stated to be that the offense was barred "by the provision of § 1044 of the Revised Statutes of the United States of America (U. S. Comp. Stat. 1901, p. 725), in this: that more than three years have elapsed between the date of the commission of the alleged crime . . . and the date of the finding of the said indictment." Recitals were made in the plea, tending to support the claim that the particular defendant was not a fugitive from justice at any time between the dates of the commission of the offense alleged and the finding of the indictment. The United States demurred to each of the pleas, and argument was had thereon. Subsequently, the judgment which we have heretofore excerpted was entered. On the same day the following stipulation was signed by counsel and filed with the papers in the case:

"The court, by order duly filed, having sustained the demurrer and plea in abatement of the defendants James T. Barber and Sumner G. Moon to the fourth count of the indictment heretofore returned and filed in the above-entitled action, it is hereby stipulated as follows:

"1st. That a nolle and order of dismissal shall, under the consent of the court, be entered in the above-entitled proceedings as to counts numbered 1, 2, and 3 thereof.

77] *"2d. That the demurrer and plea in abatement of the defendants to the fourth count of said indictment shall be heard and determined together, and that the order or ruling made on either shall be deemed to have been made on both."

In support of the contention that the pleas of the statute of limitations, filed below, should be regarded in this court, as they were designated below, as pleas in abatement, it is urged by counsel for defendants in error that the pleas presented the following propositions:

"First, conceding that the indictment alleged the *existence* of a conspiracy within three years, there was no allegation of any act within that time which could, by any possible interpretation, be said to have been done to effectuate its purpose; and therefore the right to prosecute had not accrued; and second, that as all acts therein alleged which could be said to effectuate the purpose of the conspiracy were performed more than three years before filing the indictment, the government should proceed no further on this indictment."

The claim is then made "that in cases of conspiracy, a plea in abatement is the proper method of raising the defense that the right to prosecute has not accrued, because no one of the conspirators has 'done an act to effectuate the object of the conspiracy.'"

Following this claim, it is urged that the defendants have, by reason of the stipulation heretofore referred to, "the right to a formal judgment dismissing the action on demurrer for the reason that it does not state facts sufficient to constitute an offense." Upon this assumption it seems to be contended that the judgment should be regarded as entered on the demurrer, and as the judgment does not show that the trial court decided any question in passing on such demurrer which would give this court jurisdiction, the writ of error should be dismissed.

So far as the claim based upon the stipulation is concerned, *it is plainly without merit, since we can only look to the judgment which was actually entered to determine what was decided with respect to the fourth count, and the court in that judgment expressly placed its decision that the United States could not prosecute the defendants upon the plea of the bar of limitations. The claim that the pleas were not in bar, but merely in abatement, is, we think, equally untenable. The designation of the respective pleas as a plea in abatement did not change their essential nature. As said by counsel for the government, "the plea of the statute of limitation does not question the validity of the indictment, but is directed to the merits of the case; and if found in favor of the defendant, the judgment is necessarily an acquittal of the defendant of the charge, and not a mere abatement of the action; and it has been universally classed, in both

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civil and criminal procedure, as a plea in bar, and not in abatement." The motion to dismiss the writ of error for want of jurisdiction is overruled.

Many propositions have been urged at bar in support of the contention that the judgment complained of was erroneous. We find it necessary, however, to consider but one, wherein it is claimed that "a special plea in bar is not permissible in a criminal case, but the defense of the statute of limitations must be made under the general issue." This contention, as applied to the character of case now under consideration, must be sustained, upon the authority of the recent decision in United States v. Kissel, No. 390, this term [218 U. S. 601, 54 L. ed. 1168, 31 Sup. Ct. Rep. 124]. In that case it was held that where an indictment charges a continuing conspiracy, which is expressly alleged to have continued to the date of the filing of the indictment, such allegation must be denied under the general issue, and not by a special plea, and it was further decided that in reviewing, under the act of 1907, the action of a trial court upon such a plea, "we are not concerned with the technical sufficiency or 79]*redundancy of the indictment, or even . . . with any consideration of the nature of the overt acts alleged." That the fourth count of the indictment in the case at bar to which the pleas were directed charged a continuing conspiracy is manifest. The charge is that the defendants "did unlawfully conspire," etc., "on the 1st day of September, in the year 1901, and at the time of the committing of the several overt acts hereinafter in this indictment set forth, and continuously at all times between said 1st day of September, in the year 1901, and date of the presenting and filing of this indictment." The indictment also explicitly charges a continuing object of the conspiracy, *viz.*, the acquisition of public land within a large area of country, which was necessarily to be obtained in small parcels, and the ability to secure which in a great measure was dependent upon the power of the conspirators from time to time to procure persons willing to make the desired unlawful entries.

Judgment reversed.

WILLIAM HENDRIX, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 79–91.)

Venue — of homicide by Indian — sufficiency of order for change.

1. The Federal district court at Paris, Texas, cannot be said to have been without jurisdiction to try a member of the Choctaw and Chickasaw Nation charged with homicide, because the order of the United States court in the Indian territory, changing the venue, pursuant to the act of June 28, 1898 (30 Stat. at L. 511, chap. 517), § 29, did not state whether the cause was transferred to the Federal district or circuit court, but only to the "United States court" at that place, where the district court was the only court to which the case could have been removed under the statute, and the record was transferred to and filed in that court, and the case was tried there.

[Venue of action, see Venue, in Digest Sup. Ct. 1908.]

Appeal — presumption — jurisdiction.

2. The presumption will be indulged that the jurisdictional fact of the Indian citizenship of the accused in a homicide case was presented to the United States court in the Indian territory, and constituted the ground of its order changing the venue, pursuant to the act of June 28, 1898 (30 Stat. at L. 511, chap. 517), § 29, to the Federal district court at Paris, Texas, where such citizenship is admitted, and the affidavit upon which the order of removal was made is not in the record, and the order recited that the court granted the motion, "being well advised in the premises," and it is stated in the affidavit of the attorney for the accused, filed in support of a motion to send the case back to Oklahoma, that the motion for removal was made "under the Federal statute permitting said removal to be made."

[For other cases, see Appeal and Error, 4106–4111, in Digest Sup. Ct. 1908.]

Federal court — jurisdiction — effect of admission of state.

3. A homicide cause, the venue of which had been changed conformably to the act of June 28, 1898 (30 Stat. at L. 511, chap. 517), § 29, because of the Indian citizenship of the accused, from the United States court in the Indian territory to the Federal district court at Paris, Texas, was not pending in the United States court in the Indian territory, within the meaning of the provisions of the Oklahoma enabling act of June 16, 1906 (34 Stat. at L. 267, chap. 3335), § 20, as amended by the act of March 4, 1907 (34 Stat. at L. 1287, chap. 2911), for the transfer to the Oklahoma courts of all cases pending in the United States courts of Oklahoma and Indian territories, not transferred to the United States circuit or district courts in the state of Oklahoma.

[For other cases, see Courts, III. b, in Digest Sup. Ct. 1908.]

Witnesses — competency — husband and wife.

4. The wife of the accused is not competent to testify in the Federal courts on his behalf.

[For other cases, see Witnesses, IV. d, in Digest Sup. Ct. 1908.]

Note.—On competency of witnesses in Federal courts—see notes to O'Connell v. Reed, 5 C. C. A. 602; Hinchman v. Parlin & O. Co. 21 C. C. A. 278.

New trial — affidavits of jurors.

5. The trial court commits no error in denying a motion for a new trial in a criminal case, founded upon the affidavits of jurors to the effect that they did not understand the legal effect of their verdict.

[For other cases, see New Trial, V. b, in Digest Sup. Ct. 1908.]

[No. 319.]

Argued November 28 and 29, 1910. Decided January 3, 1911.

IN ERROR to the District Court of the United States for the Eastern District of Texas to review a conviction of murder. Affirmed.

The facts are stated in the opinion.

Mr. **James G. Dudley** argued the cause and filed a brief for plaintiff in error:

Jurisdiction in a criminal case is never presumed, but must always be shown; is never waived by a defendant, and want of jurisdiction can be attacked at any stage of a criminal proceeding, or even collaterally.

Re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; United States v. Rogers, 23 Fed. 662; Re Mills, 135 U. S. 270, 34 L. ed. 110, 10 Sup. Ct. Rep. 762; Re Graham, 138 U. S. 461, 34 L. ed. 1051, 11 Sup. Ct. Rep. 363.

When the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction, and causes pending at the time fall, unless saved by provision of the statute.

United States v. Boisdore, 8 How. 113, 12 L. ed. 1009; Baltimore & P. R. Co. v. Grant, 98 U. S. 398, 25 L. ed. 231; United States v. Tynen, 11 Wall. 88, 20 L. ed. 153; Merchants' Ins. Co. v. Ritchie, 5 Wall. 541, 18 L. ed. 540; McNulty v. Batty, 10 How. 79, 13 L. ed. 335; Ex parte McCardle, 7 Wall. 514, 19 L. ed. 265; Downes v. Bidwell, 182 U. S. 248, 45 L. ed. 1091, 21 Sup. Ct. Rep. 770; Gwin v. United States, 184 U. S. 675, 46 L. ed. 750, 22 Sup. Ct. Rep. 526; Murphy v. Utter, 186 U. S. 109, 46 L. ed. 1078, 22 Sup. Ct. Rep. 776; Bird v. United States, 187 U. S. 124, 47 L. ed. 103, 23 Sup. Ct. Rep. 42; Colt v. Young, 2 Blatchf. 473, Fed. Cas. No. 3,032; United States v. Barr, 4 Sawy. 255, Fed. Cas. No. 14,527; United States v. Hague, 22 Fed. 706; United States v. Van Vliet, 23 Fed. 35; Manley v. Olney, 32 Fed. 709; Birdseye v. Shaeffer, 37 Fed. 825; Aspley v. Murphy, 50 Fed. 377; Postal Teleg. Cable Co. v. Southern R. Co. 89 Fed. 194; Fairchild v. United States, 91 Fed. 298; Strong v. United States, 93 Fed. 258; Emblen v. Lincoln Land Co. 94 Fed. 713; United States v. Jacobus, 37 C. C. A. 469, 96 Fed. 262; United States v. Kelly, 38 C. C. A. 276, 97 Fed. 461; Cincinnati Brewing Co. v. Bettman, 102 Fed. 17; Emblen v. Lincoln Land Co. 42 C. C. A. 502, 102 Fed. 562; McClain v. Williams, 10 S. D. 336, 43 L.R.A. 289, 73 N. W. 72; Roush v. Morrison, 47 Ind. 416; State ex rel. Atty. Gen. v. Wharton, 25 La. Ann. 32; Walmsley v. Nicholls, 36 La. Ann. 801; State ex rel. Church v. Weeks, 38 Mo. App. 579; Olcott v. Maclean, 10 Hun, 282; State v. Bank of Tennessee, 3 Baxt. 409; Texas Mexican R. Co. v. Jarvis, 80 Tex. 464, 15 S. W. 1089.

So, if an act conferring jurisdiction is repealed, without reservation as to pending cases, they fall with it.

Sherman v. Grinnell, 123 U. S. 679, 31 L. ed. 278, 8 Sup. Ct. Rep. 260; National Exch. Bank v. Peters, 144 U. S. 570, 36 L. ed. 545, 12 Sup. Ct. Rep. 767; Gurnee v. Patrick County, 137 U. S. 141, 34 L. ed. 601, 11 Sup. Ct. Rep. 34; United States v. Kelly, 38 C. C. A. 276, 97 Fed. 461; Sims v. Black Dog, 9 Okla. 671, 60 Pac. 504.

And if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them.

South Carolina v. Gaillard, 101 U. S. 433, 25 L. ed. 937; Texas Mexican R. Co. v. Jarvis, 80 Tex. 464, 15 S. W. 1089; Larkin v. Saffarans, 15 Fed. 153; Vance v. Rankin, 194 Ill. 627, 88 Am. St. Rep. 173, 62 N. E. 807; Griffis v. Payne, 22 Tex. Civ. App. 522, 55 S. W. 757; Burlington v. Burlington Traction Co. 70 Vt. 495, 41 Atl. 514; Dulin v. Lillard, 91 Va. 725, 20 S. E. 821.

The district court of the United States for the eastern district of Texas, to have had jurisdiction in this case by the order transferring the same, must not only have had jurisdiction of the offense, but must have obtained jurisdiction of the person of the defendant, by some means known to the law.

Re Johnson, 167 U. S. 124, 42 L. ed. 103, 17 Sup. Ct. Rep. 735.

If the wife was a competent witness by the state statute, that was controlling.

Lucas v. Brooks, 18 Wall. 436, 21 L. ed. 779.

There is no presumption in favor of the jurisdiction of the courts of the United States, but the jurisdictional facts upon which jurisdiction rests must appear from the record.

Ex parte Smith, 94 U. S. 455, 24 L. ed. 165; Grace v. American Cent. Ins. Co. 109 U. S. 283, 27 L. ed. 934, 3 Sup. Ct. Rep. 207; Smith v. McNeal, 109 U. S. 431, 27 L. ed. 987, 3 Sup. Ct. Rep. 319; Continental L. Ins. Co. v. Rhoads, 119 U. S. 239, 30 L. ed. 380, 7 Sup. Ct. Rep. 193; Fishback v. Wes-

tern U. Teleg. Co. 161 U. S. 100, 40 L. ed. 631, 16 Sup. Ct. Rep. 506.

Assistant Attorney General **Fowler** argued the cause and filed a brief for defendant in error:

The admission of Oklahoma into the Union as a state did not abrogate the offense which plaintiff in error had committed, nor did it deprive the proper court of the power to proceed with the prosecution to a final judgment.

Holt v. United States, 218 U. S. 245, 54 L. ed. 1021, 31 Sup. Ct. Rep. 2; United States v. Baum, 74 Fed. 46; Stevens v. Dimond, 6 N. H. 330; Bishop, Stat. Crimes, § 182.

If the creation of Oklahoma into a state had the effect of repealing § 5339, under which this indictment was drawn, in so far as it applied to the territory embraced within said state, yet this offense was kept alive by U. S. Rev. Stat. § 13, U. S. Comp. Stat. 1901, p. 6.

United States v. Reisinger, 128 U. S. 398, 32 L. ed. 480, 9 Sup. Ct. Rep. 99.

The United States district court at Paris, Texas, was the only court which, after the creation of the state of Oklahoma, had jurisdiction to try this case.

McNulty v. Batty, 10 How. 72, 79, 80, 13 L. ed. 333, 335, 336.

The United States court at Pauls Valley, Indian territory, had jurisdiction of both the subject-matter and of the person of William Hendrix, and the record failing to show that the facts justifying the removal existed, the order must be presumed to be valid.

Ex parte Watkins, 3 Pet. 193, 7 L. ed. 650; Voorhees v. Jackson, 10 Pet. 449, 472, 9 L. ed. 490, 499; Grignon v. Astor, 2 How. 319, 338, 11 L. ed. 283, 290; Harvey v. Tyler, 2 Wall. 328, 342, 17 L. ed. 871, 873; Applegate v. Lexington & C. C. Min. Co. 117 U. S. 255, 270, 29 L. ed. 892, 896, 6 Sup. Ct. Rep. 742.

The change of venue was made on plaintiff in error's own motion, and he cannot now be heard to impeach its validity on the ground that the facts authorizing the transfer did not exist.

Ball v. United States, 140 U. S. 118, 35 L. ed. 377, 11 Sup. Ct. Rep. 761; Murphy v. Massachusetts, 177 U. S. 155, 44 L. ed. 711, 20 Sup. Ct. Rep. 639; Perteet v. People, 70 Ill. 178; State v. McEvoy, 68 Iowa, 355, 27 N. W. 273; People ex rel. Walker v. Court of Special Sessions, 4 Hun, 441.

Under the statutes directing the enrolment of the Indians, records thereof must be kept in the Interior Department, and the courts will take judicial knowledge of such records.

Knight v. United Land Asso. 142 U. S. 161, 169, 35 L. ed. 974, 978, 12 Sup. Ct. Rep. 258.

The court did not err in refusing to permit Evelina Hendrix, the wife of plaintiff in error, to testify in his behalf.

United States v. Reid, 12 How. 361, 366, 13 L. ed. 1023, 1025; Logan v. United States, 144 U. S. 263, 298, 302, 36 L. ed. 429, 441, 442, 12 Sup. Ct. Rep. 617; United States v. Black, 1 Haskell, 570, Fed. Cas. No. 14,602; United States v. Hawthorne, 1 Dill. 422, Fed. Cas. No. 15,332; United States v. Brown, 1 Sawy. 531, Fed. Cas. No. 14,671; United States v. Hall, 53 Fed. 352.

Plaintiff in error is not entitled to a new trial for the reasons set forth in certain affidavits which it is claimed were made by members of the jury.

1. These affidavits undertake to detail a misunderstanding of the jurymen as to the effect of the verdict "Guilty, without capital punishment," when jurymen cannot be permitted to impeach by affidavit their verdict upon such ground.

Mattox v. United States, 146 U. S. 140, 149, 36 L. ed. 917, 920, 13 Sup. Ct. Rep. 50.

2. The order overruling the motion for a new trial does not recite whether the affidavits were or were not considered by the trial court. Therefore, if the affidavits were of such character that it was the duty of the court to consider them, it will be presumed that the court committed no error, and considered them; and the question whether a new trial should be granted being one within the court's discretion, and he having determined that the motion should be overruled, it is not subject to review by this court.

Henderson v. Moore, 5 Cranch, 11, 12, 3 L. ed. 22; Marine Ins. Co. v. Young, 5 Cranch, 187, 191, 3 L. ed. 74, 75; M'Lanahan v. Universal Ins. Co. 1 Pet. 187, 7 L. ed. 106; United States v. Buford, 3 Pet. 12, 32, 7 L. ed. 585, 591; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898; Mattox v. United States, 146 U. S. 140, 147, 36 L. ed. 917, 920, 13 Sup. Ct. Rep. 50.

3. The affidavits are not made a part of the bill of exceptions, and consequently constitute no part of the record in this court.

Mr. Justice **McKenna** delivered the opinion of the court:

Hendrix was indicted in the United States court in the Indian territory for the crime of murder, for killing one Roler W. Voss. On his motion the case was transferred for trial to the United States court for the eastern district of Texas, at Paris, Texas. The order transferring the case recited that it was made on the motion of

Hendrix, "the court being well advised in the premises."

On the 4th of March, 1909, in the district court, he objected to the jurisdiction of the court, on the ground that the crime was committed in the state of Oklahoma, and "that, under the act of Congress known as the 'enabling act,' passed June 16, 1906 [34 Stat. at L. 267, chap. 3335], all criminal cases pending in the United States court within the Indian territory were transferred to the district courts of the state of Oklahoma, and of the county of said state where the alleged offense is said to have been committed."

A motion was made to send the cause to such county, to the end that the offense "be tried in the county and state where alleged to have been committed, in pursuance of the Constitution of the United States and the statutes made in pursuance thereof."

The motion was supported by the affidavit of the attorney of Hendrix, which stated that he was instrumental in having the cause removed to Paris, Texas, on account of the prejudice of the presiding judge of the southern district of the Indian territory, and that, "under the Federal statute permitting said removal to be made, the same was done by Will Hendrix on my advice and suggestion, especially for the reason before mentioned. . . ."

87] *The motion was denied. Hendrix was convicted and sentenced to hard labor for life in the penitentiary of the United States at Atlanta, Georgia.

A motion for a new trial was made, stating as the grounds thereof certain rulings upon evidence, and the action of the court in denying the motion to transfer the case to Garvin county, Oklahoma. And the same grounds constitute the assignments of error in this court.

Another ground is urged in the argument. It is urged that the district court at Paris, Texas, did not have jurisdiction of the person of Hendrix, because, as it is contended, the order of the court changing the venue of the case directed it to be transmitted "to the United States court at Paris, Texas," and did not designate the district court, as required by the statute. "There were district and circuit courts," it is said, "for the eastern district of Texas, at Paris, Texas, but no court by the name of the 'United States court.'" And it is asked, "to which of these courts was this case transferred?" The question is easily answered. The statute under which the change of venue was made provides "that whenever a member of the Choctaw and Chickasaw Nations is indicted for homicide, he may, within thirty days after such indictment . . . file . . . his affidavit that he cannot get a fair trial, . . . and it thereupon shall be the duty of the judge . . . to order a change of venue in such case to the United States district court for the western district of Arkansas, at Fort Smith, Arkansas, or to the United States district court for the eastern district of Texas, at Paris, Texas. . . ." 30 Stat. at L. 511, chap. 517. Reading the order of the court changing the venue of the case in connection with the statute, the order is not uncertain. Besides, the record was transferred and filed in the district court at Paris, Texas, and Hendrix was tried in that court. In other words, the case was removed to the only United States court at Paris, Texas, designated by the statute, *and tried in the only United States[88 court there in which it could be tried.

It is further contended that such district court had no jurisdiction of the person of Hendrix because the order of removal did not recite "the jurisdictional facts or findings authorizing such change of venue," nor are such facts or findings shown by the record. That is, it is not shown that he was a member of the Choctaw and Chickasaw Nations. To both objections it might be immediately answered that a complete record of the case is not here. The affidavit upon which the order of removal was made is not here. It is not denied that an affidavit was filed, as required by the statute, and it may be assumed that it was sufficient to justify the action of the court. It is admitted that Hendrix is an Indian and a member of the Choctaw and Chickasaw Nations. The motion for change of venue was made by him, and could only have been made by him, and the order recites that the court granted the motion, "being well advised in the premises." This means advised by Hendrix in the way provided by the statute. And it has indubitable confirmation in the affidavit of his attorney, filed in support of the motion to send the case back to Oklahoma. It is stated that the motion for removal was made "under the Federal statute permitting said removal to be made."

The inference is palpable that the jurisdictional fact that Hendrix was an Indian was presented to the court and constituted its ground of action,—action which, we may say, was imperatively required by the statute.

The next contention of Hendrix is that jurisdiction was taken from the district court in Texas by § 20 of the act to enable the people of Oklahoma to form a constitution and a state government, as amended March 4, 1907. By that section it was provided that all causes, civil and criminal,

pending in the United States courts of Oklahoma territory, or in the United States 89]courts in the Indian *territory, at the time those territories should become a state, not transferred to the United States circuit court or district courts in the state of Oklahoma, should be proceeded with, held, and determined by the courts of the state, with rights of appeal to the final appellate court of the state and to the Supreme Court of the United States. And it is provided that "all criminal cases pending in the United States courts in the Indian territory, not transferred to the United States circuit or district courts in the state of Oklahoma, shall be prosecuted to a final determination in the state courts of Oklahoma under the laws now in force in that territory." 34 Stat. at L. 1287, chap. 2911.

The argument is that, by certain acts of Congress, explained in Re Johnson, 167 U. S. 120, 42 L. ed. 103, 17 Sup. Ct. Rep. 735, the United States courts in the Indian territory were given jurisdiction of offenses committed in the territory against the laws of the United States, and that the laws which conferred jurisdiction on the United States courts held in Arkansas, Kansas, and Texas, outside of the limits of the territory, were repealed. But we have seen that by § 29 of the act of June 28, 1898, a change of venue of cases in the United States courts of the territory could be invoked by a member of the Choctaw and Chickasaw Nations, and that under the statute the venue of the pending case was, on the motion of Hendrix, changed to the district court at Paris, Texas. It is, however, contended that the power of the court to make the order "had been taken away and repealed by the act of Congress known as the 'enabling act,' and the state of Oklahoma had been erected and the state courts had succeeded to the jurisdiction of the United States courts in the Indian territory." The "enabling act," it is urged, "makes no exception or provision saving cases pending in the United States court in the Indian territory, nor any provision saving cases then pending in any of the United States 90] courts" at Paris, *Texas, or in the eastern district of Texas, on change of venue, and therefore the court had no jurisdiction to try Hendrix. To support the contention it is argued that when the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction and causes pending at the time fall, unless saved by provision of the statute. Many cases are cited to support the proposition, and other cases to sustain the view that, "if an act conferring jurisdiction is repealed without reservation as to pending cases, they fall with it." The effect would have to be admitted if the imputed cause existed. The act of June 28, 1898, under which the change of venue was ordered, was not repealed. The conditions of its future application, of course, disappeared with the admission of the state in the Union, but what had been done before that time was not abrogated, nor was the statute repealed. It had performed its office as to the pending case, but even if we should consider it necessarily as a continuing power, not completely fulfilling its purpose by the transfer simply of a case from one court to another, we cannot regard it as having been repealed, nor that jurisdiction had been taken from the district court at Paris, Texas. The "enabling act" provides only for the transfer of cases to the courts of Oklahoma which were pending in the district court of the territory of Oklahoma and in the United States courts of Indian territory. That this case was so pending was the conception of counsel when the motion was made to transfer it to the district court of Gravin county, Oklahoma, and the same conception is expressed in the argument. And it is necessary to meet the words of the enabling act, which embraced, as we have seen, only cases pending in the courts of Oklahoma and Indian territories. The foundation of the conception seems to be that the venue of the case was not legally changed to the district court at Paris, Texas, and that it was still pending in the United States court in *the Indian ter-[91 ritory when the enabling act was passed, and was transferred by the act to the courts of the state. To this operation of the act we cannot assent. The act is explicit in its terms and provisions. It was careful in its accommodations for the new conditions,—the change of the territories into a state, and in the adjustments made necessary by the creation of new jurisdictions, state and Federal. There was no such necessity for cases transferred to other jurisdictions still adequate to dispose of them. The contention is therefore untenable.

It is assigned as error that the wife of Hendrix was not allowed to testify in his behalf to certain matters which, it is contended, were "vitally material to his defense." The ruling was not error. Logan v. United States, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617.

On the motion for new trial, affidavits of four jurors were offered, stating with some detail that they did not understand the legal effect of the verdict. Only one of the affidavits is in the record. The maker states that, by finding the defendant guilty, as charged in the indictment, without capital punishment, "he did not understand

what the punishment would be on such a verdict, and agreed to it on the understanding that the punishment would only be two years in the penitentiary." He further states that he was in favor of a verdict for manslaughter, and would never have consented to the verdict had he thought or believed it "would carry with it a life penalty." The motion for new trial, as we have said, was denied. We see no error in the ruling. Mattox v. United States, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50.

The other errors assigned are not pressed in the argument.

Judgment affirmed.

Mr. Justice **Harlan** dissents.

92] *WEST SIDE BELT RAILROAD COMPANY, Francis H. Skelding, and Henry W. McMasters, Receivers, Plffs. in Err.,

v.

PITTSBURGH CONSTRUCTION COMPANY.

(See S. C. Reporter's ed. 92–104.)

Error to state court — frivolousness of Federal question.

1. The contention that full faith and credit were not given to the judgment of a Federal court dismissing an action by a foreign corporation because of its failure to register within the state before entering into the contract in suit, by a decision of a state court holding that such judgment was not a bar to a second action between the same parties upon the same contract, where the corporation had brought itself within the curative provisions of Pa. act May 23, 1907, is not so far frivolous as not to serve as the basis of a writ of error from the Federal Supreme Court to the state court.

[For other cases, see Appeal and Error, 1110–1137, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — construction of curative act.

2. Whether the provisions of Pa. act May 23, 1907, validating contracts of foreign corporations, extended to a contract which had previously been adjudged invalid by a Federal court because of the corporation's failure to register within the state before entering into such contract, will be determined by the Federal Supreme Court for itself on a writ of error to a state court, presenting the question whether full faith and credit were given to such judgment by the decision of the state court that it was not a bar to a second action between the same parties on the same contract, after the corporation had brought itself within the terms of such statute.

[For other cases, see Appeal and Error, 2124–2151, 2249–2251, in Digest Sup. Ct. 1908.]

Foreign corporations — invalid contracts — curative legislation.

3. Contracts of a foreign corporation which have been adjudged invalid because of its failure to register within the state before making such contracts are embraced by the provisions of Pa. act May 23, 1907, legalizing contracts of foreign corporations which, after making such contracts, but prior to the passage of the act, have established a known place of business in the state, and designated authorized agents for the transaction of its business, and, before commencing suit, have paid all taxes that would have accrued if they had complied with the law at the time of beginning business.

[Foreign corporations generally, see Corporations XII., in Digest Sup. Ct. 1908.]

Judgment — full faith and credit.

4. The judgment of a Federal court dismissing an action by a foreign corporation because of its failure to register within the state before entering into the contract in suit is not denied full faith and credit by a decision of a state court holding that such judgment is not a bar to a second action between the same parties upon the same contract, where the corporation has brought itself within the provisions of Pa. act May 23, 1907, legalizing contracts made by foreign corporations which, after making such contracts, but prior to the passage of the

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NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On necessity of color of merit in Federal question to sustain writ of error to state court—see note to Offield v. New York, N. H. & H. R. Co. 51 L. ed. U. S. 231.

On review of decisions of state courts presenting questions of full faith and credit —see note to Allen v. Alleghany Co. 49 L. ed. U. S. 551.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to validity of contracts made by foreign corporations which have not complied with statutory conditions of the right to do local business—see note to Edison General Electric Co. v. Canadian P. Nav. Co. 24 L.R.A. 315.

As to conclusiveness and effect of judgments as between Federal and state courts —see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; and Union & Planters' Bank v. Memphis, 49 C. C. A. 468.

act, have established a known place of business in the state, and designated authorized agents for the transaction of its business, and before commencing suit, have paid all taxes that would have accrued if they had complied with the laws at the time of beginning business.

[For other cases, see Judgment, VI., VIII., in Digest Sup. Ct. 1908.]

[No. 681.]

Submitted December 5, 1910. Decided January 3, 1911.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment which affirmed a judgment of the Court of Common Pleas of Allegheny County in that state holding that a judgment of a Federal court dismissing an action by a foreign corporation because of its failure to register within the state before making the contract in suit was not a bar to a second action between the same parties upon the same contract, after the corporation had complied with the provisions of a curative statute. Affirmed.

See same case below, 227 Pa. 90, 75 Atl. 1029.

The facts are stated in the opinion.

Mr. **Thomas Patterson** submitted the cause for plaintiffs in error:

The effect to be given a Federal judgment in any subsequent proceeding in a state court, where such judgment is pleaded, raises a Federal question that is reviewable in the Supreme Court of the United States.

Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co. 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238; Deposit Bank v. Frankfort, 191 U. S. 499, 48 L. ed. 276, 24 Sup. Ct. Rep. 154.

The judgment of a court of record in Pennsylvania being conclusive upon the parties, and not open to collateral attack or inquiry, the effect necessarily to be given by the court of Pennsylvania to the judgment of the circuit court of the United States is that of a judgment which is, as a plea, a bar; and as evidence, conclusive in any further litigation between the parties.

Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; Deposit Bank v. Frankfort, 191 U. S. 499, 48 L. ed. 276, 24 Sup. Ct. Rep. 154; Stevens v. Hughes, 31 Pa. 384.

While a prohibition of contracting power which is imposed by the legislature solely in the interests of the public may, in like manner, be removed by the legislature, and the contract validated so long as it remains *in fieri*, yet when action has been brought on the contract, the statutory prohibition has been pleaded, and final judgment has passed in favor of the defendant upon this ground, it is then too late for the legislature to remove the statutory bar and revitalize the contract, for the contract no longer has a separate existence, but is merged in the judgment,—*transit in rem judicatum*,—and the successful party has a vested right in the judgment in his favor which is beyond legislative control.

United States v. Lefflcr, 11 Pet. 86, 9 L. ed. 642; Ewell v. Daggs, 108 U. S. 151, 27 L. ed. 685, 2 Sup. Ct. Rep. 408; Gross v. United States Mortg. Co. 108 U. S. 488, 27 L. ed. 798, 2 Sup. Ct. Rep. 940; Erskine v. Steele County, 87 Fed. 630, affirmed in 39 C. C. A. 173, 98 Fed. 215; Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co. 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; Cooley, Const. Lim. p. 528; Sutherland, Stat. Constr. § 480; Lewis v. Pennsylvania R. Co. 220 Pa. 317, 18 L.R.A.(N.S.) 278, 69 Atl. 821, 13 A. & E. Ann. Cas. 1142.

No court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contracts.

McMullen v. Hoffman, 174 U. S. 654, 48 L. ed. 1123, 19 Sup. Ct. Rep. 839.

An appellate court must and does decide cases which are pending before it in accordance with the existing laws, even though the law may not have been passed until after the judgment in the lower court was rendered. And it matters not that, to give effect to the new law, the appellate court must set aside a judgment rightful when entered.

United States v. The Peggy, 1 Cranch, 103, 2 L. ed. 49; Dinsmore v. Southern Exp. Co. 183 U. S. 115, 46 L. ed. 111, 22 Sup. Ct. Rep. 45; Day v. Day, 22 Md. 530; Simpson v. Stoddard County, 173 Mo. 423, 73 S. W. 700; Pelt v. Payne, 60 Ark. 637, 30 S. W. 426; Sidway v. Lawson, 58 Ark. 117, 23 S. W. 648.

Messrs. **Samuel McClay** and **Edwin W. Smith** submitted the cause for defendant in error:

The construction of a state statute is a matter for the state court, and its determination thereof is binding on this court.

Miller v. Swann (Miller v. Anderson) 150 U. S. 132, 37 L. ed. 1028, 14 Sup. Ct. Rep. 52.

The supreme court of Pennsylvania gave the same effect to the judgment of the cir-

cuit court of the United States for the western district of Pennsylvania, when it was pleaded in bar of this action, that it would have given to a judgment of a court of its own state.

Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co. 172 U. S. 493, 515, 43 L. ed. 528, 535, 19 Sup. Ct. Rep. 238; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506.

A real, and not a fictitious, Federal question, is essential to the jurisdiction of the Supreme Court over the judgment of a state court.

Millingar v. Hartupee, 6 Wall. 258, 18 L. ed. 829; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22; Re Kemmler, 136 U. S. 438, 34 L. ed. 521, 10 Sup. Ct. Rep. 930.

A color for a motion to dismiss, where the claim of a Federal question is not so clearly superfluous as to authorize its dismissal, may be sufficient to permit the court to proceed to the consideration of the question involved, where, with the motion to dismiss, was a motion to affirm, on the ground that the writ of error was taken merely for delay.

Douglas v. Wallace, 161 U. S. 346, 40 L. ed. 727, 16 Sup. Ct. Rep. 485; Lowry v. Silver City Gold & S. Min. Co. 179 U. S. 196, 45 L. ed. 151, 21 Sup. Ct. Rep. 104, 21 Mor. Min. Rep. 113; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120.

The curative act of May 23, 1907, of the Pennsylvania legislature, is constitutional.

Cooley, Const. Lim. 7th ed. 535; Watson v. Mercer, 8 Pet. 88, 8 L. ed. 876, 1 Watts, 358; Satterlee v. Matthewson, 16 Serg. & R. 169; Randall v. Kreiger, 90 U. S. 137–150, 23 L. ed. 124–127; Gross v. United States Mortg. Co. 108 U. S. 477–488, 27 L. ed. 795–799, 2 Sup. Ct. Rep. 940; Rosenplanter v. Provident Sav. Life Assur. Soc. 46 L.R.A. 473, 37 C. C. A. 566, 96 Fed. 721; Cooley, Const. Lim. 7th ed. 538, 539; Hess v. Werts, 4 Serg. & R. 356.

The judgment in the circuit court of the United States is *res judicata* only of the issues then presented, of the facts as they appeared, and of the legislation existing at the rendition of the judgment in the court below.

Utter v. Franklin, 172 U. S. 417, 43 L. ed. 498, 19 Sup. Ct. Rep. 183; Barnet v. Barnet, 15 Serg. & R. 72, 16 Am. Dec. 516; Mercer v. Watson, 1 Watts, 356; New York & O. Land Co. v. Weidner, 169 Pa. 364, 32 Atl. 557.

Mr. Justice **McKenna** delivered the opinion of the court:

This is the second action between the parties, defendant in error being plaintiff in both, and the purpose of both being the recovery of $332,750.98 upon an award of James H. McRoberts chief engineer of the railroad company, made under the circumstances hereinafter detailed. In the present action the declaration contains a count upon a *quantum meruit*.

The first action was brought in the United States circuit court for the western district of Pennsylvania. A verdict was directed for the plaintiff (defendant in error here) for the full amount of the award, subject to the court's decision upon a point reserved. Subsequently judgment *non obstante* was entered for the defendant (plaintiff in error here). One of the grounds of the motion, and, as it was the only one considered, it is not necessary to give the others, was that the action could not be maintained because the plaintiff (defendant in error here) being a foreign corporation (it was incorporated under the laws of West Virginia) did not register as required by the statute of Pennsylvania, before making the contract on which the action was based.

An act passed in 1874 provided that no foreign corporation should do business in the state until it had established an office or offices and appointed an agent or agents for the transaction of business therein. And it was made unlawful for such corporation to do any business until it had filed in the office of the secretary of the commonwealth a statement, under seal, signed by the president and secretary, showing the title and object of the corporation, *the location[97 of its offices, and the names of its agents. A certificate of the secretary of the commonwealth of such filing was required to be kept for public inspection in every office. Transacting business without complying with the provisions of the act was made a misdemeanor.

An act was passed in 1889 which provided that any limited partnership, bank, joint stock association organized under the laws of the commonwealth, or under the laws of any other state, and doing business in the commonwealth, should register, in the office of the auditor general, the place of its business and postoffice address, the names of certain of its officers, and the amount of capital authorized and the amount paid. Such registration was also required of every corporation then engaged in business in the commonwealth. Annual registration was required thereafter. A penalty of $500 was imposed for violations of the act.

The plaintiff had not registered at the

time the contract involved in the act was made. It, however, subsequently registered.

It was held, following the decisions of the courts of Pennsylvania, that the statutes made unlawful business transactions within the state by a foreign corporation which had not complied with their provisions. And it was said [151 Fed. 130]:

"Nor does the award of the engineer have any efficacy in this case. Authority on his part to act, and the obligation of parties to abide by his decision, rests in both cases on the provision of a contract which is *contra legem*. The law will not enforce an award based on an illegal contract. Benton v. Singleton, 114 Ga. 556, 58 L.R.A. 181, 40 S. E. 811."

The opinion concluded as follows:

"Upon the whole, therefore, we are of opinion that, by reason of the nonregistration of the plaintiff corporation prior to the contract here involved, the verdict for plaintiff cannot be sustained. Judgment 98] will *therefore be entered in favor of the defendant *non obstante veredicto*, but said judgment shall not bar any subsequent suit or proceeding by the plaintiff for services performed."

The circuit court of appeals, to which the case was carried, also expressed the view, applying, as it said, the decisions of the courts of the state, that the contract was illegal, and its illegality made void the award made under it. The judgment of the circuit court was affirmed.

Then an act of legislature of Pennsylvania was passed, entitled, "An Act Validating Contracts, Bonds, or Obligations Made by Corporations of Other States, Without First Having Established Known Places of Business and Designating Authorized Agents for the Transaction of Their Business Within This Commonwealth, and Providing for the Enforcement of the Same." P. L. 205.

Thereupon this action was brought not only upon the award made by James H. Roberts, but also for work and labor done as upon a *quantum meruit*. Among other defenses, the judgment in the United States circuit court was pleaded as a bar to the action notwithstanding the act of May 23, 1907. The trial court was of opinion that the act "cured the defect in plaintiff's contract," and accordingly the judgment was not a bar to the action. The court also ruled against the other defenses, and entered judgment for plaintiff (defendant in error here). It was sustained by the supreme court of the state, on the ground that the adjudication in the circuit court "settled nothing with respect to the merits of this case; all that was there adjudicated was the plaintiff's right to maintain its action as an unregistered foreign corporation." The supreme court further decided that "the effect of the act of May 23, 1907, was to remove the impediment created by the prior act to the enforcement of the contract, and the plaintiff had at once acquired the right to maintain an action thereon."

*The action of the state court, decid-[99 ing against the judgment of the United States circuit court as a bar, constitutes the Federal question in the case, the contention of plaintiff in error being that due faith and credit were denied the judgment. A motion, however, is made to dismiss the writ of error on the ground that no Federal question is presented by the record, or alternatively to affirm the judgment.

The motion to dismiss is based on the contention that the judgment of the circuit court reserved to plaintiff a right of action for the services performed, and that the supreme court of the state having decided that the present action was within the reservation, it gave, not denied, the same faith and credit it would have given to a state judgment rendered under similar circumstances.

When a party asserts that due faith and credit have not been given to a judgment rendered in an action between him and the other party, he asserts a right under the Constitution of the United States, and necessarily this raises a Federal question. This is the assertion in the present case, and the consideration which the supreme court of Pennsylvania gave it demonstrates that it is not so far frivolous as to sustain a motion to dismiss. The motion is therefore denied. On the other hand, we cannot say that the motion to dismiss is without color, and pass, therefore, to the merits, for the determination of which a fuller statement of the facts becomes necessary.

The West Side Belt Railroad Company, which we shall refer to as the railroad company, entered into a contract with one Petrie to construct an extension of its road. Petrie engaged to construct and complete the proposed work in the manner and within the time called for by the specifications, and the railroad company agreed to pay for the work the sum of $400,000. The contract was dated April 25, 1901. On the 24th of May following, Petrie, with the consent of the railroad company, entered *into a[100 contract with the Pittsburgh Construction Company, referred to herein as the construction company, to do the work. This contract was a transcript of the contract between Petrie and the railroad company, except as to the consideration. Following the signatures of the parties this appears: "For value received, the Westside Belt Com-

pany and John S. Scully and T. S. Barnsdall do hereby guarantee and become surety for the payment of the money mentioned in this contract as the same becomes due and payable."

Under the contract John H. McRoberts was made the final arbitrator to determine all matters in dispute, and disputes arose which were submitted to him. He, after full hearing, made an award in favor of the construction company in the sum of $332,750.98.

The construction company brought the action to which we have referred in the circuit court of the United States against the railroad company, Scully and Barnsdall, on their contract of guaranty for the amount of the award. The proceedings in the circuit court, and its judgment, and that of the circuit court of appeals, have been stated.

An act of May 23, 1907, mentioned above, provided that contracts made by foreign corporations should be binding, and might be enforced in the courts of the commonwealth, provided the corporation had subsequently and prior to the passage of the act complied with the laws of the commonwealth by establishing a known place of business in the state, and designating authorized agents for the transaction of its business, and before commencing any suit upon such contract, bond, or obligation, and had paid all taxes that would have accrued to the commonwealth if it had complied with the laws at the time of beginning business.

After the passage of the act this action was brought. The declaration contained two counts, one for the recovery of the sum of $332,750.98, with interest, for services 101] performed *and materials furnished, conclusively evidenced by the award of James H. McRoberts, and the other upon a *quantum meruit* for the value of the work done and materials furnished, as of the date of the performing and furnishing the same. Judgment was rendered for the construction company, as we have stated.

The decision in this case turns upon a comparison of the two actions, and the effect of the act of May 23, 1907.

It was assumed by the trial court, and also by the supreme court, that the action in the circuit court was between the same parties and upon the same cause of action as this one. Making that assumption, the trial court said the question was, Did the act of May 23 "revitalize the contract, which the United States court declared invalid?" And, construing the statute, decided that it was its intention to legalize every contract, bond, or obligation of a foreign corporation which had not complied with the laws of the state, but subsequently had done so, and paid all of the taxes which would have accrued. "The act makes no distinction," the court said, "between contracts which have been litigated and those which have not been litigated;" and as it was found that the plaintiff (defendant in error) had complied with all the requirements of the statute, it was held that the defect in the contract was cured and the judgment of the circuit court was no bar to recovery. The supreme court pronounced the ruling correct, and, we may assume, approved the grounds upon which it was based. It is true the learned court discussed the judgment more than it did the act of May 23, but this, we infer, was for the purpose of showing that the judgment in the circuit court was rendered not upon the controversies which arose between the parties in consequence of the contract, its terms, the extent or manner of its performance, or the liability of the railroad company upon its contract of guaranty, but "was based," as the court said, "exclusively on the *plain-[102 tiff's disability to maintain the action because of its failure to register within the state before the contract sued upon was entered into," and that, therefore, the judgment did not preclude a consideration of the act of May 23, or take from it the power to "revitalize" the contract. We agree, therefore, with the railroad company, that the effect of the act of May 23 constitutes "the real and only issue in the case."

That the action could be maintained without it is not contended. It is true that the declaration contained a count upon a *quantum meruit*, in order to bring the case within the reservation of the judgment of the circuit court, but evidence to sustain it was ruled out upon the objection of plaintiff in error, on the ground substantially that the contract furnished its own measure of damages, "ascertained in the manner set forth" in the contract, that is, by an appraisement and award, and that the evidence offered was a "contradiction of the written contracts in the case," and therefore incompetent. The *quantum meruit*, therefore, is out of the case, and the action rests on the contract, as the action in the circuit court did, and the judgment in the latter, adjudging its invalidity, is a bar to the present action, unless such effect has been taken from it by the act of May 23, 1907. And this is admitted. Indeed, defendant in error asserts that it was assumed by everybody at the trial, but it is insisted that the effect of the act is not a Federal question, but solely one for the state courts. In this we cannot concur. It is an element in the consideration of the question whether due faith and credit were given to the judgment of the circuit court, and we are

brought to the consideration of the curative effect of the act.

In Watson v. Mercer, 8 Pet. 88, 8 L. ed. 876, such an act was sustained against a charge that it devested vested rights and impaired the obligation of a contract. The act considered made valid the deeds of mar-
103] ried women which were invalid *by reason of defective acknowledgments, and avoided a judgment in ejectment rendered against one of the parties to the action because of such a defect in a deed relied on for title. The controversy was between the successor by descent of the married woman and the grantee in the deed. It was said in the argument that the descents had been confirmed by two judgments of the supreme court of the state against the deed, adjudicating it to be void on points involving its validity, which judgments, it was contended, were conclusive evidence that the deed was no deed, and that the rights acquired by descent were absolute vested rights. The act was nevertheless sustained, as we have stated.

Satterlee v. Matthewson, 2 Pet. 380, 7 L. ed. 458, is to the same effect. Title was set up as a defense in an action of ejectment to which the plaintiff replied that, conceding it to be older and better than his, it nevertheless could not be set up against him, as the defendant was his tenant. The trial court took that view, and the supreme court of the state reversed it on the ground that, by the statute law of the state, the relation of landlord and tenant could not subsist under a Connecticut title. Before the second trial of the case the legislature of the state (Pennsylvania) passed a law providing that the relation of landlord and tenant should exist under such titles. This court affirmed the judgment of the supreme court of the state, sustaining the law.

The doctrine of Satterlee v. Matthewson and Watson v. Mercer was repeated in Randall v. Kreiger, 23 Wall. 137, 150, 23 L. ed. 124, 126.

In Gross v. United States Mortg. Co. 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940, the same principles were applied to sustain an act of the state of Illinois, making valid a mortgage which was inoperative under the provisions of prior laws. So also Ewell v. Daggs, 108 U. S. 143, 27 L. ed. 682, 2 Sup. Ct. Rep. 408.

In Utter v. Franklin, 172 U. S. 416, 43 L. ed. 498, 19 Sup. Ct. Rep. 183, it was de-
104] cided that *an act of Congress validating a defect in bonds of the territory of Arizona was within the power of Congress.

The principle of the cases is declared to be by Mr. Justice Matthews, in Ewell v. Daggs, *supra*, "that the right of a defendant to avoid his contract is given to him by statute, for purpose of its own and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains *in fieri*, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract." And such view of curative statutes is entertained by the supreme court of Pennsylvania, as indicated by its opinion in the present case and the cases there cited.

The Federal question having been correctly decided, the judgment is affirmed.

NOBLE STATE BANK, Plff. in Err.,
v.
C. N. HASKELL, G. W. Bellamy, J. P. Connors, J. A. Menefee, M. E. Trapp, and H. H. Smock.

(See S. C. Reporter's ed. 104–113.)

Constitutional law — reserved right to amend corporate charter — creating depositor's guaranty fund.

1. Contract obligations under a bank's charter which is subject to alteration or repeal are not unconstitutionally impaired by the levy and collection, under a state statute, of an assessment based upon average daily deposits, for the purpose of creating a depositors' guaranty fund to secure the full repayment of deposits in case it or any other bank existing under the state laws becomes insolvent, unless such statute deprives the bank of liberty or property without due process of law.

[For other cases, see Constitutional Law, 1386–1412, in Digest Sup. Ct. 1908.]

Constitutional law — police power — due process of law — creating depositors' guaranty fund.

2. The levy and collection, under a state statute, from every bank existing under the

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Note.—As to reserved power to alter, amend, or repeal corporate charters—see note to Greenwood v. Union Freight R. Co. 26 L. ed. U. S. 961 and Omaha Water Co. v. Omaha, 77 C. C. A. 281.

As to what constitutes due process of law—see notes to People v. OBrien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

For a discussion of police power generally—see notes to State v. Marshall, 1 L.R.A. 51; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; State v. Schlemmer, 10 L.R.A. 135; and Barbier v. Connolly, 28 L. ed. U. S. 923.

state laws, of an assessment based upon average daily deposits, for the purpose of creating a depositors' guaranty fund to secure the full repayment of deposits in case any such bank becomes insolvent, is a valid exercise of the police power, and cannot be regarded as depriving a solvent bank of its liberty or property without due process of law.

[For other cases, see Constitutional Law, 582–604, 881–890, in Digest Sup. Ct. 1908.]

Constitutional law — police power — regulating banking.

3. The police power of a state extends to the regulation of the banking business, and even to its prohibition except on such conditions as the state may prescribe.

[For other cases, see Constitutional Law, 881–890, in Digest Sup. Ct. 1908.]

[No. 71.]

Argued December 8, 1910. Decided January 3, 1911.

IN ERROR to the Supreme Court of the State of Oklahoma to review a decree which affirmed a decree of the District Court of Logan County in that state, dismissing the petition in a suit to enjoin the levy and collection from a state bank of an assessment for the purpose of creating a depositors' guaranty fund. Affirmed.

See same case below 22 Okla. 48, 97 Pac. 590.

The facts are stated in the opinion.

Mr. C. B. Ames argued the cause, and, with Messrs. J. B. Dudley and D. T. Flynn, filed a brief for plaintiff in error:

The law requires a taking of the plaintiff's property for a private use.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 658, 22 L. ed. 460; State ex rel. Griffith v. Osawkee Twp. 14 Kan. 418, 19 Am. Rep. 99; Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; Baltimore & E. S. R. Co. v. Spring, 80 Md. 510, 27 L.R.A. 72, 31 Atl. 208; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130.

It is not an exercise of the power of taxation.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 658, 22 L. ed. 460; State ex rel. Griffith v. Osawkee Twp. 14 Kan. 418, 19 Am. Rep. 99; Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; Baltimore & E. S. R. Co. v. Spring, 80 Md. 510, 27 L.R.A. 72, 31 Atl. 208; Sutherland-Innes Co. v. Evart, 30 C. C. A. 305, 58 U. S. App. 335, 86 Fed. 597; Weismer v. Douglas, 64 N. Y. 91, 21 Am. Rep. 586.

It is not a valid exercise of the police power.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764; Atchison, T. & S. F. R. Co. v. Campbell, 61 Kan. 439, 48 L.R.A. 251, 78 Am. St. Rep. 328, 59 Pac. 1051; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302.

It is therefore a taking of property without due process of law, and violative of the Constitution of the United States.

Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Harding v. Butts, 18 Ill. 503; Embury v. Conner, 3 N. Y. 512, 53 Am. Dec. 325; Atty. Gen. v. Boston & A. R. Co. 160 Mass. 62, 22 L.R.A. 112, 35 N. E. 252; Atchison, T. & S. F. R. Co. v. Campbell, 61 Kan. 439, 48 L.R.A. 251, 78 Am. St. Rep. 328, 59 Pac. 1051; Mays v. Seaboard Air Line R. Co. 75 S. C. 455, 56 S. E. 30; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130.

In taking the plaintiff's property it impairs the obligation of contracts; and, being a taking without due process of law, cannot be upheld as an amendment of the plaintiff's charter.

Fletcher v. Peck, 6 Cranch, 135, 3 L. ed. 177; Sinking Fund Cases, 99 U. S. 720, 748, 25 L. ed. 501, 512; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; Opinion of Justices, 66 N. H. 629, 33 Atl. 1079; Hill v. Glasgow, R. Co. 41 Fed. 615; Atchison, T. & S. F. R. Co. v. Campbell, 61 Kan. 439, 48 L.R.A. 251, 78 Am. St. Rep. 328, 59 Pac. 1051; Grand Rapids Sav. Bank v. Warren, 52 Mich. 557, 18 N. W. 356; Hawthorne v. Calef, 2 Wall. 10, 17 L. ed. 776; McDonnell v. Alabama Gold L. Ins. Co. 85 Ala. 401, 5 So. 120; Ireland v. Palestine, B. N. P. & N. W. Turnp. Co. 19 Ohio St. 369; Mays v. Seaboard Air Line R. Co. 75 S. C. 455, 56 S. E. 30; Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed.

1102, 26 Sup. Ct. Rep. 660, 6 A. & E. Ann. Cas. 253.

The governor, when acting as a member of the state banking board, is subject to the control of the courts.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Rolston v. Missouri Fund Comrs. (Rolston v. Crittenden) 120 U. S. 390, 30 L. ed. 721, 7 Sup. Ct. Rep. 599; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas. 764.

The petition alleges and the demurrer admits that it is the purpose of the defendants to compel the plaintiff to pay the assessment required by the law. It therefore shows a sufficient state of facts to justify relief by injunction.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

Messrs. C. B. Ames, D. T. Flynn, and T. G. Chambers also filed a brief for plaintiff in error:

Property cannot be taken for private use in the exercise of the right of eminent domain, even when part of the property taken is needed for public use.

Re Albany Street, 11 Wend. 149, 25 Am. Dec. 618; Embury v. Conner, 3 N. Y. 512, 53 Am. Dec. 325; 1 Lewis, Em. Dom. § 204.

Property cannot be taken for private use under the taxing power.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; State ex rel. Griffith v. Osawkee Twp. 14 Kan. 418; Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; Baltimore & E. S. R. Co. v. Spring, 80 Md. 510, 27 L.R.A. 72, 31 Atl. 208.

Regulating railroads is clearly an exercise of the police power; but, in so doing, the state cannot do anything which takes for private use the smallest part of the railroad's property.

Atty. Gen. v. Boston & A. R. Co. 160 Mass. 62, 22 L.R.A. 112, 35 N. E. 252; Atchison, T. & S. F. R. Co. v. Campbell, 61 Kan. 439, 48 L.R.A. 251, 78 Am. St. Rep. 328, 59 Pac. 1051; Mays v. Seaboard Air Line R. Co. 75 S. C. 455, 56 S. E. 30; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 A. & E. Ann. Cas. 989.

Private property cannot be taken for private use by the amendment of corporate charters.

Woodward v. Central Vermont R. Co. 180 Mass. 599, 62 N. E. 1051; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Atchison, T. & S. F. R. Co. v. Campbell, 61 Kan. 439, 48 L.R.A. 251, 78 Am. St. Rep. 328, 59 Pac. 1051; Mays v. Seaboard Air Line R. Co. 75 S. C. 455, 56 S. E. 30.

Mr. Charles West, Attorney General of Oklahoma, argued the cause, and, with Messrs. E. G. Spilman and W. C. Reeves, filed a brief for defendants in error:

Laws exist restricting the issuance of circulation, and attaching conditions to the same,—notably by making the issuance of circulating medium a franchise or privilege, and restricting its use to particular corporations established for that purpose in the state or nation. The constitutionality of this regulation has everywhere been upheld or taken for granted.

Bank of Augusta v. Earle, 13 Pet. 519, 596, 10 L. ed. 274, 311; Myers v. Manhattan Bank, 20 Ohio, 295; People v. Bartow, 6 Cow. 290; People v. Brewster, 4 Wend. 498; Pennington v. Townsend, 7 Wend. 276.

The security of the public in its dealings with banks is a governmental function, and the creation of a mutual reserve fund is a safety to the public and a compulsory benefit to the banks.

Freund, Pol. Power, §§ 40, 400, 401.

Banking is public business.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; State v. Richcreek, 167 Ind. 217, 5 L.R.A.(N.S.) 875, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 A. & E. Ann. Cas. 899.

The Constitution should be liberally construed.

Gibbons v. Ogden, 9 Wheat. 187, 6 L. ed. 68.

The law is valid unless plainly invalid.

Hylton v. United States, 3 Dall. 171, 175, 1 L. ed. 556, 558.

A modification of a common-law rule is not a deprivation of property.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; State ex rel. Goodsill v. Woodmansee, 1 N. D. 246, 11 L.R.A. 421, 46 N. W. 970; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; Tenney v. Lenz, 16 Wis. 566; Van Horn v. People, 46 Mich. 183, 41 Am. Rep. 159, 9 N. W. 246; Holst v. Roe, 39 Ohio St. 340, 48 Am. Rep. 459; Wilton v. Weston, 48 Conn. 325; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 98, 32 L. ed. 353, 2 Inters. Com.

Rep. 238, 9 Sup. Ct. Rep. 28; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; New York ex rel. New York Electric Lines Co. v. Squire, 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880; Head v. Amoskeag Mfg. Co. 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441; Wurts v. Hoagland, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; State ex rel. Utick v. Polk County, 87 Minn 325, 60 L.R.A. 161, 92 N. W. 216; Swift v. Calnan, 102 Iowa, 206, 37 L.R.A. 462, 63 Am. St. Rep. 443, 71 N. W. 233; Firemen's Benev. Asso. v. Lounsbury, 21 Ill. 511, 74 Am. Dec. 115; Fire Dept. v. Helfenstein, 16 Wis. 140; Exempt Firemen's Benev. Fund v. Roome, 93 N. Y. 313, 45 Am. Rep. 217; Phœnix Assur. Co. v. Fire Dept. 117 Ala. 631, 42 L.R.A. 468, 23 So. 843.

Can all banking be made a franchise?

Zane, Banks & Bkg. §§ 7–15; Morse, Bkg. § 13; State ex rel. Goodsill v. Woodmansee, 1 N. D. 246, 11 L.R.A. 420, 46 N. W. 970; Myers v. Manhattan Bank, 20 Ohio, 295; State v. Stebbins, 1 Stew. (Ala.) 299; Allnutt v. Inglis, 12 East, 527, 11 Revised Rep. 482; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Hale, de Portibus Maris, 1 Hargrave's Law Tracts, 78.

The exercise of the police power violates no vested rights.

Sioux City Street R. Co. v. Sioux City, 138 U. S. 98, 34 L. ed. 898, 11 Sup. Ct. Rep. 226; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Cummings v. Spaunhorst, 5 Mo. App. 21; Atty. Gen. v. North American L. Ins. Co. 82 N. Y. 172.

Mr. Charles West also filed a separate brief for defendants in error:

What at common law was a common right may be prohibited for the public good without violating due process of law.

The Oil Case—Ohio Oil Co. v. Indiana, 177 U. S. 211, 44 L. ed. 740, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; The Sheep Case—Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; The Bulk Sale Law Decisions—Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; Kidd, D. & P. Co. v. Musselman Grocer Co. 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606.

Private property may be taken pursuant to a public demand, for individual use, without violating the 14th Amendment.

The Ditch Case—Clark v. Nash, 198 U. S. 369, 49 L. ed. 1088, 25 Sup. Ct. Rep. 676, 4 A. & E. Ann. Cas. 1171; The Aerial Right of Way Case—Strickley v. Highland Boy Gold Min. Co. 200 U. S. 531, 50 L. ed. 583, 23 Sup. Ct. Rep. 301, 4 A. & E. Ann. Cas. 1174; Compulsory Sale of Minority Stock Case—Offield v. New York, N. H. & H. R. Co. 203 U. S. 378, 51 L. ed. 236, 27 Sup. Ct. Rep. 72.

The following groups of cases exemplify the public right to involuntary co-operation by owners of property.

The Dog Tax Cases—Tenney v. Lenz, 16 Wis. 566; Van Horn v. People, 46 Mich. 183, 41 Am. Rep. 159, 9 N. W. 246; Holst v. Roe, 39 Ohio St. 340, 48 Am. Rep. 459; Wilton v. Weston, 48 Conn. 325; The Quarantine Fees Cases—Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 461, 30 L. ed. 237, 240, 6 Sup. Ct. Rep. 1114; The Public Utility Expense Cases—Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; The Firemen Fund Cases—Firemen's Benev. Asso. v. Lounsbury, 21 Ill. 511, 74 Am. Dec. 115; Fire Dept. v. Helfenstein, 16 Wis. 141; Exempt Firemen's Benev. Fund. v. Roome, 93 N. Y. 313, 45 Am. Rep. 217; Phœnix Assur. Co. v. Fire Dept. 117 Ala. 631, 42 L.R.A. 471, 23 So. 843.

As to these cases the Dog Tax Cases are not overruled or impaired by Fox v. Mohawk & H. River Humane Soc. 165 N. Y. 517, 51 L.R.A. 684, 80 Am. St. Rep. 767, 59 N. E. 353.

In the Firemen Fund Cases, the question of the 14th Amendment was squarely passed upon. In Firemen's Benev. Asso. v. Lounsbury, 21 Ill. 511, 74 Am. Dec. 115, it was said: "The power the legislature possesses of imposing burdens upon certain members of the community who are supposed to be benefited by the efforts or acts of certain other members" is the power upon which the cases rest.

The diversion of such funds for the upbuilding of an efficient fire service was held a public purpose, and not violative of the 14th Amendment.

Exempt Firemen's Benev. Fund v. Roome, 93 N. Y. 313, 45 Am. Rep. 217; Fire Dept. v. Noble, 3 E. D. Smith, 440.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a proceeding against the governor of the state of Oklahoma and other officials who constitute the state banking board, to prevent them from levying and collecting an assessment from the plaintiff under an act approved December 17, 1907. This act creates the board, and directs it to levy upon every bank existing under the laws of the state an assessment of 1 per cent of the bank's average daily deposits, with certain deductions, for the purpose of creating a depositors' guaranty fund. There are provisos for keeping up the fund,

and by an act passed March 11, 1909, since the suit was begun, the assessment is to be 5 per cent. The purpose of the fund is shown by its name. It is to secure the full repayment of deposits. When a bank becomes insolvent and goes into the hands of the bank commissioner, if its cash immediately available is not enough to pay depositors in full, the banking board is to draw from the depositors' guaranty fund (and from additional assessments if required) the amount needed to make up the deficiency. A lien is reserved upon the assets of the failing bank to make good the sum thus taken from the fund. The plaintiff says that it is solvent and does not want the help of the guaranty fund, and that it cannot be called upon to contribute toward securing or paying the depositors in other banks, consistently with article 1, § 10, and the 14th Amendment of the Constitution of the United States. The petition was dismissed on demurrer by the supreme court of the state. 22 Okla. 48, 97 Pac. 590.

The reference to article 1, § 10, does not 110]strengthen the *plaintiff's bill. The only contract that it relies upon is its charter. That is subject to alteration or repeal, as usual, so that the obligation hardly could be said to be impaired by the act of 1907 before us, unless that statute deprives the plaintiff of liberty or property without due process of law. See Sherman v. Smith, 1 Black, 587, 17 L. ed. 163. Whether it does so or not is the only question in the case.

In answering that question, we must be cautious about pressing the broad words of the 14th Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter *a nolumus mutare* as against the lawmaking power.

The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund, so as to be entitled to a return of what remained of it if the purpose were given up (see Danby Bank v. State Treasurer, 39 Vt. 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 A. & E. Ann. Cas. 1171; Strickley v. *Highland Boy Gold Min.[111 Co. 200 U. S. 527, 531, 50 L. ed. 581, 583, 26 Sup. Ct. Rep. 301, 4 A. & E. Ann. Cas. 1174; Offield v. New York, N. H. & H. R. Co. 203 U. S. 372, 51 L. ed. 231, 27 Sup. Ct. Rep. 72; Bacon v. Walker, 204 U. S. 311, 315, 51 L. ed. 499, 501, 27 Sup. Ct. Rep. 289. And in the next, it would seem that there may be other cases beside the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 576. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said.

It may be said in a general way that the police power extends to all the great public needs. Camfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If, then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit, as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keep-

ing money on hand. The priority of claim given to depositors is incidental to the same object, and is justified in the same way. The power to restrict liberty by fixing a minimum of capital required of those who 112]would engage in banking is not *denied. The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank. See Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255. The power to compel, beforehand, co-operation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end. Gundling v. Chicago, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633. So far is that from being the case that the device is a familiar one. It was adopted by some states the better part of a century ago, and seems never to have been questioned until now. Danby Bank v. State Treasurer, 39 Vt. 92; People v. Walker, 17 N. Y. 502. Recent cases going not less far are Lemieux v. Young, 211 U. S. 489, 496, 53 L. ed. 295, 300, 29 Sup. Ct. Rep. 174; Kidd, D. & P. Co. v. Musselman Grocer Co. 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606.

It is asked whether the state could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. Hudson County Water Co. v. McCarter, 209 U. S. 349, 355, 52 L. ed. 828, 831, 28 Sup. Ct. Rep. 529, 14 A. & E. Ann. Cas. 560. It will serve as a *datum* on this side, that, in our opinion, the statute before us is well within the state's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line. Citizens' L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39.

The question that we have decided is not much helped by propounding the further one, whether the right to engage in banking is or can be made a franchise. But as the latter question has some bearing on the 113]former, and as it *will have to be considered in the following cases, if not here, we will dispose of it now. It is not answered by citing authorities for the existence of the right at common law. There are many things that a man might do at common law that the states may forbid. He might embezzle until a statute cut down his liberty. We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the state in taking the whole business of banking under its control. On the contrary, we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection, and the above-described co-operation are necessary safeguards, this court certainly cannot say that it is wrong. State ex rel. Goodsill v. Woodmansee, 1 N. D. 246, 11 L.R.A. 420, 46 N. W. 970; Brady v. Mattern, 125 Iowa, 158, 106 Am. St. Rep. 291, 100 N. W. 358; Weed v. Bergh, 141 Wis. 569, 25 L.R.A.(N.S.) 1217, 124 N. W. 664; Com. v. Vrooman, 164 Pa. 306, 25 L.R.A. 250, 44 Am. St. Rep. 603, 30 Atl. 217; Myers v. Irwin, 2 Serg. & R. 368; Myers v. Manhattan Bank, 20 Ohio, 283, 302; Atty. Gen. v. Utica Ins. Co. 2 Johns. Ch. 371, 377. Some further details might be mentioned, but we deem them unnecessary. Of course, objections under the state Constitution are not open here.

Judgment affirmed.

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*ASHTON C. SHALLENBERGER[114 Governor of the State of Nebraska, Silas R. Barton, Auditor of Public Accounts of the State of Nebraska, et al., Appts.,

v.

FIRST STATE BANK OF HOLSTEIN, Nebraska, et al.

(See S. C. Reporter's ed. 114-120.)

This case is governed by the decision in Noble State Bank v. Haskell, ante, 112.

[No. 445.]

Argued December 8, 1910. Decided January 3, 1911.

APPEAL from the Circuit Court of the United States for the District of Nebraska to review a decree enjoining the enforcement of a statute forbidding banking except by a corporation formed under the act, and providing for a guaranty fund. Reversed.

See same case below 172 Fed. 999.

Mr. **Charles O. Whedon** argued the cause and filed a brief for appellants:

Every reasonable construction must be

resorted to in order to save the statute from unconstitutionality.

Parsons v. Bedford, 3 Pet. 433, 448, 7 L. ed. 732, 737; United States v. Coombs, 12 Pet. 72, 75, 9 L. ed. 1004, 1005; Grenada County v. Brogden (Grenada County v. Brown) 112 U. S. 261, 28 L. ed. 704, 5 Sup. Ct. Rep. 125; Presser v. Illinois, 116 U. S. 252, 269, 29 L. ed. 615, 620, 6 Sup. Ct. Rep. 580; Hooper v. California, 155 U. S. 657, 39 L. ed. 301, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

The Supreme Court leaves it to the states, in the exercise of their police powers, to determine what tends to promote not only the public health and morals, but the public welfare and safety as well.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

The right of a merchant to sell his entire stock in bulk without notice to his creditors was and is a natural right, yet a large number of the states have enacted laws forbidding such sales, and these laws have been held constitutional by this court.

Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; Kidd, D. & P. Co. v. Musselman Grocer Co. 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606.

A law which declared grain option contracts to be gambling contracts, and the making of them to be a criminal offense, is valid.

Booth v. People, 186 Ill. 43, 50 L.R.A. 762, 78 Am. St. Rep. 229, 57 N. E. 798, 184 U. S. 425, 431, 46 L. ed. 623, 626, 22 Sup. Ct. Rep. 425.

The whole matter of the legislative element of sovereignty, as opposed to individual liberty, must, in the absence of other constitutional restriction, be left to the gradual processes of judicial inclusion and exclusion, as the cases presented for decision require.

Parks v. State, 159 Ind. 220, 59 L.R.A. 190, 64 N. E. 862.

The supreme court of Ohio sustained a law which prohibited the practice of healing by those classing themselves as Christian Scientists.

State v. Marble, 72 Ohio St. 21, 70 L.R.A. 835, 106 Am. St. Rep. 570, 73 N. E. 1063, 2 A. & E. Ann. Cas. 898.

The state of Nebraska enacted that no female should be employed in any manufacturing, mechanical, or mercantile establishment, hotel, or restaurant in the state more than sixty hours during any one week, and that ten hours should constitute a day's labor. The validity of the statute was called in question in the case of Wenham v. State, 65 Neb. 394, 58 L.R.A. 825. 91 N. W. 421, and the statute was sustained as a proper exercise of the police power of the state.

Why may not the legislature add to the above matters which have been regulated and prohibited under the police power, the securing of bank deposits?

Blaker v. Hood, 53 Kan. 509, 24 L.R.A. 854, 36 Pac. 1115; Bank of Augusta v. Earle, 13 Pet. 519, 595, 10 L. ed. 274, 311.

The question is not what may be the individual opinions of those constituting courts as to the wisdom of such legislation, but what is the power of the state?

Sinking Fund Cases, 99 U. S. 718, 25 L. ed. 501; Powell v. Pennsylvania, 127 U. S. 684, 32 L. ed. 256, 8 Sup. Ct. Rep. 992, 1257.

The general terms under which such legislation is justified is the police power of the state; and however indefinite and difficult of exact definition this power may be, it is sufficient to say that it is ample.

Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Nesbit v. Independent Dist. 144 U. S. 615, 36 L. ed. 564, 12 Sup. Ct. Rep. 746; Missouri P. R. Co. v. Humes, 115 U. S. 523, 29 L. ed. 466, 6 Sup. Ct. Rep. 110; San Bernardino County v. Southern P. R. Co. 118 U. S. 423, 30 L. ed. 127, 6 Sup. Ct. Rep. 1144; Hayes v. Missouri, 120 U. S. 72, 30 L. ed. 580, 7 Sup. Ct. Rep. 350; Mugler v. Kansas, 123 U. S. 663, 31 L. ed. 211, 8 Sup. Ct. Rep. 273; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 189, 31 L. ed. 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Powell v. Pennsylvania, 127 U. S. 683, 32 L. ed. 256, 8 Sup. Ct. Rep. 992, 1257; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 29, 32 L. ed. 586, 9 Sup. Ct. Rep. 207; Bell's Gap. R. Co. v. Pennsylvania, 134 U. S. 238, 33 L. ed. 895, 10 Sup. Ct. Rep. 533; Leisy v. Hardin, 135 U. S. 130, 34 L. ed. 139, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Re Kemmler, 136 U. S. 449, 34 L. ed. 524, 10 Sup. Ct. Rep. 930; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 394, 35 L. ed. 1054, 12 Sup. Ct. Rep. 255; McPherson v. Blacker, 146 U. S. 39, 36 L. ed. 878, 13 Sup. Ct. Rep. 3; Giozza v. Tiernan, 148 U. S. 662, 37 L. ed. 601, 13 Sup. Ct. Rep. 721; New York & N. E. R. Co. v. Bristol, 151 U. S. 569, 38 L. ed. 273, 14 Sup. Ct. Rep. 437; Lawton v. Steele, 152 U. S. 136, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; Marchant v. Pennsylvania R. Co. 153 U. S. 390, 38 L. ed. 756, 14 Sup. Ct. Rep. 894; Pearsall v. Great Northern R. Co. 161 U. S. 666, 40 L. ed. 845, 16 Sup. Ct. Rep. 705; Jones v. Brim, 165 U. S. 182, 41 L. ed. 678, 17 Sup. Ct. Rep. 282; Holden v. Hardy, 169 U. S. 383, 42 L. ed. 788, 18 Sup. Ct. Rep.

383; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 103, 43 L. ed. 912, 19 Sup. Ct. Rep. 609; L'Hote v. New Orleans, 177 U. S. 596, 44 L. ed. 903, 20 Sup. Ct. Rep. 788; Leovy v. United States, 177 U. S. 631, 44 L. ed. 918, 20 Sup. Ct. Rep. 797; Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 52 L. ed. 111, 28 Sup. Ct. Rep. 26, 12 A. & E. Ann. Cas. 555; Phillips v. Mobile, 208 U. S. 479, 52 L. ed. 581, 28 Sup. Ct. Rep. 370; New York v. Miln, 11 Pet. 102, 9 L. ed. 648.

Who is to determine the measure of control that is to be exercised, if not the state? And if the state shall say that, to accomplish the desired control, banking must be done by corporations only, must not the individual surrender his so-called "inalienable right" to engage in the banking business, for the public good?

Adams Exp. Co. v. State, 161 Ind. 346, 67 N. E. 1033; Parks v. State, 159 Ind. 211, 59 L.R.A. 190, 64 N. E. 862; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 661, 29 L. ed. 520, 6 Sup. Ct. Rep. 252; Jones v. Brim, 165 U. S. 182, 41 L. ed. 678, 17 Sup. Ct. Rep. 282; Harbison v. Knoxville Iron Co. 103 Tenn. 421, 56 L.R.A. 316, 76 Am. St. Rep. 682, 53 S. W. 955; License Cases, 5 How. 583, 12 L. ed. 291; State ex rel. Goodsill v. Woodmansee, 1 N. D. 246, 11 L.R.A. 420, 46 N. W. 970; People v. Utica Ins. Co. 15 Johns. 358, 8 Am. Dec. 243; State v. Richcreek, 167 Ind. 217, 5 L.R.A.(N.S.) 874, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 A. & E. Ann. Cas. 899; Com. v. Vrooman, 164 Pa. 306, 25 L.R.A. 250, 44 Am. St. Rep. 603, 30 Atl. 217; Pennsylvania R. Co's Appeal, 116 Pa. 78, 8 Atl. 914; Nance v. Hemphill, 1 Ala. 557; Myers v. Manhattan Bank, 20 Ohio, 283.

By the statute of Nebraska, marriage is declared to be a civil contract. Ordinarily such contracts are entered into with a view to the "pursuit of happiness." Yet no matter what power for good one of the parties possesses, or what his or her mental ability may be, if he or she is possessed of one fourth or more of negro blood, the contract is by statute declared to be void and the issue of the marriage illegitimate. Such marriages are, by the laws of many states, made felonies; and so far as I am advised, they have never been held to be invalid. On the contrary, they have been held enforceable in State v. Gibson, 36 Ind. 402, 10 Am. Rep. 42; State v. Jackson, 80 Mo. 177, 50 Am. Rep. 499; State v. Hairston, 63 N. C. 453; Green v. State, 58 Ala. 190, 29 Am. Rep. 739; Lonas v. State, 3 Heisk. 309.

If one may constitutionally be deprived of selling cream which does not contain 20 per cent of fat, in the exercise of the police power of the state, why may the state not require that a person desiring to engage in the banking busines shall do so under the form of a corporation?

State v. Crescent Creamery Co. 83 Minn. 284, 54 L.R.A. 466, 85 Am. St. Rep. 464, 86 N. W. 107.

The legislature of Massachusetts enacted a law compelling all inhabitants over twenty-one years of age to submit, under certain circumstances, to vaccination, under penalty for refusal. In the case of Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765, Jacobson was convicted in the state court of a refusal to be vaccinated. The conviction was sustained by the highest court of the state, and that judgment was affirmed by the Supreme Court of the United States.

In Phillips v. State, 77 Ohio St. 214, 82 N. E. 1064, a statute of Ohio requiring junk dealers and dealers in secondhand articles, to retain such articles for thirty days before disposing of the same, was upheld.

As the legislative act in question operates upon all individuals alike, and does not prohibit them from engaging in the banking business, but merely prescribes the terms and conditions upon which they may engage in that business, it is valid.

McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 188, 31 L. ed. 650, 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Hayes v. Missouri, 120 U. S. 68, 71, 30 L. ed. 578, 580, 7 Sup. Ct. Rep. 350.

The state may pass laws amending previous statutes under which corporations are created.

Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 41 L.R.A. 481, 53 Am. St. Rep. 557, 66 N. W. 624, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; Sherman v. Smith, 1 Black, 587, 17 L. ed. 163; Inland Fisheries Comrs. v. Holyoke Water Power Co. 104 Mass. 446, 6 Am. Rep. 247, 15 Wall. 500, 21 L. ed. 133; Close v. Glenwood Cemetery 107 U. S. 466, 476, 27 L. ed. 408, 412, 2 Sup. Ct. Rep. 267; Anderson v. Seymour, 70 Minn. 358, 73 N. W. 171; Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357; Roxbury v. Boston & P. R. Corp. 6 Cush. 434; Massachusetts General Hospital v. State Mut. Life Assur. Co. 4 Gray, 227; Parker v. Metropolitan R. Co. 109 Mass. 506; Story v. Jersey City & B. P. Pl. Road Co. 16 N. J. Eq. 14, 84 Am. Dec. 134; People ex rel. Kimball v. Boston & A. R. Co. 70 N. Y. 569; Montclair Twp. v. New York & G.

L. R. Co. 45 N. J. Eq. 443, 18 Atl. 242; Pennsylvania College Cases, 13 Wall. 190, 20 L. ed. 550; Greenwood v. Union Freight R. Co. 105 U. S. 13, 26 L. ed. 961; Citizens' Sav. Bank v. Owensboro, 173 U. S. 637, 43 L. ed. 840, 19 Sup. Ct. Rep. 530, 571; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437; Looker v. Maynard, 179 U. S. 46, 52, 45 L. ed. 79, 81, 21 Sup. Ct. Rep. 21; Bissel v. Heath, 98 Mich, 472, 57 N. W. 585.

Mr. **Arthur F. Mullen**, Attorney General of Nebraska, and Mr. **I. L. Albert** also argued the cause, and, with Mr. Grant G. Martin, filed a brief for appellants:

Banking is a proper subject for legislative control.

State ex rel. Goodsill v. Woodmansee, 1 N. D. 246, 11 L.R.A. 420, 46 N. W. 970; People v. Utica Ins. Co. 15 Johns. 358, 8 Am. Dec. 243; Zane, Banks & Bkg. 7–15, § 8.

Where the legislature undertakes to regulate a trade or business which is a proper subject of legislative control, and the means employed have a real, substantial relation to the end sought, such means will not be declared unconstitutional on the ground that they are unnecessarily arbitrary, oppressive, or unjust, unless those characteristics are so manifest as to leave no room for doubt in reasonable minds.

Sinking Fund Cases, 99 U. S. 718, 25 L. ed. 501; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N. W. 500; Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; State v. Namias, 49 La. Ann. 618, 62 Am. St. Rep. 657, 21 So. 852; State v. Vandersluis, 42 Minn. 129, 6 L.R.A. 119, 43 N. W. 789; Logan v. Postal Teleg. & Cable Co. 157 Fed. 570; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; Offield v. New York, N. H. & H. R. Co. 203 U. S. 375, 51 L. ed. 235, 27 Sup. Ct. Rep. 72; Missouri P. R. Co. v. Humes, 115 U. S. 514, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175.

Is the provision restricting banking to corporations, and those providing for the guaranty of deposits, so manifestly and unnecessarily arbitrary, unjust, or oppressive that reasonable minds cannot differ with respect to them?

Weed v. Bergh, 141 Wis. 569, 25 L.R.A. (N.S.) 1217, 124 N. W. 664; State ex rel. Goodsill v. Woodmansee, 1 N. D. 246, 11 L.R.A. 420, 46 N. W. 970; Myers v. Irwin, 2 Serg. & R. 368; Com. v. Vrooman, 164 Pa. 306, 25 L.R.A. 250, 44 Am. St. Rep. 603, 30 Atl. 217; Brady v. Mattern, 125 Iowa, 158, 106 Am. St. Rep. 291, 100 N. W. 358.

The very title of the act shows that it had for its object not revenue, but regulation. The same may be said of its several provisions. It is not an attempted exercise of the taxing power, but of the police power, by the state. While the guaranty feature of the act operates as a guaranty to depositors, such result is merely subsidiary to the real purpose of the act, which is, to protect the public against the disastrous consequences of bank failures, ofter precipitated by unfounded apprehensions on the part of depositors as to the safety of their deposits.

Tide-water Co. v. Coster, 18 N. J. Eq. 523, 90 Am. Dec. 634; Jacobson v. Massachusetts, 197 U. S. 26, 49 L. ed. 649, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765; Adams Exp. Co. v. State, 161 Ind. 346, 67 N. E. 1033.

The fact that the law operates to the direct advantage of depositors does not invalidate it.

Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; Wilton v. Weston, 48 Conn. 325; Tenney v. Lenz, 16 Wis. 566; Van Horn v. People, 46 Mich. 183, 41 Am. Rep. 159, 9 N. W. 246; Holst v. Roe, 39 Ohio St. 340, 48 Am. Rep. 459; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; New York ex rel. New York Electric Lines Co. v. Squire, 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 98, 32 L. ed. 353, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Firemen's Benev. Asso. v. Lounsbury, 21 Ill. 511, 74 Am. Dec. 115; Fire Dept. v. Helfenstein, 16 Wis. 141; Exempt Firemen's Benev. Fund v. Roome, 93 N. Y. 313, 45 Am. Rep. 217; Phœnix Assur. Co. v. Fire Dept. 117 Ala. 631, 42 L.R.A. 468, 23 So. 843; San Francisco v. Liverpool & L. & G. Ins. Co. 74 Cal. 123, 5 Am. St. Rep. 425, 15 Pac. 380.

Other states have had a guaranty law.

Re Gibson, 21 N. Y. 9; Re Reciprocity

Bank, 22 N. Y. 9; People v. Walker, 17 N. Y. 502; Elwood v. State, 23 Vt. 701; Danby Bank v. State, 39 Vt. 92.

It is significant that in neither of these states was the constitutionality of the guaranty feature called in question.

Mr. I. L. Albert also filed a separate brief for appellants:

Banking is a proper subject for police regulation.

State ex rel. Goodsill v. Woodmansee, 1 N. D. 246, 11 L.R.A. 420, 46 N. W. 970; Weed v. Bergh, 141 Wis. 569, 25 L.R.A. (N.S.) 1217, 124 N. W. 664; Myers v. Manhattan Bank, 20 Ohio, 283; Myers v. Irwin, 2 Serg. & R. 368.

It may pass from a common-law right, exercisable at pleasure, to a right lawfully exercisable only under a franchise from the state.

McCulloch v. Maryland, 4 Wheat. 424, 4 L. ed. 605; People v. Utica Ins. Co. 15 Johns. 358, 8 Am. Dec. 243.

Whatever may be the modern conception of a bank, the power to issue notes with a view to their circulation as money was formerly incidental to the right to engage in banking.

Bank of Augusta v. Earle, 13 Pet. 519, 595, 596, 10 L. ed. 274, 311; Mercantile Nat. Bank v. New York, 121 U. S. 138, 156, 30 L. ed. 895, 902, 7 Sup. Ct. Rep. 826; State v. Scougal, 3 S. D. 55, 15 L.R.A. 477, 44 Am. St. Rep. 756, 51 N. W. 858; Exchange Bank v. Hines, 3 Ohio St. 31.

The right to issue notes with a view to their circulation as money has long been regarded as a franchise, and not one exercisable at the pleasure of each citizen.

Encyclopedia Britannica, title, "Banking;" Zane, Banks & Bkg. 7–15.

If the legislature can take away one branch of banking from private citizens for the public good, it would seem to follow as a matter of strict logical deduction that all branches of the business could be made franchises.

A bank, or banking system, is an appropriate governmental agency which the state may create and employ to serve its legitimate ends.

M'Culloch v. Maryland, 4 Wheat. 424, 4 L. ed. 605.

The power to create such agency carries with it the power to make it exclusive in the domain within which it operates, whether such agency be operated directly by the state, or through instrumentalities created by it.

Ibid.; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265; St. Tammany Waterworks Co. v. New Orleans Waterworks Co. 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. Rep. 405; Davenport Gas & Electric Co. v. Davenport, 124 Iowa, 22, 98 N. W. 892; Atlantic City Waterworks Co. v. Atlantic City, 39 N. J. Eq. 367; Memphis v. Memphis Water Co. 5 Heisk. 495.

Mr. **John Lee Webster** argued the cause, and, with Mr. William V. Allen, filed a brief for appellees:

The business of banking is one in which individuals, of right, have engaged from time immemorial.

Bank of Augusta v. Earle, 13 Pet. 519, 595, 596, 10 L. ed. 274, 311; Bank of California v. San Francisco, 142 Cal. 276, 64 L.R.A. 918, 100 Am. St. Rep. 130, 75 Pac. 832; State v. Scougal, 3 S. D. 55, 15 L.R.A. 477, 44 Am. St. Rep. 756, 51 N. W. 858.

Many cases recognize the right to regulate banking in a reasonable degree, and at the same time recognize the right of private banking.

Ex parte Pittman, 31 Nev. 56, 99 Pac. 704; International Trust Co. v. American Loan & T. Co. 62 Minn. 501, 65 N. W. 78, 632; Marymont v. Nevada State Bkg. Board, — Nev. —, 32 L.R.A.(N.S.) 477, 111 Pac. 295.

It is not within the police power of the state to confine banking to corporations, and to deprive citizens of their common-law right to do a banking business.

State v. Scougal, 3 S. D. 55, 15 L.R.A. 477, 44 Am. St. Rep. 756, 51 N. W. 858; Marymont v. Nevada State Bkg. Board, — Nev. —, 32 L.R.A.(N.S.) 477, 111 Pac. 295.

Can a statute be ruled to be a regulation of a natural, inherent, and inalienable right of the citizen when it takes from him the liberty and the privileges and immunities which are protected in the citizens by the Constitution of the United States?

State v. Scougal, 3 S. D. 55, 15 L.R.A. 477, 44 Am. St. Rep. 756, 51 N. W. 858; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Slaughter-House Cases, 16 Wall. 97, 21 L. ed. 415; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 757, 28 L. ed. 585, 591, 4 Sup. Ct. Rep. 652; Allgeyer v. Louisiana, 165 U. S. 578, 590, 41 L. ed. 832, 836, 17 Sup. Ct. Rep. 427; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Gillespie v. People, 188 Ill. 183, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; Braceville Coal Co. v. People, 147 Ill. 71, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; People v. Marx, 99 N. Y. 377, 52

Am. Rep. 34, 2 N. E. 29; Wyeth v. Board of Health (Wyeth v. Thomas) 200 Mass. 478, 23 L.R.A.(N.S.) 147, 128 Am. St. Rep. 439, 86 N. E. 925.

It has been ruled in New York that a statute is unconstitutional which limits the right of a citizen to become a member of a copartnership.

Schnaier v. Navarre Hotel & Importation Co. 182 N. Y. 88, 70 L.R.A. 722, 108 Am. St. Rep. 790, 74 N. E. 561.

In People v. Ringe, 197 N. Y. 143, 27 L.R.A.(N.S.) 528, 90 N. E. 451, 18 A. & E. Ann. Cas. 474, the court held a statute unconstitutional which prohibited the formation of a partnership for the business of undertaking, unless each member was licensed.

The state cannot compel private bankers to incorporate. The formation of corporations must be the voluntary act of the parties.

1 Cook, Corp. 4th ed. § 2–a; 1 Thomp. Corp. § 52; Dartmouth College v. Woodward, 4 Wheat. 518, 707, 708, 4 L. ed. 629, 676, 677.

The taking of the assets of one bank to pay the claims of depositors of another bank is taking property for a private use without due process of law, and without compensation.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Parkersburg v. Brown, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442; State ex rel. Griffith v. Osawkee Twp. 14 Kan. 418, 19 Am. Rep. 99; Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; Baltimore & E. S. R. Co. v. Spring, 80 Md. 510, 27 L.R.A. 72, 31 Atl. 208; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 417, 41 L. ed. 489, 495, 17 Sup. Ct. Rep. 130; Davidson v. New Orleans, 96 U. S. 97–102, 24 L. ed. 616–619; Dodge v. Mission Twp. 54 L.R.A. 242, 46 C. C. A. 661, 107 Fed. 827; Lucas County v. State (Davies v. State) 75 Ohio St. 135, 7 L.R.A. (N.S.) 1196, 78 N. E. 955; State ex rel. Garrett v. Froehlich, 118 Wis. 129, 61 L.R.A. 345, 99 Am. St. Rep. 985, 94 N. W. 50; William Deering & Co. v. Peterson, 75 Minn. 118, 77 N. W. 568; Cole v. La Grange, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416.

The guaranty-fund provision of the act is a phase of paternalism that is obnoxious to our system of government.

State ex rel. Garth v. Switzler, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245.

A bank has been held by this court to be a private, as distinct from a public, corporation.

Dartmouth College v. Woodward, 4 Wheat. 518, 669, 4 L. ed. 629, 667. See also Briscoe v. Bank of Kentucky, 11 Pet. 257–324, 9 L. ed. 709–735; Bolton v. White, 2 Cranch, C. C. 426, Fed. Cas. No. 1,616; Rundle v. Delaware & R. Canal, 1 Wall. Jr. 275, Fed. Cas. No. 12,139; Piqua Branch of State Bank v. Knoop, 16 How. 369, 14 L. ed. 977.

This court has gone so far as to hold that even though a sovereign state owns stock in the bank, nevertheless the bank remains a private corporation, and that a suit against the bank is not a suit against the state.

Bank of United States v. Planters' Bank, 9 Wheat. 904, 907, 6 L. ed. 244.

The fact that a state bank is a private corporation adds force to our contention that the claim of a depositor of a bank is a private claim, and that the taking of the money from the banks by the process of the guaranty fund, to pay the depositors of another bank, is an appropriation of the money to a private use, and not for a public use.

Parkersburg v. Brown, 106 U. S. 487, 491, 27 L. ed. 238, 240, 1 Sup. Ct. Rep. 442; Cole v. La Grange, 113 U. S. 1, 9, 28 L. ed. 896, 898, 5 Sup. Ct. Rep. 416; Dodge v. Mission Twp. 54 L.R.A. 242, 46 C. C. A. 661, 107 Fed. 832; Allen v. Jay, 60 Me. 124, 11 Am. Rep. 185; Coates v. Campbell, 37 Minn. 498, 35 N. W. 366; Lowell v. Boston, 111 Mass 454, 15 Am. Rep. 39; Patty v. Colgan, 97 Cal. 251, 18 L.R.A. 744, 31 Pac. 1133; Lucas County v. State (Davies v. State) 75 Ohio St. 135, 7 L.R.A. (N.S.) 1196, 78 N. E. 955; Wisconsin Keeley Institute Co. v. Milwaukee County, 95 Wis. 153, 36 L.R.A. 55, 60 Am. St. Rep. 105, 70 N. W. 68; State ex rel. Garrett v. Froehlich, 118 Wis. 129, 61 L.R.A. 345, 99 Am. St. Rep. 985, 94 N. W. 50; State ex rel. Garth v. Switzler, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245; Kingman v. Brockton, 153 Mass. 255, 11 L.R.A. 123, 26 N. E. 998; State ex rel. Griffith v. Osawkee Twp. 14 Kan. 418, 19 Am. Rep. 99; William Deering & Co. v. Peterson, 75 Minn. 118, 77 N. W. 568; Deal v. Mississippi County, 107 Mo. 464, 14 L.R.A. 622, 18 S. W. 24; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Atchison, T. & S. F. R. Co. v. Campbell, 61 Kan. 439, 48 L.R.A. 251, 78 Am. St. Rep. 328, 59 Pac. 1051; Harp v. Choctaw, O. & G. R. Co. 118 Fed. 169; Oxnard Beet Sugar Co. v. State, 73 Neb. 57, 102 N. W. 80, 105 N. W. 716; Michigan Sugar Co. v. Auditor General, 124 Mich. 674, 56 L.R.A. 329, 83 Am. St. Rep. 354, 83 N. W. 625; Minnesota Sugar Co. v. Iverson, 91 Minn. 30, 97 N. W. 455.

It is the taking of the assets of one bank without compensation. This cannot be done, even though the property taken be appropriated to a public use.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362–399, 38 L. ed. 1014–1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Cotting v. Kansas City Stockyards Co. (Cotting v. Godard) 183 U. S. 79–87, 46 L. ed. 92–100, 22 Sup. Ct. Rep. 30.

The guaranty provision of the new banking act is not within the scope of the police powers of the state. The police power has its limitations. The police power cannot justify the invasion of any property or contract right of the citizen, granted to him under the Constitution.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431; Dobbins v. Los Angeles, 195 U. S. 223–237, 239, 49 L. ed. 169–175, 176, 25 Sup. Ct. Rep. 18; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150–158, 41 L. ed. 666–669, 17 Sup. Ct. Rep. 255; Minnesota v. Barber, 136 U. S. 313, 319, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 699, 43 L. ed. 858, 865, 19 Sup. Ct. Rep. 565; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; Wisconsin Keeley Institute Co. v. Milwaukee County, 95 Wis. 153, 36 L.R.A. 55, 60 Am. St. Rep. 105, 70 N. W. 68.

The police power is the law of necessity, which means more than expediency.

Chy Lung v. Freeman, 92 U. S. 275, 280, 23 L. ed. 550, 552; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Bryan v. Chester, 212 Pa. 259, 108 Am. St. Rep. 870, 61 Atl. 894; Crawford v. Topeka, 51 Kan. 756, 20 L.R.A. 692, 37 Am. St. Rep. 323, 33 Pac. 476; Passaic v. Paterson Bill Posting, Adv. & Sign Painting Co. 72 N. J. L. 285, 111 Am. St. Rep. 676, 62 Atl. 267, 5 A. & E. Ann. Cas. 995; State v. Redmon, 134 Wis. 110, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 A. & E. Ann. Cas. 408; Belleville v. St. Clair County Turnp. Co. 234 Ill. 428, 17 L.R.A. (N.S.) 1071, 84 N. E. 1049; Sayre v. Phillips, 148 Pa. 482, 16 L.R.A. 49, 33 Am. St. Rep. 842, 24 Atl. 76.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a suit by many banks to prevent the banking board of Nebraska from carrying out and enforcing an act similar to the Oklahoma statute just passed upon. It forbids banking except by a corporation formed under the act, and provides for a guaranty fund. The circuit court held the statute unconstitutional, and issued an injunction against the enforcement of it. 172 Fed. 999. For the reasons given in the foregoing case, the decree of the circuit court must be reversed.

Decree reversed.

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*ASSARIA STATE BANK OF ASSARIA, Citizens Bank of Axtell, et al., Appts., [121

v.

JOSEPH N. DOLLEY, as Bank Commissioner of the State of Kansas, and Mark Tulley, as State Treasurer of the State of Kansas.

(See S. C. Reporter's ed. 121–127.)

Constitutional law — police power — creating depositor's guaranty fund.

1. A state statute creating a bank depositors' guaranty fund for the purpose of securing the full repayment of deposits in case of the insolvency of any bank contributing to the fund is no less a valid exercise of the police power because contribution to such fund is not absolutely required.

[For other cases, see Constitutional Law, 881–891, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — creating bank depositors' guaranty fund.

2. An unconstitutional discrimination does not result from the preference of ordinary depositors over other creditors, given by a state statute creating a bank depositors' guaranty fund for the purpose of securing the full repayment of deposits in case of the insolvency of any bank contributing to the fund.

[For other cases, see Constitutional Law, IV. a, 5, in Digest Sup. Ct. 1908.]

Constitutional law — discrimination — bank depositors' guaranty fund.

3. Unincorporated banks, and banks not having a surplus of 10 per cent, are not unconstitutionally discriminated against by excluding them from availing themselves of the privileges of a state statute creating a bank depositors' guaranty fund for the purpose of securing the full repayment of deposits in case of the insolvency of any bank contributing to the fund.

[For other cases, see Constitutional Law, IV. a, 5, in Digest Sup. Ct. 1908.]

[No. 617.]

Argued December 8, 1910. Decided January 3, 1911.

NOTE.—For a discussion of police power generally—see notes to State v. Marshall, 1 L.R.A. 51; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; State v. Schlemmer, 10 L.R.A. 135; and Barbier v. Connolly, 28 L. ed. U. S 923.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

APPEAL from the Circuit Court of the United States for the District of Kansas to review a decree dismissing a bill to enjoin the enforcement of a state statute creating a bank depositors' guaranty fund. Affirmed.

See same case below 175 Fed. 365.

The facts are stated in the opinion.

Mr. Chester I. Long argued the cause, and, with Messrs. B. P. Waggener, John Lee Webster, James Willis Gleed, and John L. Hunt, filed a brief for appellants:

The so-called bank guaranty law is not a regulation of either banks or banking. It is a law creating an insurance scheme to be conducted by the state, the expenses of which are to be paid out of moneys raised by general taxation.

Re Right of National Banks to Participate in Kansas Bank Guaranty Law, 27 Ops. Atty. Gen. 272.

Taxation for a private purpose is a taking of property without due process of law.

Brannon, 14th Amendment, p. 160; Cole v. La. Grange, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Cooley, Taxn. 67; Sharpless v. Philadelphia, 21 Pa. 147, 59 Am. Dec. 759.

The law is not a police regulation. A statute to compel payment of debts is not a police regulation.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

This law acts by way of gift,—by taking the property of one and giving it to another Police power is simply the enforcement of the maxim, *Sic utere tuo ut alienum non laedas*, and acts by way of restraint.

Tiedeman, Pol. Power, § 1; Freund, Pol. Power, §§ 3, 8, 22.

An exercise of the police power can be justified only by the needs of the public generally. This law benefits only a limited class of bank depositors.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Hume v. Laurel Hill Cemetery, 142 Fed. 553; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; State v. Redmon, 134 Wis. 89, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 A. & E. Ann. Cas. 408; Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 12 L.R.A.(N.S.) 707, 79 N. E. 836.

The police power exists only where a necessity for its exercise exists. This law does not depend upon the necessity of those benefited—the depositors—for its existence, because it may be put in action only by the voluntary act of private banking corporations.

Larabee v. Dolley, 175 Fed. 365; Tiedeman, Pol. Power, § 1; Freund, Pol. Power, §§ 3, 8, 22; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; Lawton v. Steele, 152 U. S. 133, 28 L. ed. 385, 14 Sup. Ct. Rep. 499; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100; Gardner v. Michigan, 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106; Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; People v. Steele, 231 Ill. 340, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321, 83 N. E. 236.

The law is therefore not an exercise of the police power. No other public purpose justifies it. A public purpose is a governmental purpose.

Dodge v. Mission Twp. 54 L.R.A. 242, 46 C. C. A. 661, 107 Fed. 830.

A governmental purpose is one for the accomplishment of which, as shown by history, governments were instituted.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Opinion of Justices, 155 Mass. 598, 15 L.R.A. 809, 30 N. E. 1142.

Considered as an act for the relief of sufferers from bank failures, or as an act to pay the debts of banks, the purpose of the act is private, and not public.

Baltimore & E. S. R. Co. v. Spring, 80 Md. 510, 27 L.R.A. 72, 31 Atl. 208; State ex rel. Griffith v. Osawkee Twp. 14 Kan. 418, 19 Am. Rep. 99; Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455.

Classification must rest upon some difference which bears a reasonable and just relation to the act in relation to which the classification is proposed.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

Power to pass the law arises from the necessity for the law.

Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; State v. Redmon, 134 Wis. 89, 14 L.R.A. (N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 A. & E. Ann. Cas. 408.

The state had no power to pass the law, except in the interest of the public generally.

Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Hume v. Laurel Hill Cemetery, 142 Fed. 552;

Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; State v. Redmon, 134 Wis. 89, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137; Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 12 L.R.A.(N.S.) 707, 79 N. E. 836.

It is as much in the interest of the public generally that depositors in banks without a 10 per cent surplus should be paid as that depositors in other banks should be paid.

State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285.

Classification in accordance with the peculiarities of the bank with which the depositor does business, and not in accordance with the needs of the depositor, is arbitrary.

State v. Haun, 61 Kan. 153, 47 L.R.A. 369, 59 Pac. 340.

The law deprives banks which have not a 10 per cent surplus of property without due process of law.

Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am St. Rep. 863, 10 S. E. 285; McKinster v. Sager, 163 Ind. 671, 68 L.R.A. 273, 106 Am. St. Rep. 268, 72 N. E. 854.

Giving banks which have a 10 per cent surplus the alternative of either being deprived of their property or of illegally conducting their business is depriving them of their property without due process of law just as certainly as if they were not given the alternative of illegally conducting their business.

Mr. **John Lee Webster** also argued the cause, and, with Messrs. B. P. Waggener, Chester I. Long, James Willis Gleed, and John L. Hunt, filed a brief for appellants:

The arbitrary and capricious discriminations between depositors and other creditors renders the bank guaranty deposit law unconstitutional.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 559, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431; Ritchie v. People, 155 Ill. 105, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; State v Hinman, 65 N. H. 103, 23 Am. St. Rep. 25, 18 Atl. 194; State v. Montgomery, 94 Me. 192, 80 Am. St. Rep. 386, 47 Atl. 165, 15 Am. Crim. Rep. 117; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 109–112, 46 L. ed. 92, 108–110, 22 Sup. Ct. Rep. 30.

The fact that in the same city or locality some banks may and some may not become guaranteed banks produces such an arbitrary and unlawful discrimination between depositors of the same class as renders the whole act unconstitutional.

McKinster v. Sager, 163 Ind. 671, 68 L.R.A. 273, 106 Am. St. Rep. 268, 72 N. E. 854; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150–159, 41 L. ed. 666–669, 17 Sup. Ct. Rep. 255; Storck v. Baltimore, 101 Md. 476, 61 Atl. 330; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79–107, 46 L. ed. 92–107, 22 Sup. Ct. Rep. 30.

Neither the right to regulate nor the police power of the state can be used as a weapon to destroy.

Barbier v. Connolly, 113 U. S. 27–31, 28 L. ed. 923–925, 5 Sup. Ct. Rep. 357; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79–106, 46 L. ed. 92–107, 22 Sup. Ct. Rep. 30; State v. Haun, 61 Kan. 146, 47 L.R.A. 369, 59 Pac. 340; State v. Redmon, 134 Wis. 105, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 A. & E. Ann. Cas. 408.

Conceding the power reasonably to regulate the business of banking, such power to regulate is not a power to destroy nor to take away the property of the banks without due process of law, and without just compensation.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 696, 43 L. ed. 863, 19 Sup. Ct. Rep. 565; Budd v. New York, 143 U. S. 547, 36 L. ed. 256, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Reagan v. Farmers' Loan & T. Co. 154 U. S. 397, 38 L. ed. 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30

The police power is the law of necessity.

Bryan v. Chester, 212 Pa. 259, 108 Am. St. Rep. 870, 61 Atl. 894; Passaic v. Patterson Bill Posting, Adv. & Sign Painting Co. 72 N. J. L. 285, 111 Am. St. Rep. 676, 62 Atl. 267, 5 A. & E. Ann. Cas. 995; People ex rel. Wineburgh Adv. Co. v. Murphy, 195 N. Y. 126, 21 L.R.A.(N.S.) 735, 88 N. E. 17; Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; State v. Redmon, 134 Wis. 89, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 A. & E. Ann. Cas. 408;

Belleville v. St. Clair County Turnp. Co. 234 Ill. 428, 17 L.R.A.(N.S.) 1071, 84 N. E. 1049; Sayre v. Phillips, 148 Pa. 482, 16 L.R.A. 49, 33 Am. St. Rep. 842, 24 Atl. 76.

If it be the law that a necessity must exist for the exercise of the police power, the statute cannot be justified as an exercise of the police power which leaves it to the will or caprice of the citizen or the bank whether they will or will not accept of its provisions. The mere fact that it is voluntary is a declaration on the face of it that it is not within the police power, and is not an exercise of the police power.

The police power can only be exercised when necessary to accomplish a public need. It must be demanded by the public generally, as distinct from the demand of a class.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Hume v. Laurel Hill Cemetery, 142 Fed. 552; Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 12 L.R.A.(N.S.) 707, 79 N. E. 836; State v. Redmon, 134 Wis. 89, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 A. & E. Ann. Cas. 408.

The police power does not recognize favorites. The police power will not justify arbitrary or capricious classifications.

Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; State v. Montgomery, 94 Me. 192, 80 Am. St. Rep. 386, 47 Atl. 165, 15 Am. Crim. Rep. 117; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; State v. Haun, 61 Kan. 146, 47 L.R.A. 369, 59 Pac. 340.

Good intentions on the part of the legislature will not justify the discriminations.

Bonnett v. Vallier, 136 Wis. 200, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885.

The Kansas bank guaranty act, when looked at collectively, is so full of classifications that are arbitrary and unreasonable, and of discriminations which are unlawful, that the entire act must be declared to be unconstitutional.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Storck v. Baltimore, 101 Md. 476, 61 Atl. 330; Bonnett v. Vallier, supra; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Sayre v. Phillips, 148 Pa. 482, 16 L.R.A. 49, 33 Am. St. Rep. 842, 24 Atl. 76; State v. Mitchell, 97 Me. 66, 94 Am. St. Rep. 481, 53 Atl. 887.

One of the primary purposes of the Kansas bank guaranty law is to take the property of certain banks, and appropriate the same to pay the private claim of an individual against some other bank, with whom the contributing banks sustain no obligation, moral or contractual. It is the taking of the property of one person to pay the private debts of another, hence is unconstitutional.

Dobbins v. Los Angeles, 195 U. S. 223–237, 49 L. ed. 169–176, 25 Sup. Ct. Rep. 18; Crescent Liquor Co. v. Platt, 148 Fed. 898; Alma Coal Co. v. Cozad, 79 Ohio St. 348, 20 L.R.A.(N.S.) 1092, 87 N. E. 172; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; State ex rel. Griffith v. Osawkee Twp. 14 Kan. 418, 19 Am. Rep. 99; Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; Baltimore & E. S. R. Co. v. Spring, 80 Md. 510, 27 L.R.A. 72, 31 Atl. 208; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Dodge v. Mission Twp. 54 L.R.A. 242, 46 C. C. A. 661, 107 Fed. 827; Lucas County v. State (Davies v. State) 75 Ohio St. 114, 7 L.R.A.(N.S.) 1196, 78 N. E. 955; State ex rel. Garrett v. Froehlich, 118 Wis. 129, 61 L.R.A. 345, 99 Am. St. Rep. 985, 94 N. W. 50; William Deering & Co. v. Peterson, 75 Minn. 118, 77 N. W. 568; State ex rel. Garth v. Switzler, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245; First State Bank v. Shallenberger, 172 Fed. 999.

The obligation of a contract in the constitutional sense includes the right to have the contract enforced; and that no statute which tends to postpone or retard the enforcement of the contract for the benefit of others, and which discriminates against such right of enforcement, is constitutional.

People ex rel. Reynolds v. Buffalo, 140 N. Y. 300, 37 Am. St. Rep. 563, 35 N. E. 485; Barnitz v. Beverly, 163 U. S. 128, 41 L. ed. 100, 16 Sup. Ct. Rep. 1042; Western Nat. Bank v. Reckless, 96 Fed. 77; Peninsular Lead & Color Works v. Union Oil & Paint Co. 100 Wis. 488, 42 L.R.A. 331, 69 Am. St. Rep. 934, 76 N. W. 359.

An act is unconstitutional which changes the remedy, unless it supplies an alternative remedy equally adequate and efficacious.

People ex rel. Reynolds v. Buffalo, 140 N. Y. 300, 37 Am. St. Rep. 563, 35 N. E. 485; McGahey v. Virginia, 135 U. S. 662–693, 34 L. ed. 304–314, 10 Sup. Ct. Rep. 972.

Statutes which seriously impair the remedy which existed at the time the contract was entered into "impair the obligation" of the contract, within the meaning of the Constitution.

Hawthorne v. Calef, 2 Wall. 10, 17 L. ed. 776; Louisiana v. New Orleans, 102 U. S. 203, 26 L. ed. 132; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190.

Messrs. **Fred S. Jackson**, Attorney General of Kansas, and **A. C. Mitchell** argued the cause, and, with Mr. G. H. Buckman, filed a brief for appellees:

The Kansas bank guaranty law is a voluntary law, and applies only to those who seek and obtain admission to its benefits, and therefore cannot constitute a taking of property without due process of law, or a denial of the equal protection of the laws.

Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829, 168 Pa. 309, 31 Atl. 1065.

The appellant banks have not presented by their bill such a state of facts as will work a justiciable injury to them.

Albany County v. Stanley, 105 U. S. 305, 26 L. ed. 1044; Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Com. v. Merchants' & Mfrs. Nat. Bank, 168 Pa. 309, 31 Atl. 1065; Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20; Braxton County Ct. v. West Virginia, 208 U. S. 192, 52 L. ed. 450, 28 Sup. Ct. Rep. 275; State v. Smiley, 65 Kan. 240, 67 L.R.A. 903, 69 Pac. 199; Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; Tyler v. Registration Ct. Judges, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206.

The appellants, being all citizens of the state of Kansas, have not presented a state of facts which raises a controversy under the Constitution of the United States.

Metcalf v. Watertown, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; Blackburn v. Portland Gold Min. Co. 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222.

The banking business is a public business, and its regulation is within the police power of the state.

Freund, Pol. Power, §§ 400, 401; Tiedeman, Pol. Power, § 194; Blaker v. Hood, 53 Kan. 499, 24 L.R.A. 854, 36 Pac. 1115; State v. Richcreek, 167 Ind. 217, 5 L.R.A. (N.S.) 878, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 A. & E. Ann. Cas. 899; Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; Zane, Banks & Bkg. §§ 8, 9; Morse, Bkg. § 13; Bank of California v. San Francisco, 142 Cal. 276, 64 L.R.A. 918, 100 Am. St. Rep. 130, 75 Pac. 832.

The Kansas bank guaranty law is a regulation of banking, and is a proper exercise of the police power of the state.

Freund, Pol. Power, § 400; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 330; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill in equity brought by many state banks of Kansas to prevent the enforcement of the Kansas law *providing for a bank depositors' guaranty fund. [126 The defendants demurred. The circuit court, while holding the act unconstitutional, dismissed the bill on the ground that the appellants did not show that their rights under the Constitution were infringed, and therefore did not state a case within the jurisdiction of the court. 175 Fed. 365, 375, 381, 382. The ground of complaint was that the law imposed certain conditions upon sharing the benefits and burdens of contributors to the guaranty fund, that the appellants would not or could not contribute, and that unless they did, the effect of the law would be to drive them out of business. It was complained also that whereas theretofore the plaintiffs would have been entitled to share *pro rata* in the assets of an insolvent bank to which they had given credit, now depositors with such of their debtors as should go into the guaranty system would be preferred. Again, various conditions of the scheme not affecting the plaintiffs were pointed out as unreasonable and arbitrary, and the whole act was alleged to be unconstitutional and void. There was added a charge that the act required taxation to meet the expenses of carrying out the scheme. To all this the court replied that so far as the plaintiffs were concerned, it did not appear that they could not change their condition so as to enable themselves to contribute, and that the possible preference of other creditors was put as a pure speculation, it not being averred that any guaranteed bank indebted to any of the plaintiffs had failed, to which it might be added that the plaintiffs are free to withdraw their credits and collect their debts now. The charge as to taxation did not state a case under the Constitution, and violation of constitutional rights was the only ground for coming into the circuit court.

The case of Noble State Bank v. Haskell, just decided [219 U. S. 104, ante, 112, 31 Sup. Ct. Rep. 186] cuts the root of the plaintiffs' case, except so far as the Kansas law shows certain minor differences from *that of Oklahoma. [127 The most important of these

is that contribution to the fund is not absolutely required. On this ground it is said, and was thought by the circuit judge, that the law could not be justified under the police power. We cannot agree to such a limitation. If, as we have decided, the law might compel the contribution on the grounds that we have stated, it may try to bring about the same result by the creation of motives less compulsory than command and of disadvantages in holding aloof less peremptory than an immediate stop. We shall not go through the details of minute criticism urged by the appellants, in most if not all of which they are in no way concerned. Perhaps the most striking of these subordinate matters is the preference of ordinary depositors over other creditors,—a preference that seems to be overstated by the appellants. This, obviously, is in aid of what we have assumed to be the one of the chief objects and justifications of such laws,—securing the currency of checks. The ordinary deposits are those that are drawn against in that way. Another discrimination complained of is that against unincorporated banks and banks not having a surplus of 10 per cent. But if the state might require incorporation, it may give advantages to incorporated companies. It might provide that no banking business should be done except by corporations, and that corporations should not be formed or continue with less than a surplus of 10 per cent, both provisions being for the purpose of assuring safety. If, instead of that, it allows the plaintiffs to keep on without incorporation, and with a smaller surplus, they cannot complain that the safer banks will outstrip them as the result of the law. We think it unnecessary to discuss the case more at length.

Decree affirmed.

128] *MORRIS ENGEL, Appt.,
v.
EDWARD R. O'MALLEY, Frank Moss, Clark Williams, and William F. Baker.

(See S. C. Reporter's ed. 128–139.)

Statutes — who may assail validity.

1. One who can satisfy the requirement of N. Y. Laws 1910, chap. 348, for licensing private bankers, that the applicant for license must have been continuously for five years immediately preceding his application a resident of the United States, cannot complain that such provision is unconstitutional.

[For other cases, see Statutes, 53–60, in Digest Sup. Ct. 1908.]

Constitutional law — police power — regulating private banking.

2. The business of receiving deposits of money in small sums from time to time until they reach an amount sufficient to be sent to other states or foreign countries is banking, and as such is a proper subject for regulation in the exercise of the police power of the state.

[For other cases, see Constitutional Law, 881–891, in Digest Sup. Ct. 1908.]

Constitutional law — police power — licensing private bankers.

3. The police power of the state justifies the requirement of N. Y. Laws 1910, chap. 348, that a license from the comptroller be obtained by individuals or partnerships desiring to engage in the business of receiving deposits of money for safe-keeping, or for the purpose of transmission to another, or for any other purpose.

[For other cases, see Constitutional Law, 881–891, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — equal protection of the laws — licensing private bankers.

4. The possibility that the comptroller may refuse a license to a private banker upon his arbitrary whim does not inval-

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Note.—For a discussion of police power generally—see notes to State v. Marshall, 1 L.R.A. 51; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; State v. Schlemmer, 10 L.R.A. 135; and Barbier v. Connolly, 28 L. ed. U. S. 923.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

State licenses or taxes as affecting interstate commerce—see notes to Rotherniel v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

Prohibiting or regulating private banking.

There is no doubt, under the authorities, of the right of the state, in the exercise of its police power, to regulate and impose conditions upon the business of private banking.

In State v. Richchreek, 167 Ind. 217, 5 L.R.A.(N.S.) 874, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 A. & E. Ann. Cas. 899, there was upheld over objections founded on the constitutional prohibitions against taking property without compensation or due process of law, granting special privi-

idate, under U. S. Const. 14th Amend., the requirement of N. Y. Laws 1910, chap. 348, that a license from that official be obtained by individuals or partnerships desiring to engage in that business.

[For other cases, see Constitutional Law, 360–368, 586–590, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — licensing private bankers.

5. No unconstitutional discrimination is made by exempting those private bankers in whose business the average amount of each sum received is not less than $500, and those who give a bond in a specified amount, from the requirement of N. Y. Laws 1910, chap. 348, that a license from the comptroller be obtained by individuals or partnerships desiring to engage in the business of receiving deposits of money for safe-keeping, or for the purpose of transmission to another, or for any other purpose.

[For other cases, see Constitutional Law, 360–368, in Digest Sup. Ct. 1908.]

Commerce — state regulation — licensing private bankers.

6. Interstate commerce is not unconstitutionally regulated by the requirement of N. Y. Laws 1910, chap. 348, that a license from the comptroller be obtained by individuals or partnerships desiring to engage in the business of private banking, as applied to one whose business chiefly consists in receiving deposits in very small sums from time to time until they reach an amount sufficient to be sent to other states and foreign countries.

[For other cases, see Commerce, III. d, in Digest Sup. Ct. 1908.]

[No. 703.]

Argued December 15, 16, 1910. Decided January 3, 1911.

APPEAL from the Circuit Court of the United States for the Southern District of New York to review a decree sustaining a demurrer to a bill which seeks to prevent the enforcement of a state statute forbidding the carrying on of the business of private banking without a license from the comptroller. Affirmed.

See same case below 182 Fed. 365.

The facts are stated in the opinion.

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leges, or abridging the privileges and immunities of citizens, a statute applying both to new and established institutions, requiring that the real estate, furniture, and fixtures of private bankers shall constitute no more than one third of the entire capital of the bank, and that the responsibility and net worth of the individual members of a private banking concern shall be at least equal to double the amount of capital paid into the bank, and that all individual bankers and at least one member of a firm conducting a banking business must be residents of the state.

The legislature may define as banking the business of merchants in receiving deposits of money which the depositor may withdraw either in money or in goods, with interest, and throw around such business the general safeguards provided for the banking business proper. MacLaren v. State, 141 Wis. 577, 135 Am. St. Rep. 55, 124 N. W. 667, 18 A. & E. Ann. Cas. 826.

A municipal ordinance assigning private bankers to different classes, and imposing a graded license tax and also an ad valorem tax on the capital employed, does not deny due process of law, nor violate constitutional requirements as to equality and uniformity of taxation, nor does it violate a provision of the state Constitution for the imposition of license taxes upon any business which cannot be reached by the ad valorem system. Bradley v. Richmond, 110 Va. 521, 66 S. E. 872.

In Blaker v. Hood, 53 Kan. 499, 24 L.R.A. 854, 36 Pac. 1115, the court upheld, as a valid exercise of the police power, an act providing for the organization of corporate banks, and for the regulation of all banking business, except that done by national banks, whether conducted by corporations, partnerships, or individuals; creating the office of bank commissioner; requiring that all engaged in the banking business make reports to him of their resources and liabilities, and submit to inspection and investigation in order to disclose their financial condition; and prescribing methods of business intended to protect depositors and patrons. It was also held in this case that the provisions of the Kansas Constitution authorizing the organization and control of banks of circulation apply only to banks of issue, and do not prohibit the enactment of laws imposing regulations upon banks of deposit and discount.

A statute making it a misdemeanor for any banker to discount commercial paper at more than a certain rate per cent was upheld in Youngblood v. Birmingham Trust & Sav. Co. 95 Ala. 521, 20 L.R.A. 58, 36 Am. St. Rep. 245, 12 So. 579, against the objection that it was unconstitutional as class legislation, because it applied to bankers only. This legislation applies to corporate as well as individual bankers,—a fact which the court regarded as a sufficient ground for distinguishing Carter Bros. v. Coleman, 84 Ala. 256, 4 So. 151, where the statute, then directed against individual bankers only, was held invalid.

The New York statute sustained in the principal case was held invalid in Lee v. O'Malley, 69 Misc. 215, 126 N. Y. Supp. 775, on two of the grounds unsuccessfully urged in the Federal Supreme Court: *viz.*, the exemption of those private bankers whose deposits average $500 or more, and the purely arbitrary discretion vested in the comptroller.

When we come to the question of the right of the state to prohibit private banking, the authorities are conflicting.

The right to prohibit the business of banking by private individuals in all its

Mr. **Charles Dushkind** argued the cause, and filed a brief for appellant:

A statute that is repugnant to the Constitution is not voidable, but is absolutely void.

Ex parte Young, 209 U. S. 129, 52 L. ed. 717, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep 441, 14 A. & E. Ann. Cas. 764; Norton v. Shelby County, 118 U. S. 441, 30 L. ed. 185, 6 Sup. Ct. Rep. 1121.

An unconstitutional act is rendered void not by judicial decision, but the Constitution itself declares it void. It is self-operating; it has no legal inception and never has a legal existence.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431.

Anyone against whom an unconstitutional act is sought to be enforced should have the right to resist its enforcement, and attack the validity of the act, no matter whether the obnoxious feature of the law applies to him or not.

Tyler v. Registration Ct. Judges, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; Hooker v. Burr, 194 U. S. 415, 48 L. ed. 1046, 24 Sup. Ct. Rep 706; Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20; Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736; Albany County v. Stanley, 105 U. S. 305, 26 L. ed. 1044; Southern R. Co. v. King, 217 U. S. 534, 54 L. ed. 871, 30 Sup. Ct. Rep. 594.

The statute is unconstitutional because it gives the comptroller arbitrary power to deprive the appellant of his right to carry on his business.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633.

The statute is repugnant to the 14th Amendment because it contains unjust discriminations.

Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Cooley, Const. Law, 556, 557; Com. use of Titusville v. Clark, 195 Pa. 634, 57 L.R.A. 348, 86 Am. St. Rep. 694, 46 Atl. 286; State v. Gravett, 65 Ohio St. 289, 55 L.R.A. 791, 87 Am. St. Rep. 605, 62 N. E. 325; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43.

There is a wide distinction between the banking business and the occupations where public health or public morals are involved.

Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Cooley, Const. Lim. pp. 289, 290.

It is one thing to tax merchants upon

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departments and incidents, including discount, deposit, and exchange, as well as the issuance of bills to circulate as money, is affirmed in State ex rel. Goodsill v. Woodmansee, 1 N. D. 246, 11 L.R.A. 420, 46 N. W. 970.

And requiring incorporation as a condition of doing a banking business is declared in Weed v. Bergh, 141 Wis. 569, 25 L.R.A.(N.S.) 1217, 124 N. W. 664, to be regulation, and not prohibition and therefore not to interfere unconstitutionally with the right to transact such business, even though all existing banks must be converted into corporations within three months after the passage of the statute, where incorporation may be effected within that time without loss by the application of ordinary business methods.

See also Shallenberger v. First State Bank, 219 U. S. 114, ante, 117, 31 Sup. Ct. Rep. 189, wherein was sustained, as a valid exercise of the police power, a Nebraska statute forbidding banking except by a corporation, and providing for a depositors' guaranty fund.

And see Noble State Bank v. Haskell, 219 U. S. 104. ante, 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, where the court said that the police power of the state extends even to the prohibition of the banking business except upon such conditions as the state may prescribe.

The right to prohibit private banking is denied, except as to the privilege of issuing bills to circulate as money, in State v. Scougal, 3 S. D. 55, 15 L.R.A. 477, 44 Am. St. Rep. 756, 51 N. W. 858.

And it was held in Marymont v. Nevada State Bkg. Board. — Nev. —, 32 L.R.A. (N.S.) 477, 111 Pac. 295, that ordinary banking by individuals may not be prohibited by statutory enactment while corporations are allowed and authorized to conduct this business. The court reviewed State ex rel. Goodsill v. Woodmansee; Weed v. Bergh; and State v. Scougal, — supra, and adopted the view held in the latter case as "the most carefully considered of the three cases." The constitutional objections which it finds fatal are those founded upon the guaranties of inalienable rights to liberty, property, safety, and happiness, of due process of law, and upon the reservation of nonenumerated rights to the people.

the volume of their business, and it is quite another thing to say that all merchants in a particular line whose business amounts to less than $10,000 per annum shall pay a license tax, file reports, deposit securities, and be under government supervision or close up their shops, while all those whose business amounts to $10,001 or more need not pay any tax, nor file any reports, nor deposit any securities, and they may transact their business as they see fit.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431.

Hostile discriminations against any class singled out have been repeatedly condemned by this court.

Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 153, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

Circumstances and conditions that led to the enactment of the law cannot be considered on the question as to the constitutionality of the law.

Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148; Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287; Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529.

The statute is violative of the commerce clause of the Constitution because it attempts to regulate interstate and foreign commerce.

Mobile County v. Kimball, 102 U. S. 691, 702, 26 L. ed. 238, 241; Pom. Const. Law, § 378; Cooley, Const. Law, 7th ed. p. 688; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015; State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146; Fargo v. Michigan (Fargo v. Stevens) 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; State ex rel. Carr v. Woodruff Sleeping & Parlor Coach Co. 114 Ind. 155, 1 Inters. Com. Rep. 798, 15 N. E. 814; Pickard v. Pullman Southern Car Co. 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; McCall v. California, 136 U. S. 104, 34 L. ed. 392, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Preston v. Finley, 72 Fed. 857; Re Nichols, 48 Fed. 164; Re White, 11 L.R.A. 284, 3 Inters. Com. Rep. 531, 43 Fed. 914; Culberson v. American Trust & Bkg. Co. 107 Ala. 457, 19 So. 34; International Textbook Co. v. Pigg, 217 U. S. 93, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 81, 18 A. & E. Ann. Cas. 1103; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 356, 30 L. ed. 1187, 1188, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Butler Bros. Shoe Co. v. United States Rubber Co. 84 C. C. A. 167, 156 Fed. 17; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592

A license fee is a tax.

Gundling v. Chicago, 177 U. S. 183, 189, 44 L. ed. 725, 729, 20 Sup. Ct. Rep. 633; Royall, v. Virginia, 116 U. S. 572, 579, 29 L. ed. 735, 737, 6 Sup. Ct. Rep. 510.

Mr. **Louis Marshall** argued the cause, and, with Mr. E. H. Letchworth, filed a brief for appellees:

Legislation regulating various occupations by requiring them to be licensed, or by imposing special taxation upon them, or subjecting them to inspection, or by imposing other conditions to some extent hampering those engaged in the occupation, or affecting the profitableness of the property invested in the business, has been declared constitutional.

People ex rel. Armstrong v. Warden, 183 N. Y. 223, 2 L.R.A.(N.S.) 859, 76 N. E. 11, 5 A. & E. Ann. Cas. 325; Musco v. United Surety Co. 132 App. Div. 300, 117 N. Y. Supp. 21, affirmed in 196 N. Y. 459, 134 Am. St. Rep. 851, 90 N. E. 171; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep 721; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Gray v. Connecticut, 159 U. S. 74, 40 L. ed. 80, 15 Sup. Ct. Rep. 985; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; Clark v. Titusville, 184 U. S. 329, 46 L. ed. 569, 22 Sup. Ct. Rep. 382; Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct.

Rep. 144; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100; Gardner v. Michigan, 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106; Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 L. ed. 708, 27 Sup. Ct. Rep. 412; Cox v. Texas, 202 U. S. 446, 50 L. ed. 1099, 26 Sup. Ct. Rep. 671; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 223, 21 Sup. Ct. Rep. 132; Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; Hawker v. New York, 170 U. S. 194, 42 L. ed. 1004, 18 Sup. Ct. Rep. 573; Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; People ex rel. Nechamcus v. Warden, 144 N. Y. 529, 27 L.R.A. 718, 39 N. E. 686; Tenement House Dept. v. Moeschen, 179 N. Y. 325, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, 1 A. & E. Ann. Cas. 439; Health Dept. v. Trinity Church, 145 N. Y. 32, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; Grand Rapids v. Braudy, 105 Mich. 670, 32 L.R.A. 116, 55 Am. St. Rep. 472, 64 N. W. 29; People v. Granite State Provident Asso. 161 N. Y. 492, 55 N. E. 1053.

Private banking not only can, but should, be similarly regulated.

Atty Gen. v. Utica Ins. Co. 2 Johns. Ch. 375, 15 Johns. 358, 8 Am. Dec. 243; Curtis v. Leavitt, 15 N. Y. 252; Perkins v. Smith, 116 N. Y. 444, 23 N. E. 21; Bank of Augusta v. Earle, 13 Pet. 519, 596, 10 L. ed. 274, 311; Blaker v. Hood, 53 Kan. 499, 24 L.R.A. 854, 36 Pac. 1115; Youngblood v. Birmingham Trust & Sav. Co. 95 Ala. 521, 20 L.R.A. 58, 36 Am. St. Rep. 245, 12 So. 579; State v. Richcreek, 167 Ind. 217, 5 L.R.A.(N.S.) 874, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 A. & E. Ann. Cas. 899; State ex rel. Godsill v. Woodmansee, 1 N. D. 246, 11 L.R.A. 420, 46 N. W. 970; State v. Scougal, 3 S. D. 55, 15 L.R.A. 477, 44 Am. St. Rep. 756, 51 N. W. 858; Weed v. Bergh, 141 Wis. 569, 25 L.R.A.(N.S.) 1217, 124 N. W. 664; MacLaren v. State, 141 Wis. 577, 135 Am. St. Rep. 55, 124 N. W. 667, 18 A. & E. Ann. Cas. 826.

It being conceded that the complainant is a citizen and has carried on business in the state of New York for upwards of twenty years, and there being nothing to indicate that he has applied for or has been refused a license by the comptroller on any ground whatsoever, he is not in a position to attack the constitutionality of this law, even assuming, but by no means conceding, that in a proper case the provisions relating to five years' residence, and to the discretionary power of the comptroller with respect to the granting or refusing of a license, might be successfully attacked.

Southern R. Co. v. King, 217 U. S. 534, 54 L. ed. 871, 30 Sup. Ct. Rep. 594; Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; Tyler v. Registration Ct. Judges, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; Turpin v. Lemon, 187 U. S. 51, 60, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20; Hooker v. Burr, 194 U. S. 415, 48 L. ed. 1046, 24 Sup. Ct. Rep. 706; Worcester v. Worcester Consol. Street R. Co. 196 U. S. 539, 49 L. ed. 591, 25 Sup. Ct. Rep. 327; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736; Albany County v. Stanley, 105 U. S. 305, 26 L. ed. 1044; Red River Valley Nat. Bank v. Craig, 181 U. S. 548, 45 L. ed. 994, 21 Sup. Ct. Rep. 703; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Wiley v. Sinkler, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17; Chadwick v. Kelley, 187 U. S. 540, 47 L. ed. 293, 23 Sup. Ct. Rep. 175; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 Sup. Ct. Rep. 496.

Part of a statute may be void and the remainder be valid, and the courts will uphold the valid features of the statute unless they are so inextricably bound up with the void provisions as to taint the entire mass.

Eilenbecker v. District Ct. 134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. Rep. 424; United States v. Steffens, 100 U. S. 82, 25 L. ed. 550; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; Jaehne v. New York, 128 U. S. 189, 32 L. ed. 398, 9 Sup. Ct. Rep. 70; Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174.

In any event this act should be sustained, unless its invalidity appears beyond reasonable doubt

Sage v. Brooklyn, 89 N. Y. 196; Re New York Elev. R. Co. 70 N. Y. 342; People v. Equitable Trust Co. 96 N. Y. 394; People ex rel. Sinkler v. Terry, 108 N. Y. 7, 14 N. E. 815; Rogers v. Buffalo, 123 N. Y. 181, 9 L.R.A. 579, 25 N. E. 274; Sweet v. Syracuse, 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289; People ex rel. Carter v. Rice, 135 N. Y. 484, 16 L.R.A. 836, 31 N. E. 921; People ex rel. Metropolitan Street R. Co. v. State Tax Comrs. 174 N. Y. 437, 63 L.R.A. 884, 105 Am. St. Rep. 674, 67 N. E. 69; Re Fishway, 131 App. Div. 418, 115 N. Y. Supp. 745; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Atchison, T. & S. F. R. Co. v. Mat-

thews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. St. Rep. 609; Sweet v. Rechel, 159 U. S. 386, 40 L. ed. 193, 16 Sup. Ct. Rep. 43; United States v. Gettysburg Electric R. Co. 160 U. S. 668, 40 L. ed. 576, 16 Sup. Ct. Rep. 427; Union P. R. Co. v. United States, 99 U. S. 700, 25 L. ed. 496; Buttfield v. Stranahan, 192 U. S. 492, 48 L. ed. 534, 24 Sup. Ct. Rep. 349; Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522.

The clause of the statute which provides that one who proposes to engage in the business of private banking must show that he has been continuously, for a period of five years immediately preceding the date of his application, a resident of the United States, is valid.

State v. Richcreck, 167 Ind. 217, 5 L.R.A. (N.S.) 874, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 A. & E. Ann. Cas. 899; Chadwick v. Kelley, 187 U. S. 540, 47 L. ed. 293, 23 Sup. Ct. Rep. 175; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; Com. v. Hana, 195 Mass. 262, 11 L.R.A.(N.S.) 799, 122 Am. St. Rep. 251, 81 N. E. 149, 11 A. & E. Ann. Cas. 514.

The provision in the act, to the effect that, after notice of application for a license has been posted, the comptroller may, in his discretion, approve or disapprove the application, does not confer the arbitrary power of rejection. The discretion conferred is a legal discretion, which must be reasonable.

New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144, affirming 81 App. Div. 128, 80 N. Y. Supp. 1108, and 175 N. Y. 440, 108 Am. St. Rep. 781, 67 N. E. 913; Davis v. Massachusetts, 167 U. S. 43, 42 L. ed. 71, 17 Sup. Ct. Rep. 731; Wilson v. Eureka City, 173 U. S. 32, 43 L. ed. 603, 19 Sup. Ct. Rep. 317; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765; Fischer v. St. Louis, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673; Crowley v. Christensen, 137 U. S. 92–94, 34 L. ed. 624, 625, 11 Sup. Ct. Rep. 13; 2 Willoughby, Const. 1294.

That the discretion conferred on the comptroller is not to be exercised capriciously is further indicated by § 26, which relates to the revocation of a license where issued, which must be "for cause shown." This phrase has a well-settled meaning in the jurisprudence of New York, and negatives arbitrary action.

People ex rel. Munday v. Fire Comrs. 72 N. Y. 445; People ex rel. New York v. Nichols, 79 N. Y. 582.

A court may refer to the public history of the times, and to legislative documents, to ascertain the reason of an enactment as well as the meaning of particuar provisions therein, and to that end may consider the evil which it is designed to remedy, contemporaneous events, and the existing situation with regard to the subject-matter of the legislation as it was pressed upon the attention of the legislative body.

Tenement House Dept. v. Moeschen, 179 N. Y. 325, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, 1 A. & E. Ann. Cas. 439; United States v. Union P. R. Co. 91 U. S. 72, 79, 23 L. ed. 224, 228; Platt v. Union P. R. Co. 99 U. S. 60, 25 L. ed. 428; Church of the Holy Trinity v. United States, 143 U. S. 463, 36 L. ed. 229, 12 Sup. Ct. Rep. 511; The Delaware, 161 U. S. 472, 40 L. ed. 776, 16 Sup. Ct. Rep. 516; Shaw v. Kellogg, 170 U. S. 331, 42 L. ed. 1057, 18 Sup. Ct. Rep. 632; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Musco v. United Surety Co. 196 N. Y. 465, 134 Am. St. Rep. 851, 90 N. E. 171.

The act does not deprive the complainant and those similarly situated of the equal protection of the law. The exceptions contained therein constitute a legitimate exercise of the right of classification. All persons coming within the class to which the complainant belongs are accorded like treatment, and there is no discrimination among the members of any of the classes enumerated in the act.

People ex rel. Farrington v. Mensching, 187 N. Y. 16, 10 L.R.A.(N.S.) 625, 79 N. E. 884, 10 A. & E. Ann. Cas. 101; Musco v. United Surety Co. 132 App. Div. 300, 117 N. Y. Supp. 21, affirmed in 196 N. Y. 466, 134 Am. St. Rep. 851, 90 N. E. 171; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Kentucky R. Tax Cases, 115 U. S. 321, 337, 29 L. ed. 414, 419, 6 Sup. Ct. Rep. 57; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 294, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Cook v. Marshall County, 196 U. S. 261, 274, 49 L. ed. 471, 476, 25 Sup. Ct. Rep. 233; New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705, 4 A. & E. Ann. Cas. 381; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; Cox v. Texas, 202 U. S. 446, 50 L. ed. 1099, 26 Sup. Ct. Rep. 671; District of Columbia v. Brooke, 214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. Rep. 560; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 Sup. Ct. Rep. 496; Brown-Forman Co. v.

Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 Sup. Ct. Rep. 578; People ex rel. Eisman v. Ronner, 185 N. Y. 285, 77 N. E. 1061; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Lang v. New Jersey, 209 U. S. 467, 52 L. ed. 894, 28 Sup. Ct. Rep. 594; Ohio ex rel. Lloyd v. Dollison, 194 U. S. 445, 48 L. ed. 1062, 24 Sup. Ct. Rep. 703; People v. Havnor, 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; Com. v. Danziger, 176 Mass. 290, 57 N. E. 461; Tenement House Dept. v. Moeschen, 179 N. Y. 325, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, 1 A. & E. Ann. Cas. 439, affirmed in 203 U. S. 583, 51 L. ed. 328, 27 Sup. Ct. Rep. 781; Welch v. Swasey, 214 U. S. 91, 107, 53 L. ed. 923, 930, 29 Sup. Ct. Rep. 567; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; Savannah, T. & I. of H. R. Co. v. Savannah, 198 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. Rep. 690; Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 L. ed. 708, 27 Sup. Ct. Rep. 412; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; New York N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; Clark v. Titusville, 184 U. S. 329, 46 L. ed. 569, 22 Sup. Ct. Rep. 382; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736; Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; Halter v. Nebraska, 205 U. S. 43–46, 51 L. ed. 701–703, 27 Sup. Ct. Rep. 419, 10 A. & E. Ann. Cas. 525; Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. Rep. 89; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 A. & E. Ann. Cas. 957; Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 A. & E. Ann. Cas. 1034; Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 A. & E. Ann. Cas. 865; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 370, 15 A. & E. Ann. Cas. 645; Standard Oil Co. v. Tennessee, 217 U. S. 413, 54 L. ed. 817, 30 Sup. Ct. Rep. 543; People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 N. Y. 148, 24 L.R.A.(N.S.) 201, 85 N. E. 1070; Erb v. Morasch, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819; Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 52 L. ed. 111, 28 Sup. Ct. Rep. 26, 12 A. & E. Ann. Cas. 555; State v. McFarland, — Wash. —, 110 Pac. 792; Ex parte Crowder, 171 Fed. 250; State v. Foster, 22 R. I. 163, 50 L.R.A. 339, 46 Atl. 833; Daniels v. State, 150 Ind. 348, 50 N. E. 74; Strauss v. Galesburg, 203 Ill. 234, 67 N. E. 836; Bush v. New York L. Ins. Co. 135 App. Div. 447, 119 N. Y. Supp. 796; Re Home Discount Co. 147 Fed. 538; White v. Missouri, K. & T. R. Co. 230 Mo. 287, 29 L.R.A.(N.S.) 874, 130 S. W. 325; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376.

There is nothing in this legislation which comes within the purview of the commerce clause; but, on the contrary, it is a legitimate exercise of the police power.

Musco v. United Surety Co. 196 N. Y. 466, 134 Am. St. Rep. 851, 90 N. E. 171.

Banking and its several branches do not come within the commerce clause.

Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Passenger Cases, 7 How. 283, 12 L. ed. 702; Mobile County v. Kimball, 102 U. S. 691, 702, 26 L. ed. 238, 241; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep 207; Paul v. Virginia, 8 Wall. 169, 19 L. ed. 357; New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; John Hancock Mut. L. Ins. Co. v. Warren, 181 U. S. 73, 45 L. ed. 755, 21 Sup. Ct. Rep. 535; Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 249, 50 L. ed. 1014, 26 Sup. Ct. Rep. 619, 6 A. & E. Ann. Cas. 317; Nathan v. Louisiana, 8 How. 73, 12 L. ed. 992; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Cornell v. Coyne, 192 U. S. 418, 428, 48 L. ed. 504, 508, 24 Sup. Ct. Rep. 383.

At the most, banking is a mere incident

of commerce, which may be regulated under the police power.

Hooper v. California, 155 U. S. 655, 39 L. ed. 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Osborne v. Mobile, 16 Wall. 479, 21 L. ed. 470; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202; The Daniel Ball, 10 Wall. 557, 566, 19 L. ed. 999, 1002; Diamond Match Co. v. Ontonagon, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266; Ficklen v. Taxing Dist. 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; Crossman v. Lurman, 192 U S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234; New York ex rel. Silz v. Hesterberg, 211 U. S. 40, 41, 53 L. ed. 79, 80, 29 Sup. Ct. Rep. 10; Pennsylvania Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 A. & E. Ann. Cas. 1101; Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600.

In any event, the regulation of private banks, though engaged in the transmission of money abroad, was a proper subject of state legislation until Congress might choose to deal with the subject, which it has not yet done.

Covington & C. Bridge Co. v. Kentucky, 154 U. S. 209, 38 L. ed. 965, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Olsen v. Smith, 195 U. S. 332, 49 L. ed. 224, 25 Sup. Ct. Rep. 52; Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Reid v. Colorado, 187 U. S. 137, 47 L. ed 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Sinnot v. Davenport, 22 How. 227, 243, 16 L. ed. 243, 247; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; People v. Erie R. Co. 198 N. Y. 369, 29 L.R.A.(N.S.) 240, 91 N. E. 849, 19 A. & E. Ann. Cas. 811.

Mr. Theodcre Connoly also filed a brief for appellee William F. Baker.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity to prevent the carrying out of chapter 348 of the Laws of New York for 1910, which forbids individuals or partnerships to engage in the business of receiving deposits of money for safe-keeping, or for the purpose of transmission to another, or for any other purpose, without a license from the comptroller. The requirements for obtaining the license, so far as they affect the plaintiff, are that the applicant shall deposit $10,000 with the comptroller, and present a bond with a penalty of not more than $50,000 or less than $10,000, to be fixed by the comptroller, conditioned upon the faithful performance of the duties undertaken. After notice shall have been posted for two weeks, the comptroller may approve or disapprove the application, in his discretion, and licensees are to pay a fee of $50. § 25. The license is revocable at all times by the comptroller for cause shown. § 26. Carrying on the business specified, or using the word "banking" or "banker" on signs, letter heads, or advertisements in connection with any business, without a license, is made a misdemeanor. § 27. The foregoing provisions do not apply to any corporation or "individual banker" authorized to do business under the banking law, or to national banks; to any hotel keeper who shall receive money for safe-keeping from a *guest; [135 to any express or telegraph company receiving money for transmission; to individuals or partnerships where the average amount of each sum received on deposit or for transmission in the ordinary course of business shall have been not less than $500 during the fiscal year preceding an affidavit to that effect; or, finally, to any individual or partnership filing a bond approved by the comptroller for $100,000 when the business is in a city having a million inhabitants, or, if elsewhere, for $50,000; or money, or securities that the comptroller approves. § 29d.

The plaintiff alleges that he is a citizen of the United States, and has been engaged in the business specified in the statute for twenty years; that by good reputation and considerable expenditure he has made his business of great value, and that it chiefly consists in receiving deposits in very small sums from time to time until they reach an amount sufficient to be sent to other states and mainly to foreign countries. The plaintiff further alleges that he has not the means that would enable him to make the deposit and give the bond required, and that the enforcement of the law against him will compel him to close. He avers that the statute is unconstitutional as against him under the 14th Amendment and under the commerce clause of the Constitution of the United States. Article 1, § 8. The bill was demurred to and the demurrer was sustained by the circuit court.

The first objection urged by the plaintiff in argument is to a requirement that we

have not mentioned,—that the applicant must have been continuously for five years immediately preceding his application a resident of the United States. As the plaintiff alleges that he satisfies this requirement, he has nothing to complain of. And therefore, without intimating any doubt as to the validity of the clause, we pass at once to the matters in which he is concerned. Southern R. Co. v. King, 217 U. S. 524, 534, 54 L. ed. 868, 871, 30 Sup. 136]Ct. Rep. 594. *As a preliminary to his argument, the plaintiff denies that he is in any sense a banker, and even goes so far as to treat the receipt of money for safe-keeping or transmission within the meaning of the act as a case of bailment, in which the very coins received must be returned or sent on. Of course, this is not a true construction of the statute, as is sufficiently indicated by the title "Private Banking." The receipt of money by a bank, although it only creates a debt, is in a popular sense the receipt of money for safe-keeping, since the depositor can draw it out again at such time and in such sums as he chooses. It is safe to assume that the transmission of money contemplated very generally is accomplished by a draft, and practically never by sending on the identical currency received. One form, at least, of the business aimed at, and, on the face of the bill, that carried on by the plaintiff, is a branch of the banking business. Furthermore, it is a business largely done with poor and ignorant immigrants, especially on their first arrival here.

We presume that the money deposited with the plaintiff is not drawn upon by checks, so that a part of the argument in Noble State Bank v. Haskell, just decided [219 U. S. 104, ante, 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186], may not apply. On the other hand, experience has shown that the protection of such depositors against fraud, which is the purpose running through the statute, is especially needed by at least that class of them with whom the persons hit by the statute largely deal. The case cited establishes that the state may regulate that business, and may take strong measures to render it secure. It also establishes that the plaintiff has no such constitutional right to carry it on at will as to raise him above state laws not manifestly unfit to accomplish the supposed end, greatly in excess of the need, or arbitrary and capricious in discrimination. The quasi paternal relations shown in argument and by documents to exist between those following the plaintiff's calling and newly-arrived 137] *immigrants justifies a supervision more paternal than is needed in ordinary affairs. Whether the court thinks them wise or not, such laws are within the scope of the discretion which belongs to legislatures, and which it is usual for them to exert.

This appeal seems to have been taken upon the notion that the plaintiff had a business which, under the 14th Amendment, the state could not touch. But although cut off from that broad proposition, his counsel presents other more specific objections to the act with earnestness and force. It is said that even if the plaintiff could furnish the money and bond required, the comptroller might refuse a license upon his arbitrary whim. No guides are given in § 25 for the discretion that he is to exercise, and a provision in § 29c that nothing in the article shall be construed to require the comptroller to make any inquiry as to the solvency of any applicant is thought to exclude solvency as the test, and to leave the matter at sea. We do not so understand the purpose and purport of § 29e, and should suppose that the discretion to be exercised in the refusal to grant the license under § 25 was similar to that exercised under § 26 in revoking one; and that in each case the comptroller was expected to act for cause. But the nature and extent of the remedy, if any, for a breach of duty on his part, we think it unnecessary to consider; for the power of the state to make the pursuit of a calling dependent upon obtaining a license is well established, where safety seems to require it, and what we have said before sufficiently indicates that this calling is one to which the requirement may be attached. See Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; New York ex rel. Lieberman v. Van de Carr, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144.

Again, it is argued that the statute makes unconstitutional discriminations by excepting the classes mentioned in § 29d above, especially those in whose business the average amount of each sum received is not less than $500, *and those who[138 give a bond of $100,000 or $50,000. But the former of these exceptions has the manifest purpose to confine the law as nearly as may be to the class thought by the legislature to need protection, and the latter merely substitutes a different form of security, as it well may. "Legislation which regulates business may well make distinctions depend upon the degree of evil." Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 355, 356, 52 L. ed. 236, 244, 28 Sup. Ct. Rep. 114. It is true, no doubt, that where size is not an index to an admitted evil, the law cannot discriminate between the great and small. But in this case size

is an index. Where the average amount of each sum received is not less than $500, we know that we have not before us the class of ignorant and helpless depositors, largely foreign, whom the law seeks to protect. See Musco v. United Surety Co. 196 N. Y. 459, 465, 134 Am. St. Rep. 851, 90 N. E. 171; McLean v. Arkansas, 211 U. S. 539, 551, 53 L. ed. 315, 321, 29 Sup. Ct. Rep. 206.

We come to the final objection, that this statute is an attempt to regulate commerce with other states. When, as in this matter, the Constitution takes from the states only a portion of their otherwise absolute control, there may be expected difficulties in drawing the dividing line, because where it shall be put is a question of more or less. The trouble is inherent in the situation, but it is the same in kind that meets us everywhere else in the law. The question is whether the state law creates a direct burden upon what it is for Congress to control, and the facts of the specific case must be weighed. In doing so we recur to what we have said above,—that we cannot regard the statement of the plaintiff's business in his bill as describing the receipt of bailments for the transmission of the identical objects received to other states. Neither do we regard the law as having had such bailments primarily in mind. Under the statement in the bill and the words of the law, we must take it that the money received, even when received for transmission, becomes the money of the 139] depositary, *and his obligation that of a debtor under contract to pay as may be directed. Presumably the depositor retains the right to call for his money himself, or to change any direction that may have been given, until the money has left the "private banker's" hands. The law, as was said of a similar one by the New York court of appeals, was passed for the purpose of regulating and safeguarding the business of receiving deposits which precedes and is not to be confounded with the later transmission of money, although leading to it. Musco v. United Surety Co. 196 N. Y. 459, 466, 467, 134 Am. St. Rep. 851, 90 N. E. 171. The fact that it is very likely to lead to it does not change the result. Diamond Glue Co. v. United States Glue Co. 187 U. S. 611, 616, 47 L. ed. 328, 332, 23 Sup. Ct. Rep. 206. The case is similar in principle to Ware v. Mobile County, 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 A. & E. Ann. Cas. 1031, where the nearest cases on the other side are distinguished. See further Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128. We are of opinion that the commerce clause of the Constitution is not infringed, and, on the whole case, that the decree of the Circuit Court was right.

Decree affirmed.

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*KENTUCKY UNION COMPANY, [140
Plff. in Err.,
v.
COMMONWEALTH OF KENTUCKY, Deft. in Err. (No. 22.)

EASTERN KENTUCKY COAL LANDS CORPORATION, Plff. in Err.,
v.
COMMONWEALTH OF KENTUCKY, Deft. in Err. (No. 47.)

EASTERN KENTUCKY COAL LANDS CORPORATION, Plff. in Err.,
v.
COMMONWEALTH OF KENTUCKY, Deft. in Err. (No. 48.)

(See S. C. Reporter's ed. 140-165.)

Constitutional law — ex post facto laws — forfeiting land titles.

1. The objection that the retrospective features of Ky. act of March 15, 1906, art. 3, forfeiting land titles for failure to list and pay taxes, make the law an *ex post facto* one, is not valid, where such legislation, as construed by the highest court of the state, imposes no retrospective penalties or punishment of a criminal nature.

[For other cases, see Constitutional Law, 949-953, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — taxation — forfeiture for nonpayment — notice and hearing.

2. Due process of law in forfeiting lands to the state for failure to list and pay taxes for certain specified years is afforded by Ky. act of March 15, 1906, art. 3, under which a judicial proceeding is provided by

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NOTE.—On what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On notice and hearing required to constitute due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194; and Ulman v. Baltimore, 11 L.R.A. 255.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

As to what laws are *ex post facto*—see notes to State v. Cooler, 3 L.R.A. 181; Anderson v. O'Donnell, 1 L.R.A. 632; Calder v. Bull, 1 L. ed. U. S. 648; Sturges v. Crowninshield, 4 L. ed. U. S. 529; Re Medley, 33 L. ed. U. S. 835; Otoe County v.

which the owner of the title may have the taxes assessed, and, upon payment thereof, the forfeiture avoided, and such forfeiture is declared only after a judicial proceeding in which the owner of the title is summoned and heard.

[For other cases, see Constitutional Law, 552, 553, 725–744, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — forfeiture for nonpayment of taxes — cutting down statute of limitations.

3. The forfeiture to the state for the benefit of actual occupants in adverse possession, which is provided for by Ky. act of March 15, 1906, art. 3, in case of the failure of the owner or claimant to list the lands and pay taxes thereon for certain specified years, is not lacking in due process of law because the effect is to cut down the period of limitation in which actions may be brought by the holders of the title to recover against adverse claimants.

[For other cases, see Constitutional Law, 686–688, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — taxation — forfeiture for benefit of adverse occupant.

4. There is no denial of due process of law in the provisions of Ky. act of March 15, 1906, art. 3, under which the forfeiture of land titles to the state, as the result of proper proceedings and after due notice to the owner of the title, who is in default for payment of taxes, is to inure to the benefit of adverse claimants occupying and paying taxes upon the land, and not in default.

[For other cases, see Constitutional Law, IV. b, 6, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — when raised in time.

5. A Federal question first raised by a petition for rehearing in the highest state court is open for review in the Federal Supreme Court on writ of error to the state court, if that court considered such question in denying the petition.

[For other cases, see Appeal and Error, 1304–1307, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — forfeiture for nonpayment of taxes —judicial sale.

6. A judicial sale under Ky. act of March 15, 1906, art. 3, of lands forfeited to the state for failure to list and pay taxes for certain specified years, is not lacking in due process of law because, under such statute, it is not necessary that the petition for forfeiture shall point out and describe the parts of the tract held by adverse claimants to whose benefit the forfeiture will accrue, where it is open to the defendant to show what parts of the tract are subject to sale, if less than the whole is to be sold.

[For other cases, see Constitutional Law, 543–550, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — question of local law.

7. The dismissal of the petition of the owner, brought under Ky. act of March 15, 1906, art. 3, for the assessment and taxation of his lands to escape the forfeiture provided by that statute, because such petition did not contain a description of the land sufficient to identify it, involves no Federal question which can be reviewed by the Federal Supreme Court on writ of error to a state court, unless the ruling was so arbitrary and baseless as to amount to a deprivation of due process of law.

[For other cases, see Appeal and Error, 2140–2143, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — forfeiture for nonpayment of taxes.

8. The provisions for the forfeiture of land titles to the state for failure to list and pay taxes thereon for certain specified years, made by Ky. act of March 15, 1906, art. 3, do not deny the equal protection of the laws because, in the application of such statute, it can only meet conditions such as are embraced within the law in a part of the counties of the state.

[For other cases, see Constitutional Law, 292–336, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — forfeiture for nonpayment of taxes.

9. Landowners who did not acquire their title until after the delinquencies had occurred cannot claim to have been denied the equal protection of the laws by the application to them of the provisions of Ky. act of March 15, 1906, art. 3, for the forfeiture of such lands to the state, because of the failure of the owners to list lands for taxation and pay the taxes thereon for certain specified years.

[For other cases, see Constitutional Law, 292–336, in Digest Sup. Ct. 1908.]

States — Virginia compact — land titles.

10. Requiring upon notice and hearing

Baldwin, 28 L. ed. U. S. 331; and Barnitz v. Beverly, 41 L. ed. U. S. 94.

On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to when Federal question is raised in time to sustain the appellate jurisdiction of the Federal Supreme Court over state courts—see note to Chicago, I. & L. R. Co. v. McGuire, 49 L. ed. U. S. 414.

On vested right in defense of statute of limitations—see notes to McEldowney v. Wyatt, 45 L.R.A. 609, and Slover v. Union Bank, 1 L.R.A.(N.S.) 528.

On due process of law in revenue proceedings—see note to Read v. Dingess, 8 C. C. A. 398.

the listing of land titles for taxation for certain specified years, or, in default thereof, forfeiting such title to the state, as is done by Ky. act of March 15, 1906, art. 3, does not, as to titles under grants from the state of Virginia, violate the provisions of the compact of 1789, between the states of Virginia and Kentucky, for the security of private rights existing at the time of the separation of the states, to be determined by the then-existing laws of Virginia.
[For other cases, see States, VII. b, in Digest Sup. Ct. 1908.]

[Nos. 22, 47, 48.]

Argued October 28 and 31, 1910. Decided January 3, 1911.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Leslie Circuit Court, in that state, forfeiting certain land titles to the state for failure to list and pay taxes thereon for certain specified years. Affirmed. Also

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Letcher Circuit Court, in that state, dismissing the petition of a landowner for the assessment and taxation of his lands for certain specified years, to escape forfeiture to the state. Affirmed. Also

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Pike Circuit Court, in that state, forfeiting certain lands to the state for failure to list and pay taxes for certain specified years. Affirmed.

See same case below, No. 22, 128 Ky. 610, 108 S. W. 931, 110 S. W. 398; No. 47, 127 Ky. 667, 106 S. W. 260, 108 S. W. 1138; No. 48, 33 Ky. L. Rep. 857, 111 S. W. 362.

The facts are stated in the opinion.

Messrs. **Louis B. Wehle** and **William B. Dixon** argued the cause and filed a brief for plaintiff in error in No. 22:

The Kentucky statute in question violates the Constitution of the United States, for,

1. It is an *ex post facto* law.

Citizens' Nat. Bank v. Com. 118 Ky. 51, 80 S. W. 479, 81 S. W. 686; Chicago, St. L. & N. O. R. Co. v. Com. 115 Ky. 278, 72 S. W. 1119; Com. v. Nute, 115 Ky. 239, 72 S. W. 1090; Campbell v. Thomas, 9 B. Mon. 82; New Domain Oil Gas Co. v. Gaffney Oil Co. 134 Ky. 792, 121 S. W. 699; Ballowe v. Hillman, 18 Ky. L. Rep. 677, 37 S. W. 950; Breathitt Coal, Iron & Lumber Co. v. Strong, 106 Ky. 699, 51 S. W. 189; Kidd v. Central Trust & S. D. Co. 23 Ky. L. Rep. 1402, 65 S. W. 355; Helton v. Central Trust & S. D. Co. 24 Ky. L. Rep. 628, 69 S. W. 720; Bryant v. Kendall, 25 Ky. L. Rep. 1859, 79 S. W. 186; Goff v. Lowe, 25 Ky. L. Rep. 2176, 80 S. W. 219; Steele v. Bryant, 132 Ky. 569, 116 S. W. 755; Cooley, Const. Lim. 5th ed. p. 323; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Watson v. Mercer, 8 Pet. 110, 8 L. ed. 884; Cummings v. Missouri, 4 Wall. 277, 18 L. ed. 356; Ex parte Garland, 4 Wall. 333, 18 L. ed. 366; Pierce v. Carskadon, 16 Wall. 234, 21 L. ed. 276; Locke v. New Orleans, 4 Wall. 172, 18 L. ed. 334; Burgess v. Salmon, 97 U. S. 381, 24 L. ed. 1104; Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443.

2. It denies to persons of whom the plaintiff in error is one the equal protection of the laws.

Wurts v. Hoagland, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Western U. Teleg. Co. v. Indiana, 165 U. S. 304, 41 L. ed. 725, 17 Sup. Ct. Rep. 345; King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925; Kentucky R. Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533.

3. It takes the property of the plaintiff in error without due process of law; for,

(a) It cuts off the owner's right of action in ejectment against adverse occupants.

Batterton v. Chiles, 12 B. Mon. 352, 54 Am. Dec. 539; Wheeler v. Jackson, 137 U. S. 255, 34 L. ed. 663, 11 Sup. Ct. Rep. 76; Sturges v. Crowninshield, 4 Wheat. 122, 207, 4 L. ed. 529, 551; Piatt v. Vattier, 1 McLean, 158, Fed. Cas. No. 11,117; Koshkonong v. Burton, 104 U. S. 668, 675, 26 L. ed. 886, 889; Berry v. Ransdall, 4 Met. (Ky.) 292; Price v. Hopkin, 13 Mich. 318; Osborn v. Jaines, 17 Wis. 574; Rodebaugh v. Philadelphia Traction Co. 190 Pa. 358, 42 Atl. 953; Soper v. Lawrence Bros. Co. 201 U. S. 359, 50 L. ed. 788, 26 Sup. Ct. Rep. 473.

(b) The terms of forfeiture imposed by it are arbitrary and excessive.

Story, Const. 4th ed. § 1943; Cooley, General Principles of Const. Law, 3d ed. p. 241; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 708, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 698, 43 L. ed. 864, 19 Sup. Ct. Rep. 565; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246; Livingston v. Moore, 7 Pet. 469, 493, 551.

8 L. ed. 751, 759, 781; 11 Cooley, Tax. 3d ed. p. 1023; King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925; Walker v. Sauvinet, 92 U. S. 90, 93, 23 L. ed. 678, 679; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 31, 25 L. ed. 989, 992; Hurtado v. California, 110 U. S. 516, 535, 28 L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292; King v. Hatfield, 130 Fed. 564; Barbour v. Nelson, 1 Litt. (Ky.) 60; Marshall v. McDaniel, 12 Bush, 378; Shaw v. Robinson, 111 Ky. 715, 64 S. W. 620; 2 Tidd, Pr. p. 1069.

The requirement to pay 30 per cent interest and 15 per cent penalty as part of the proceeding for extinguishment of the cause for forfeiture, which the Kentucky court of appeals has held to be *ex post facto*, may not be stricken out of article 3, because it is not separable from the other requirements for the extinguishment of the cause for forfeiture. The suggestion of the Kentucky court of appeals, that the requirement may be stricken and article 3 still enforced in accordance with the apparent legislative intent, is not binding upon this court, for it is not a construction.

United States v. Fisher, 2 Cranch, 358, 2 L. ed. 304; Lewis v. United States, 92 U. S. 618, 621, 23 L. ed. 513, 514; Doggett v. Florida R. Co. 99 U. S. 72, 25 L. ed. 301; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. Rep. 508; Venice v. Murdock, 92 U. S. 494, 23 L. ed. 583.

Even if the requirement to pay the interest and penalty were separable, a delinquent, until there has been a judicial decision to that effect, is protected in relying upon the presumption that a petition to list his land, without offering to pay the interest and penalty, would be rejected.

Tibbs v. Timberlake, 4 Litt. (Ky.) 13; Stapp v. Phelps, 7 Dana, 296; Gorham v. Farson, 119 Ill. 425, 10 N. E. 1; Hamilton v. McLaughlin, 145 Mass. 20, 12 N. E. 424.

Messrs. **J. W. M. Stewart** and **Z. T. Vinson** argued the cause, and, with Mr. James Breathitt, Attorney General of Kentucky, and Messrs. James H. Jeffries, David W. Baird, John F. Hager, John H. Holt, and Aaron Kohn, filed a brief for defendant in error:

The statute does not impair any contract obligation growing out of the Virginia compact.

Eastern Kentucky Coal Lands Corp. v. Com. 127 Ky. 667, 106 S. W. 260, 108 S. W. 1138; Hawkins v. Barney, 5 Pet. 457, 8 L. ed. 190.

The statute affords due process.

Eastern Kentucky Coal Lands Corp. v. Com. 127 Ky. 667, 106 S. W. 260, 108 S. W. 1138; King v. Mullins, 171 U. S. 404, 428, 43 L. ed. 214, 223, 18 Sup. Ct. Rep. 925; King v. West Virginia, 216 U. S. 92, 54 L. ed. 396, 30 Sup. Ct. Rep. 225; Fay v. Crozer, 156 Fed. 486, 217 U. S. 455, 54 L. ed. 837, 30 Sup. Ct. Rep. 568; Citizens' Nat. Bank v. Kentucky, 217 U. S. 443, 54 L. ed. 832, 30 Sup. Ct. Rep. 532.

The statute is neither an *ex post facto* nor retrospective law.

Eastern Kentucky Coal Lands Corp. v. Com. 127 Ky. 667, 106 S. W. 260, 108 S. W. 1138; King v. Mullins, 171 U. S. 404, 428, 43 L. ed. 214, 223, 18 Sup. Ct. Rep. 925; King v. West Virginia, 216 U. S. 92, 54 L. ed. 396, 30 Sup. Ct. Rep. 225; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Florida C. & P. R. Co. v. Reynolds, 183 U. S. 475, 46 L. ed. 285, 22 Sup. Ct. Rep. 176; Elder v. Wood, 208 U. S. 226, 52 L. ed. 464, 28 Sup. Ct. Rep. 263; Citizens' Nat. Bank v. Kentucky, 217 U. S. 443, 54 L. ed. 832, 30 Sup. Ct. Rep. 532.

The statute does not deny to the plaintiffs in error the equal protection of the laws, nor does it double-tax them.

Eastern Kentucky Coal Lands Corp. v. Com. 127 Ky. 667, 106 S. W. 260, 108 S. W. 1138; King v. Mullins, 171 U. S. 404, 428, 43 L. ed. 214, 223, 18 Sup. Ct. Rep. 925; Florida C. & P. R. Co. v. Reynolds, 183 U. S. 475, 46 L. ed. 285, 22 Sup. Ct. Rep. 176; Elder v. Wood, 208 U. S. 226, 52 L. ed. 464, 28 Sup. Ct. Rep. 263; Olds v. Com. 3 A. K. Marsh. 465; Citizens' Nat. Bank v. Kentucky, 217 U. S. 443, 54 L. ed. 832, 30 Sup. Ct. Rep. 532.

The act in question was a necessity.

Southwestern Oil Co. v. Texas, 217 U. S. 125, 54 L. ed. 694, 30 Sup. Ct. Rep. 496.

The West Virginia system, although legislative in form and operation, does not violate the due process clause of the Federal Constitution.

Fay v. Crozer, 217 U. S. 456, 54 L. ed. 837, 30 Sup. Ct. Rep. 568; Staats v. Board, 10 Gratt. 400; Smith v. Chapman, 10 Gratt. 445; Hale v. Branscum, 10 Gratt. 418; McClure v. Maitland, 24 W. Va. 561; Smith v. Tharp, 17 W. Va. 221; Hays v. Camden, 38 W. Va. 109, 18 S. E. 461; State v. Sponaugle, 45 W. Va. 420, 43 L.R.A. 727, 32 S. E. 283; King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925; King v. Panther Lumber Co. 171 U. S. 437, 43 L. ed. 227, 18 Sup. Ct. Rep. 573; King v. West Virginia, 216 U. S. 92, 54 L. ed. 396, 30 Sup. Ct. Rep. 225; Swann v. West Virginia, 188 U. S. 739, 47 L. ed. 677, 23 Sup. Ct. Rep. 848; Armstrong v. Morrill, 14 Wall. 120, 20 L. ed. 765; Read v. Dingess, 8 C. C. A. 389, 8 U. S. App. 526, 60 Fed. 21; Van Gunden v. Virginia

Coal & I. Co. 3 C. C. A. 294, 8 U. S. App. 229, 52 Fed. 851.

If the West Virginia system does not violate due process, how can it be reasonably contended that the Kentucky system is in violation of that provision?

Kidd, D. & P. Co. v. Musselman Grocer Co. 217 U. S. 472, 54 L. ed. 845, 30 Sup. Ct. Rep. 606; King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Hurtado v. California, 110 U. S. 533, 28 L. ed. 237, 4 Sup. Ct. Rep. 111, 292; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; Security Trust & S. V. Co. v. Lexington, 203 U. S. 323, 51 L. ed. 204, 27 Sup. Ct. Rep. 87.

It is the duty of owners of property in Kentucky to list it for taxation.

Com. v. E. H. Taylor, Jr. Co. 101 Ky. 325, 41 S. W. 11; Belknap v. Com. 120 Ky. 59, 85 S. W. 693; Olds v. Com. 3 A. K. Marsh. 465; Louisville & N. R. Co. v. Com. 85 Ky. 198, 3 S. W. 139; Marshall v. McDaniel, 12 Bush, 378.

The state legislature had the power to enact laws providing for the collection of back taxes, and imposing omitted assessments upon all property within its jurisdiction that had escaped taxation.

Citizens' Nat. Bank v. Kentucky, 217 U. S. 452, 54 L. ed. 835, 30 Sup. Ct. Rep. 532, Security Trust & S. V. Co. v. Lexington, 203 U. S. 323, 51 L. ed. 204, 27 Sup. Ct. Rep. 87; Gray, Limitations of Taxing Power, §§ 12–116; Covington v. Covington Gaslight Co. 8 Ky. L. Rep. 515, 2 S. W. 326; Chesapeake & O. S. W. R. Co. v. Grayson County, 8 Ky. L. Rep. 877; Lewis & M. Turnp. Road Co. v. Com. 8 Ky. L. Rep. 960; Livingston v. Paducah, 80 Ky. 656; Levi v. Louisville, 97 Ky. 394, 28 L.R.A. 480, 30 S. W. 973; Durrett v. Davidson, 122 Ky. 851, 8 L.R.A.(N.S.) 546, 93 S. W. 25; Kentucky Union Co. v. Com. 128 Ky. 610, 108 S. W. 931, 110 S. W. 398.

Retroactive acts for the collection of taxes are valid.

Florida C. & P. R. Co. v. Reynolds, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176; Carpenter v. Pennsylvania, 17 How. 456, 15 L. ed. 127; League v. Texas, 184 U. S. 156, 46 L. ed. 478, 22 Sup. Ct. Rep. 475; Gray, Limitations of Taxing Power, §§ 1219, 1290, 1293; Cooley, Tax. § 228; Olmsted v. Barber, 31 Minn. 256, 17 N. W. 473, 944; State v. Memphis & C. R. Co. 14 Lea, 62; Security Trust & S. V. Co. v. Lexington, 203 U. S. 334, 51 L. ed. 208, 27 Sup. Ct. Rep. 87.

The time of ten months given the delinquent in which to comply with the act before any forfeiture can accrue is reasonable and liberal under the circumstances.

Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365; 9 Rose's Notes, p. 310; Schauble v. Schulz, 69 C. C. A. 581, 137 Fed. 389; Morgan v. Des Moines, 8 C. C. A. 562, 19 U. S. App. 593, 60 Fed. 208; Lamb v. Powder River Live Stock Co. 67 L.R.A. 558, 65 C. C. A. 570, 132 Fed. 434; Vance v. Vance, 108 U. S. 514, 27 L. ed. 808, 2 Sup. Ct. Rep. 854; Smith v. Packard, 12 Wis. 372; Power v. Kitching, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737; Wheeler v. Jackson, 137 U. S. 245, 34 L. ed. 659, 11 Sup. Ct. Rep. 76; Turner v. New York, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38; Bigelow v. Bemis, 2 Allen, 496; Stine v. Bennett, 13 Minn. 153, Gil. 138.

The legislature of Kentucky had the constitutional power to make classification of property for the purposes of taxation.

Brown-Forman Co. v. Kentucky, 217 U. S. 572, 573, 54 L. ed. 886, 887, 30 Sup. Ct. Rep. 578; Michigan C. R. Co. v. Powers, 201 U. S. 292, 293, 50 L. ed. 761, 762, 26 Sup. Ct. Rep. 459; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Billings v. Illinois, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Kentucky R. Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Clark v. Titusville, 184 U. S. 329, 46 L. ed. 569, 22 Sup. Ct. Rep. 382; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Kidd v. Alabama, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401; Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20; Florida C. & P. R. Co. v. Reynolds, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176; Southwestern Oil Co. v. Texas, 217 U. S. 125, 54 L. ed. 694, 30 Sup. Ct. Rep. 496.

Messrs. J. W. M. Stewart, David W. Baird, and John F. Hager also filed a separate brief for defendant in error:

Since the creation of the state of Kentucky, claim to ownership of land is and has been property; and if property, may be

taxed; and if taxable, is required by the Constitution to be taxed.

Olds v. Com. 3 A. K. Marsh. 465; Com. v. Gatliff, 132 Ky. 95, 116 S. W. 263. See also Elder v. Wood, 208 U. S. 226, 52 L. ed. 464 28 Sup. Ct. Rep. 263; St. Louis Min. & Mill. Co. v. Montana Min. Co. 171 U. S. 650, 43 L. ed. 320, 19 Sup. Ct. Rep. 61, 19 Mor. Min. Rep. 575; Manuel v. Wulff, 152 U. S. 505, 38 L. ed. 532, 14 Sup. Ct. Rep. 651, 18 Mor. Min. Rep. 85.

The state may adopt new remedies for the collection of taxes, and apply them to taxes already overdue without a violation of the Federal Constitution. The delinquent taxpayer has no vested right in any existing mode of collecting taxes, and there is no contract between him and the state that the latter will not vary the mode of collection.

Judson, Tax. § 336.

Placing habitual delinquents in one class, and requiring them to remove such delinquency in a manner different from that required in other cases, or differing from the method therctofore existing, is not an arbitrary classification within the inhibition of the Federal Constitution against the state passing a law depriving a person of the equal protection of the laws, but such classification is reasonable in all respects.

Florida C. & P. R. Co. v. Reynolds, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176; League v. Texas, 184 U. S. 156, 46 L. ed. 478, 22 Sup. Ct. Rep. 475; Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 354, 52 L. ed. 236, 243, 28 Sup. Ct. Rep. 114; King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925; King v. West Virginia, 216 U. S. 92, 54 L. ed. 396, 30 Sup. Ct. Rep. 225; Fay v. Crozer, 217 U. S. 455, 54 L. ed. 837, 30 Sup. Ct. Rep. 568; Kentucky R. Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 Sup. Ct. Rep. 578; Michigan C. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459; Henley v. Myers, 215 U. S. 373, 54 L. ed. 240, 30 Sup. Ct. Rep. 148; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 Sup. Ct. Rep. 496; Standard Oil Co. v. Tennessee, 217 U. S. 413, 54 L. ed. 817, 30 Sup. Ct. Rep. 543; Williams v. Arkansas, 217 U. S. 79, 90, 54 L. ed. 673, 677, 30 Sup. Ct. Rep. 493, 18 A. & E. Ann. Cas. 865.

A man cannot get rid of his liability to a tax by buying without notice.

Citizens' Nat. Bank v. Kentucky, 217 U. S. 443, 54 L. ed. 832, 30 Sup. Ct. Rep. 532; Seattle v. Kelleher, 195 U. S. 351, 49 L. ed. 232, 25 Sup. Ct. Rep. 44.

The time allowed to comply with the act was reasonable.

Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 Sup. Ct. Rep. 261; Mulvey v. Boston, 197 Mass. 178, 83 N. E. 402, 14 A. & E. Ann. Cas. 349; Power v. Kitching, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737; Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365; Wheeler v. Jackson, 137 U. S. 245, 34 L. ed. 659, 11 Sup. Ct. Rep. 76; Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529.

The states, so far as the Federal Constitution is concerned, may pass retroactive laws.

Florida C. & P. R. Co. v. Reynolds, 183 U. S. 475, 46 L. ed. 285, 22 Sup. Ct. Rep. 176; League v. Texas, 184 U. S. 156, 46 L. ed. 478, 22 Sup. Ct. Rep. 475; Wade, Retroactive Laws, § 253; Municipality No. 1 v. Wheeler, 10 La. Ann. 745; New Orleans v. Poutz, 14 La. Ann. 866; New Orleans v. Cordeviolle, 13 La. Ann. 268; New Orleans v. Locke, 14 La. Ann. 867, 4 Wall. 172, 18 L. ed. 334; State v. Weyerhauser, 68 Minn. 371, 71 N. W. 265, 72 Minn. 519, 75 N. W. 718, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485; State, Dixon, Prosecutor, v. Jersey City, 37 N. J. L. 39.

One cannot be an innocent purchaser of real estate which has not been assessed for taxation, or upon which the taxes have not been paid if assessed.

Seattle v. Kelleher, 195 U. S. 351, 49 L. ed. 232, 25 Sup. Ct. Rep. 44; Citizens' Nat. Bank v. Kentucky, 217 U. S. 443, 54 L. ed. 832, 30 Sup. Ct. Rep. 532; Tallman v. Janesville, 17 Wis. 71.

The government has the right, independent of the question of payment of taxes, to require a property holder to list his property, and to enforce this duty in any constitutional way it sees fit; either by a fine or the forfeiture of the property or estate failed to be listed. The right so to forfeit the property for failure to list is as clearly recognized in all the authorities as is the right to forfeit for failure to pay.

King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925.

The compact with Virginia has no effect whatever upon the right of Kentucky to pass laws regulating taxation, or providing forfeiture for failure to assess or pay taxes.

Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547; Hawkins v. Barney, 5 Pet. 457, 8 L. ed. 190.

The statute in question gave a much longer time to a class of more stubborn offenders than was given by the statute in the case of Wheeler v. Jackson, 137 U. S. 245, 34 L. ed. 659, 11 Sup. Ct. Rep. 76, and the evil to be remedied in that case was less grievous than here.

Messrs. James Breathitt, James H. Jeffries, David W. Baird, John F. Hager, and J. W. M. Stewart also filed a brief for defendant in error:

The legislature has practically unlimited power and authority to levy and collect all taxes, and unlimited power and authority to forfeit, seize upon, and sell the property of the citizen for nonassessment or nonpayment of taxes; the only restrictions upon this power of the legislature being that the taxing laws shall be as uniform as the nature of the case will admit, that the taxes shall be levied and collected for public purposes, and that in cases of forfeiture and sale of property for nonassessment or nonpayment of taxes, that the person whose property is thus forfeited and sold shall have his day in court, and opportunity to be heard upon the issues arising in the forfeiture proceedings.

Cooley, Const. Lim. 6th ed. chap. 14, p. 587; M'Culloch v. Maryland, 4 Wheat. 316, 428, 430, 4 L. ed. 579, 606, 607; Providence Bank v. Billings, 4 Pet. 514, 561, 7 L. ed. 939, 955; Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558; Board of Education v. McLandsborough, 36 Ohio St. 227, 38 Am. Rep. 582; Kirby v. Shaw, 19 Pa. 258; Sharpless v. Philadelphia, 21 Pa. 147, 59 Am. Dec. 759; Weister v. Hade, 52 Pa. 474; Wingate v. Sluder, 51 N. C. (6 Jones, L.) 552; Herrick v. Randolph, 13 Vt. 525; Armington v. Barnet, 15 Vt. 745, 40 Am. Dec. 705; Thomas v. Leland, 24 Wend. 65; People ex rel. Griffin v. Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; Portland Bank v. Apthorp, 12 Mass. 252; Western U. Teleg. Co. v. Mayer, 28 Ohio St. 521; State v. Board of Education, 38 Ohio St. 3.

The periods of limitation fixed by the legislature in the revenue law under discussion are not only reasonably long, but amply so for the purposes for which they were intended.

Cooley, Tax. 1st ed. p. 376; Black, Tax Titles, 2d ed. chap. 32, §§ 492–501; Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365; Terry v. Tubman, 92 U. S. 156, 23 L. ed. 537.

Similar revenue laws of both Virginia and West Virginia have been upheld on all points by the supreme courts of the respective states, and also by the Supreme Court of the United States.

State v. Sponaugle, 45 W. Va. 415, 43 L.R.A. 727, 32 S. E. 283; King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925. See also Brannon, 14th Amend. p. 260. See also Morrison v. Larkin, 26 La. Ann. 699; Wild v. Serpell, 10 Gratt. 405; Yokum v. Fickey, 37 W. Va. 762, 17 S. E. 318; Smith v. Tharp, 17 W. Va. 221.

If retroactive, the law is not, for that reason alone, unconstitutional.

Thornton v. McGrath, 1 Duv. 355; Broaddus v. Broaddus, 10 Bush, 306.

A law enacted by the legislature is always within its legislative competency unless the same is inhibited by the state Constitution, or is in conflict with some provision of the Constitution of the United States.

McPherson v. Blacker, 146 U. S. 25, 36 L. ed. 873, 13 Sup. Ct. Rep. 3; Cooley, Const. Lim. 5th ed. 206, *175.

The judicial interpretation given to the law by the highest court of the state removes from it any semblance of an *ex post facto* law.

King v. Mullins, 171 U. S. 428, 43 L. ed. 223, 18 Sup. Ct. Rep. 925; Eastern Kentucky Coal Lands Corp. v. Com. 127 Ky. 716, 106 S. W. 260, 108 S. W. 1138.

Mr. **John G. Johnson** argued the cause for plaintiff in error in Nos. 47 and 48.

Mr. **William Jackson Hendrick** also argued the cause, and, with Messrs. James H. Hazelrigg, Eugene M. Berard, and Samuel Howland Hoppin, filed a brief for plaintiff in error in Nos. 47 and 48:

The Kentucky statute violates § 10, art. 1, of the Constitution of the United States, which declares that no state shall pass any bill of attainder or *ex post facto* law.

Kring v. Missouri, 107 U. S. 233, 27 L. ed. 510, 2 Sup. Ct. Rep. 443; Fletcher v. Peck, 6 Cranch, 138, 3 L. ed. 178; Cummings v. Missouri, 4 Wall. 322, 330, 18 L. ed. 362, 365; Pierce v. Carskadon, 16 Wall. 234, 21 L. ed. 276; Burgess v. Salmon, 97 U. S. 381, 385, 24 L. ed. 1104, 1106; Thompson v. Utah, 170 U. S. 343, 351, 42 L. ed. 1061, 1066, 18 Sup. Ct. Rep. 620; Rice v. Minnesota & N. W. R. Co. 1 Black, 358, 373, 17 L. ed. 147, 151; Walker v. Whitehead, 16 Wall. 314, 318, 21 L. ed. 357, 358.

A legislature probably cannot constitutionally enact a retroactive law imposing taxes for previous years upon property which was not, during such years, subject to taxation under any valid law.

First Nat. Bank v. Covington, 103 Fed. 523.

A legislature cannot declare what the law was, but what it shall be. To declare what the law is or has been is a judicial power; to declare what the law shall be is legislative.

Ogden v. Blackledge, 2 Cranch, 272, 2 L. ed. 276.

The *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal.

Cooley, Const. Lim. 6th ed. p. 320; 8 Cyc. Law & Proc. p. 1033; Burgess v. Sal-

mon, 97 U. S. 381, 24 L. ed. 1104; United States v. Hughes, 8 Ben. 29, Fed. Cas. No. 15,416.

The term "penalty" involves the idea of punishment; and its character is not changed by the mode in which it is inflicted, whether by civil action or criminal prosecution.

United States v. Chouteau, 102 U. S. 603, 26 L. ed. 246; Huntington v. Attrill, 146 U. S. 667, 36 L. ed. 1127, 13 Sup. Ct. Rep. 224.

The law so declared by this court has been duly followed in Kentucky, prior to the decisions now before the court.

Marshall v. Clark, Hughes (Ky.) 77; Chiles v. Monroe, 4 Met. (Ky.) 72; Com. v. Edwards, 9 Dana, 447; Franklin County Ct. v. Louisville & N. R. Co. 84 Ky. 59; McCracken County v. Mercantile Trust Co. 84 Ky. 344, 1 S. W. 585; Estill v. Lewis, Sneed (Ky.) 343; Shaw v. Robinson, 111 Ky. 715, 64 S. W. 620.

Statutes fixing the times within which claimants to property may assert their rights are not constitutional when vested rights are impaired.

8 Cyc. Law & Proc. p. 905; Bank of Louisville v. Public Schools, 83 Ky. 219.

In the above-cited cases the court has been merely declaring the law recognized and enforced, not only in Kentucky, but by the state courts throughout the land.

Parish v. East Coast Cedar Co. 133 N. C. 478, 98 Am. St. Rep. 718, 45 S. E. 768; J. L. Roper Lumber Co. v. Elizabeth City Lumber Co. 135 N. C. 742, 47 S. E. 757; Turner v. Turner, 4 Call. (Va.) 234; Day v. Pickett, 4 Munf. 104; Danville v. Pace, 25 Gratt. 1, 18 Am. Rep. 663; Merchants' Bank v. Ballou, 98 Va. 112, 44 L.R.A. 306, 81 Am. St. Rep. 715, 32 S. E. 481; Grand Rapids v. Lake Shore & M. S. R. Co. 130 Mich. 238, 97 Am. St. Rep. 473, 89 N. W. 932; State ex rel. Board of Education v. Board of Education, 22 Ohio C. C. 224, 12 Ohio C. D. 423; Gager v. Prout, 48 Ohio St. 89, 26 N. E. 1013; Erie County v. Walker, 10 Ohio Dec. Reprint, 558; Ryan v. State, 5 Neb. 276; State, Dixon, Prosecutor, v. Jersey City, 37 N. J. L. 39; 8 Cyc. Law & Proc. p. 900; Carpenter v. Pennsylvania, 17 How. 456, 15 L. ed. 127; Watson v. Mercer, 8 Pet. 88, 8 L. ed. 876; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Vanhorne v. Dorrance, 2 Dall. 304, 1 L. ed. 391, Fed. Cas. No. 16,857; Stebbins v. Pueblo Co. 2 McCrary, 196, 4 Fed. 282; Haley v. Philadelphia, 68 Pa. 45, 8 Am. Rep. 153; Howard v. Savannah, T. U. P. Charlt. (Ga.) 173; People ex rel. Johnson v. Peacock, 98 Ill. 172; Weister v. Hale, 52 Pa. 474.

The same principle applies to judicial decisions. These cannot have the effect of an *ex post facto* law in devesting rights or impairing contracts any more than can acts of legislature.

Havermeyer v. Iowa County, 3 Wall. 294, 18 L. ed. 38; Weightman v. Clark, 103 U. S. 256, 26 L. ed. 392; Louisiana v. Pilsbury, 105 U. S. 278, 26 L. ed. 1090; Martin v. United States, 93 C. C. A. 484, 168 Fed. 202; Erbaugh v. United States, 97 C. C. A. 663, 173 Fed. 435.

This statute is also void when attempted to be enforced against plaintiff in error, because plaintiff in error was a subsequent purchaser.

Alexander v. Preston, 8 Cranch, 53, 3 L. ed. 485; 25 Am. & Eng. Enc. Law, p. 127; 1 Cooley, Tax. pp. 24, 25, 84–86, 641; Pendleton v. Com. 110 Va. 229, 65 S. E. 536; Heine v. Levee Comrs. 19 Wall. 655, 22 L. ed. 223; Morgan v. Frankfort, 135 Ky. 178, 121 S. W. 1033; Brocking v. O'Bryan, 129 Ky. 543, 112 S. W. 631; Brodie v. Parsons, 23 Ky. L. Rep. 833, 64 S. W. 426; Kentucky C. R. Co. v. Com. 92 Ky. 64, 17 S. W. 196; Lasher v. McCreery, 66 Fed. 834; Com. v. Alger, 7 Cush. 53; 1 Thayer, Cases on Const. Law, pp. 693, 705.

It is the policy of the law to put at rest stale demands of whatever character. This applies as well to taxes as to other matters.

Chicago, St. L. & N. O. R. Co. v. Com. 115 Ky. 278, 72 S. W. 1119.

While the commonwealth of Kentucky has appealed to this court, and not in vain, to enforce the rights which were secured to it by the Virginia compact, some of its officials have not been so eager to comply with its obligations as declared by this court.

Graves v. Graves, 2 Bibb, 207, 4 Am. Dec. 697; Fowler v. Halbert, 4 Bibb, 55; The Register v. Haggin, 1 A. K. Marsh. 446; Kendal v. Slaughter, 1 A. K. Marsh. 378; Clay v. Fox, 1 A. K. Marsh. 557; M'Cracken v. Beall, 3 A. K. Marsh. 212; Hoy v. M'Murry, 1 Litt. (Ky.) 364; Luckett v. Dunn, 3 Litt. (Ky.) 218; Jackson v. Winn, 4 Litt. (Ky.) 326; Shepherd v. Young, 1 T. B. Mon. 204; Botts v. Chiles, 2 T. B. Mon. 36; Boone v. Helm, 4 Dana, 403; Roberts v. Caldwell, 5 Dana, 512; Bodley v. Gaither, 3 T. B. Mon. 59; Fisher v. Cockerill, 5 T. B. Mon. 133; Beard v. Smith, 6 T. B. Mon. 517; Clark v. Gale, 5 J. J. Marsh. 315; Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547; Hawkins v. Barney, 5 Pet. 457, 8 L. ed. 190; Doe ex dem. Gaines v. Buford, 1 Dana, 486; Rollins v. Clark, 8 Dana, 19; Ray v. Barker, 1 B. Mon. 367; Collins v. Collins, 79 Ky. 92; Shaw v. Robinson, 111 Ky. 715, 64 S.

W. 620; Dembitz, Ky. Jur. pp. 116, 162, 163.

Green v. Biddle, 8 Wheat. 1, 5. L. ed. 547, was a very well-considered case, and is still the true "law of the land."

Bronson v. Kinzie, 1 How. 316, 317, 11 L. ed. 145; Shipp v. Miller, 2 Wheat. 316, 4 L. ed. 248, 11 Wheat. 441, 6 L. ed. 515; Miller v. M'Intyre, 6 Pet. 61, 8 L. ed. 320; Carver v. Jackson, 4 Pet. 1, 101, 7 L. ed. 761, 796; Fisher v. Cockcrell, 5 Pet. 248, 253, 259, 8 L. ed. 114, 115, 118; Hawkins v. Barney, 5 Pet. 457, 8 L. ed. 190; Poole v. Fleeger, 11 Pet. 185, 9 L. ed. 680; Pollard v. Kibbe, 14 Pet. 414, 10 L. ed. 519; Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 560–565, 14 L. ed. 266–269; Curan v. Arkansas, 15 How. 316, 319, 14 L. ed. 711, 712; Von Hoffman v. Quincy, 4 Wall. 548, 550, 553, 18 L. ed. 408, 409; Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 705, 27 L. ed. 584, 589, 2 Sup. Ct. Rep. 732; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Indiana v. Kentucky, 136 U. S. 479, 34 L. ed. 329, 10 Sup. Ct. Rep. 1051; Henderson Bridge Co. v. Henderson, 173 U. S. 610, 43 L. ed. 829, 19 Sup. Ct. Rep. 553; Stearns v. Minnesota, 179 U. S. 245, 45 L. ed. 174, 21 Sup. Ct. Rep. 73; Wedding v. Meyler, 192 U. S. 573, 582, 48 L. ed. 570, 574, 66 L.R.A. 833, 24 Sup. Ct. Rep. 322.

Compacts between states are subject to the same rules of construction as contracts between individuals.

Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547; Virignia v. Tennessee, 148 U. S. 503, 37 L. ed. 537, 13 Sup. Ct. Rep. 728; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Wolff v. New Orleans, 103 U. S. 358, 26 L. ed. 395; Providence Bank v. Billings, 4 Pet. 514, 7 L. ed. 939; Home of the Friendless v. Rouse, 8 Wall. 430, 19 L. ed. 495; Farrington v. Tennessee, 95 U. S. 679, 24 L. ed. 558; New Jersey v. Yard, 95 U. S. 104, 24 L. ed. 352; Mechanics' & T. Bank v. Thomas, 18 How. 384, 15 L. ed. 460; Piqua Branch of State Bank v. Knoop, 16 How. 369, 14 L. ed. 977; Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; Hunter v. United States, 5 Pet. 185, 8 L. ed. 91.

In the construction of a compact between states, the same rules should be applied as to treaties.

United States v. Reynes, 9 How. 127, 13 L. ed. 74.

The court will give it judicial meaning and interpretation as a contract on the principles of justice and the rules of equity.

United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547; Chew Heong v. United States, 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. Rep. 255; Geofroy v. Riggs, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295.

And will interpret in a spirit of *uberrima fides*.

Tucker v. Alexandroff, 183 U. S. 424, 46 L. ed. 264, 22 Sup. Ct. Rep. 195; Wright v. Henkel, 190 U. S. 57, 47 L. ed. 954, 23 Sup. Ct. Rep. 781, 12 Am. Crim. Rep. 386; Huidekoper v. Douglass, 3 Cranch, 1, 70, 71, 2 L. ed. 347, 369; Hans v. Louisiana, 134 U. S. 1, 20, 33 L. ed. 842, 849, 10 Sup. Ct. Rep. 504; Pennoyer v. McConnaughy, 140 U. S. 1, 18, 35 L. ed. 363, 368, 11 Sup. Ct. Rep. 699; Sims v. Irvine, 3 Dall. 425, 456, 1 L. ed. 665, 678.

This court will not alter, amend, or add to any treaty by inserting any clause, small or great, any more than in a law.

The Amiable Isabella, 6 Wheat. 1, 5 L. ed. 191.

Congress is bound to regard treaties, and has no power to nullify titles vested thereunder.

Reichart v. Felps, 6 Wall. 160, 18 L. ed. 849; Jones v. Meehan, 175 U. S. 32, 44 L. ed. 61, 20 Sup. Ct. Rep. 1.

In solemn treaties it can never be presumed that either state intends to provide the means for perpetrating or protecting frauds.

United States v. The Amistad, 15 Pet. 518, 10 L. ed. 826.

Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred.

Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628; Society for Propagation of the Gospel v. New Haven, 8 Wheat. 464, 5 L. ed. 662; Bass v. Dinwiddie, Cooke (Tenn.) 130; Lowry v. Francis, 2 Yerg. 534; Thompson v. Holton, 6 McLean, 386, Fed. Cas. No. 13,958; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087, reversing 15 Ky. L. Rep. 320, 22 S. W. 851; Preston v. Walsh, 10 Fed. 315.

It is conclusively presumed that both states understood the conditions of the compact.

Rhode Island v. Massachusetts, 4 How. 635, 11 L. ed. 1135; Virginia v. Tennessee, 148 U. S. 525, 527, 37 L. ed. 545, 546, 13 Sup. Ct. Rep. 728.

The compact restricts the decisions of the courts as well as the acts of the legislature of Kentucky.

Bodley v. Taylor, 5 Cranch, 191, 223, 3 L. ed. 75, 84.

At the date of the compact there was no law permitting the forfeiture of lands for failure to enter them on the books or list

them for taxation, nor even for any other cause; not even for treason.

Hutchinson, Land Titles in Va. & W. Va. pp. 2–8; State v. Sponaugle, 45 W. Va. 415, 43 L.R.A. 727, 32 S. E. 283; State v. West Branch Lumber Co. 64 W. Va. 673, 63 S. E. 377; Hale v. Marshall, 14 Gratt. 489; Kinney v. Beverley, 2 Hen. & M. 318.

Grants from the state are protected from impairment as much as grants from individuals.

Fletcher v. Peck, 6 Cranch, 107, 3 L. ed. 169; Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547; New Jersey v. Wilson, 7 Cranch, 164, 166, 3 L. ed. 303; Wolff v. New Orleans, 103 U. S. 358, 367, 26 L. ed. 395, 399; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Louisiana v. Jumel, 107 U. S. 750, 27 L. ed. 461, 2 Sup. Ct. Rep. 128; Providence Bank v. Billings, 4 Pet. 514, 560, 7 L. ed. 939, 955; Woodruff v. Trapnall, 10 How. 190, 207, 13 L. ed. 383, 390; Poindexter v. Greenhow, 114 U. S. 271, 297, 29 L. ed. 185, 195, 5 Sup. Ct. Rep. 903, 962; Charles River Bridge v. Warren Bridge, 11 Pet. 617, 9 L. ed. 851; Legal Tender Cases, 12 Wall. 581, 20 L. ed. 322; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 237, 41 L. ed. 985, 17 Sup. Ct. Rep. 581; Stearns v. Minnesota, 179 U. S. 223, 233, 245–262, 45 L. ed. 162, 170, 174–181, 21 Sup. Ct. Rep. 73; New Orleans Gaslight Co. v. Lousiana Light & H. P. & Mfg. Co. 115 U. S. 650, 672, 29 L. ed. 516, 524, 6 Sup. Ct. Rep. 252; Terrett v. Taylor, 9 Cranch, 43, 3 L. ed. 650; Pawlet v. Clark, 9 Cranch, 292, 3 L. ed. 735; Farrington v. Tennessee, 95 U. S. 679, 24 L. ed. 558; Mechanics' & T. Bank v. Thomas, 18 How. 384, 15 L. ed. 460; Franklin County Ct. v. Deposit Bank, 87 Ky. 370, 95 S. W. 212; Baldwin v. Com. 11 Bush, 432; The Homestead Cases, 22 Gratt. 266, 12 Am. Rep. 507.

This court will determine independently of the state courts whether there is a contract, and whether it has been impaired.

Stearns v. Minnesota, 179 U. S. 233, 45 L. ed. 170, 21 Sup. Ct. Rep. 73, reversing 72 Minn. 200, 75 N. W. 210; Ohio Life Ins. & T. Co. v. Debolt, 16 How. 416, 451, 14 L. ed. 997, 1011; Wright v. Nagle, 101 U. S. 791, 794, 25 L. ed. 921, 922; Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265; Vicksburg, S. & P. R. Co. v. Dennis, 116 U. S. 665, 667, 29 L. ed. 770, 771, 6 Sup. Ct. Rep. 625; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 36, 31 L. ed. 607, 614, 8 Sup. Ct. Rep. 741; Bryan v. Board of Education, 151 U. S. 639, 38 L. ed. 297, 14 Sup. Ct. Rep. 465; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 493, 38 L. ed. 793, 796, 14 Sup. Ct. Rep. 968; Bacon v. Texas, 163 U. S. 207, 219, 41 L. ed. 132, 137, 16 Sup. Ct. Rep. 1023; McCullough v. Virginia, 172 U. S. 102, 109, 43 L. ed. 382, 384, 19 Sup. Ct. Rep. 134; Walsh v. Columbus, H. Valley & A. R. Co. 176 U. S. 469, 44 L. ed. 548, 20 Sup. Ct. Rep. 393; Sullivan v. Texas, 207 U. S. 423, 52 L. ed. 277, 28 Sup. Ct. Rep. 215; Jefferson Branch Bank v. Skelly, 1 Black, 436, 443, 17 L. ed. 173, 177; Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 77, 44 L. ed. 673, 680, 20 Sup. Ct. Rep. 545; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 147, 45 L. ed. 788, 791, 21 Sup. Ct. Rep. 575; Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; Butz v. Muscatine, 8 Wall. 575, 19 L. ed. 490; Rowan v. Runnels, 5 How. 134, 12 L. ed. 85; Given v. Wright, 117 U. S. 648, 656, 29 L. ed. 1021, 1024, 6 Sup. Ct. Rep. 907; Piqua Branch of State Bank v. Knoop, 16 How. 369, 14 L. ed. 977; Yazoo & M. Valley R. Co. v. Thomas, 132 U. S. 174, 184, 33 L. ed. 302, 306, 10 Sup. Ct. Rep. 68.

The laws existing when and where a contract is made form a part of it, and cannot be changed so as to impair it.

Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; McGahey v. Virginia, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972; Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; Woodruff v. Trapnall, 10 How. 190, 13 L. ed. 383; Furman v. Nichol, 8 Wall. 44, 19 L. ed. 370; Walker v. Whitehead, 16 Wall. 314, 317, 21 L. ed. 357, 358; Von Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403; Tennessee v. Sneed, 96 U. S. 69, 24 L. ed. 610; Memphis v. United States, 97 U. S. 293, 24 L. ed. 920; Memphis v. Brown, 97 U. S. 300, 24 L. ed. 924; Howard v. Bugbee, 24 How. 461, 16 L. ed. 753; Collins v. Collins, 79 Ky. 92; Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547; Blair v. Williams, 4 Litt. (Ky.) 35; Lapsley v. Brashears, 4 Litt. (Ky.) 47; M'Kinney v. Carroll, 5 T. B. Mon. 96; Grayson v. Lilly, 7 T. B. Mon. 6; Griswold v. Hepburn, 2 Duv. 20; Louisville & T. Turnp. Road Co. v. Boss, 19 Ky. L. Rep. 1954, 44 S. W. 981.

The decision of the state court construing statutes will not be allowed by this court to impair the obligation of contracts.

Ohio Life Ins. & T. Co. v. Debolt, 16 How. 432, 14 L. ed. 1003; Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520; Jefferson Branch Bank v. Skelly, 1 Black, 436, 17 L. ed. 173; New Jersey v. Yard, 95 U. S. 104, 24 L. ed. 352; Memphis & C. R. Co. v. Gaines, 97 U. S. 697, 24 L. ed. 1091; Northwestern University v. Illinois, 99 U. S. 309, 25 L. ed. 387; Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; Memphis Gaslight Co. v. Taxing Dist. 109 U. S. 398, 27 L. ed. 976, 3

Sup. Ct. Rep. 205; Vicksburg, S. & P. R. Co. v. Dennis, 116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. Rep. 625; Gray, Limitations of Taxing Power, p. 488.

A change of judicial construction of statutes will not be permitted to impair prior contracts.

Douglass v. Pike County, 101 U. S. 677, 686, 25 L. ed. 968, 971; Rowan v. Runnels, 5 How. 134, 139, 12 L. ed. 85, 87; Ohio Life Ins. & T. Co. v. Debolt, 16 How. 416, 432, 14 L. ed. 997, 1003; Carroll County v. United States, 18 Wall. 71, 21 L. ed. 771; Fairfield v. Gallatin County, 100 U. S. 47, 25 L. ed. 544; Elmwood Twp. v. Marcy, 92 U. S. 289, 23 L. ed. 710; Anderson v. Santa Anna Twp. 116 U. S. 356, 364, 29 L. ed. 633, 635, 6 Sup. Ct. Rep. 413; Weightman v. Clark, 103 U. S. 256, 26 L. ed. 392; Louisiana v. Pilsbury, 105 U. S. 278, 26 L. ed. 1090; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; Thomson v. Lee County, 3 Wall. 327, 18 L. ed. 177; Gray, Limitations of Taxing Power, p. 523; Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; Birrell v. New York & H. R. Co. 198 U. S. 390, 49 L. ed. 1096, 25 Sup. Ct. Rep. 667; Story v. New York Elev. R. Co. 90 N. Y. 122, 43 Am. Rep. 146; Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; Von Hoffman v. Quincy, 4 Wall. 535, 548, 18 L. ed. 403, 408; Kuhn v. Fairmount Coal Co. 215 U. S. 359, 54 L. ed. 233, 30 Sup. Ct. Rep. 140; Chicago v. Sheldon, 9 Wall. 50, 19 L. ed. 594; Chesapeake & O. Canal Co. v. Baltimore & O. R. Co. 4 Gill & J. 1; Canal Co's Case, 83 Md. 626, 35 Atl. 161, 365, 581; State v. Miller, 50 Mo. 129; Forest Products Co. v. Russell, 161 Fed. 1004; Carroll County v. Smith, 111 U. S. 562, 28 L. ed. 519, 4 Sup. Ct. Rep. 539; Francis v. Francis, 203 U. S. 233, 242, 51 L. ed. 165, 168, 27 Sup. Ct. Rep. 129; Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520; Havemeyer v. Iowa County, 3 Wall. 294, 295, 18 L. ed. 38, 39; Lee County v. Rogers, 7 Wall. 181, 19 L. ed. 160; Kenosha v. Lamson, 9 Wall. 477, 19 L. ed. 725; Olcott v. Fond du Lac County, 16 Wall. 678, 21 L. ed. 382; Taylor v. Ypsilanti, 105 U. S. 60, 26 L. ed. 1008; German Sav. Bank v. Franklin County, 128 U. S. 526, 32 L. ed. 519, 9 Sup. Ct. Rep. 159; Folsom v. Township 96, 159 U. S. 611, 40 L. ed. 278, 16 Sup. Ct. Rep. 174; Murray v. Wilson Distilling Co. 92 C. C. A. 1, 164 Fed. 1.

The plaintiff in error is protected by the 14th Amendment of the national Constitution.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451; American & F. Christian Union v. Yount, 101 U. S. 352, 25 L. ed. 888; Lathrop v. Commercial Bank, 8 Dana, 114, 33 Am. Dec. 481.

The 14th Amendment requires more than the "due process of law" theretofore required.

Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. ed. 1233; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; United States v. New York, N. H. & H. R. Co. 165 Fed. 746.

A "day in court" in the state court does not make this article 3, and the proceedings thereunder, constitutional or valid.

Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; Brannon, 14th Amend. p. 97; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108.

The general rule that this court will accept without question the decision of a state court that a state statute conforms to the state Constitution does not apply to the question now before the court.

Head v. Amoskeag Mfg. Co. 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441; Gelpcke v. Dubuque, 1 Wall. 210, 17 L. ed. 527; Douglass v. Pike County, 101 U. S. 677, 686, 25 L. ed. 968, 971; Fairfield v. Gallatin County, 100 U. S. 47, 25 L. ed. 544.

The judgment of a court of the state is void when it denies "due process of law."

Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 15, 51 L. ed. 345, 348, 27 Sup. Ct. Rep. 236; Ex parte Virginia, 100 U. S. 339, 346, 347, 354, 25 L. ed. 676, 679, 680, 682, 3 Am. Crim. Rep. 547; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Gibson v. Mississippi, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545; Bradley v. Lightcap, 195 U. S. 1, 49 L. ed. 65, 24 Sup. Ct. Rep. 748; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Union Bank v. Oxford, 90 Fed. 7; Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546; Re Tiburcio Parrott, 6 Sawy. 349, 1 Fed. 481, Rail-

road & Teleph. Cos. v. Board of Equalizers, 85 Fed. 302; Meacham v. Bear Valley Irrig. Co. 145 Cal. 606, 68 L.R.A. 600, 79 Pac. 281; University of the South v. Jetton, 155 Fed. 182; Scott v. McNeal, 154 U. S. 34, 46, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; Thompson v. Whitman, 18 Wall. 457, 468, 21 L. ed. 897, 901; Rose v. Himely, 4 Cranch, 241, 269, 2 L. ed. 608, 617; Williamson v. Berry, 8 How. 495, 540, 12 L. ed. 1170, 1189; Story, Const. 1313; Mills v. Duryee, 7 Cranch, 481, 484, 3 L. ed. 411, 413; Galpin v. Page, 18 Wall, 350, 365, 366, 368, 21 L. ed. 959, 962, 963; Poindexter v. Greenhow, 114 U. S. 271, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; Guthrie, 14th Amend. p. 73; Twining v. New Jersey, 211 U. S. 100, 101, 53 L. ed. 106, 107, 29 Sup. Ct. Rep. 14; McCracken v. Mercantile Trust Co. 84 Ky. 352, 1 S. W. 585; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 234, 235, 41 L. ed. 983, 984, 17 Sup. Ct. Rep. 581; A. Backus Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 565, 42 L. ed. 853, 857, 18 Sup. Ct. Rep. 445; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 36, 52 L. ed. 78, 87, 28 Sup. Ct. Rep. 7, 12 A. & E. Ann. Cas. 757.

The decision of this court in King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925, does not tend to sustain the statute and proceedings thereunder in the cases now at bar.

This is true: (a) because the Constitution and statutes construed in King v. Mullins, and the proceedings thereunder, contained none of the worst atrocities shown in the cases now at bar; and (b) because this court, in King v. Mullins, passed only upon the question whether, in that case, there was a sufficient "day in court" to constitute due process, taken in connection with the other conditions there shown.

The plaintiff in error has been denied due process of law and equal protection of the laws by the provisions of the article:

(a) By the unconstitutional discriminations.

(b) By unconstitutional duplicate taxation.

Allen v. Perrine, 103 Ky. 516, 41 L.R.A. 351, 45 S. W. 500; Holzhauer v. Newport, 94 Ky. 396, 22 S. W. 752; Montgomery v. Montgomery, 119 Ky. 761, 78 S. W. 465, 80 S. W. 1108; Minix v. Macoffin County, 17 Ky. L. Rep. 628, 32 S. W. 165, 749; Cooley, Taxn. 398, 399; Livingston v. Paducah, 80 Ky. 656, 659; Standard Oil Co. v. Com. 119 Ky. 75, 82 S. W. 1020; Com. ex rel. McElroy v. Walsh, 133 Ky. 103, 117 S. W. 398.

(c) By allowing a hearing upon the claim of unconstitutionality only at the risk, if mistaken, of being subjected to confiscation of its whole property.

Ex parte Young, 209 U. S. 147, 148, 52 L. ed. 723, 724, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas. 764; Cotting v. Kansas City Stock Yards Co. 183 U. S. 79, 99, 100, 102, 46 L. ed. 92, 105, 106, 22 Sup. Ct. Rep. 30; Mercantile Trust Co. v. Texas & P. R. Co. 51 Fed. 543; Louisville & N. R. Co. v. McChord, 103 Fed. 223; Consolidated Gas Co. v. Mayer, 146 Fed. 153; McGahey v. Virginia, 135 U. S. 662, 694, 34 L. ed. 304, 314, 10 Sup. Ct. Rep. 972; Central R. Co. v. Wright, 207 U. S. 127, 52 L. ed. 134, 28 Sup. Ct. Rep. 47, 12 A. & E. Ann. Cas. 463; Ex parte Wood, 155 Fed. 190.

Tax laws are void when taxation is a mere pretext for confiscation for the benefit of private persons.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; McGehee, Due Process of Law, p. 255; Robinson v. Swope, 12 Bush, 21; Hancock Stock & Fence Law Co. v. Adams, 87 Ky. 417, 9 S. W. 246, 8 Cyc. Law & Proc. p. 1127; Society for Propagation of the Gospel v. New Haven, 8 Wheat. 464, 5 L. ed. 662; Proprietors of Kennebec Purchase v. Laboree, 2 Me. 275, 11 Am. Dec. 79; Newland v. Marsh, 19 Ill. 385; Lowe v. Harris, 112 N. C. 481, 22 L.R.A. 379, 17 S. E. 540; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Graded School Dist. No. 2 v. Bracken Academy, 95 Ky. 436, 26 S. W. 8; Beekman v. Saratoga & S. R. Co. 3 Paige, 45, 22 Am. Dec. 679; Brookhaven v. Smith, 188 N. Y. 74, 9 L.R.A. (N.S.) 326, 80 N. E. 665, 11 A. & E. Ann. Cas. 1; Maguiar v. Henry, 84 Ky. 13, 4 Am. St. Rep. 182; Standard Oil Co. v. Com. 119 Ky. 75, 82 S. W. 1020; Louisville v. Cochran, 82 Ky. 27.

The "police power" resides with the legislature, and not with the courts, and the latter cannot justify enforcing a statute as a police measure by merely construing it to be such, contrary to the true intent as found by this court.

Western Turf. Asso. v. Greenberg, 204 U. S. 359, 51 L. ed. 520, 27 Sup. Ct. Rep. 384.

Even if this article 3 were an attempted exercise of the police power, it would not be superior to the national Constitution.

1 Thayer, Cases on Const. Law, p. 742, note; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Fletcher v. Peck, 6 Cranch, 135, 3 L. ed. 177; Legal Tender Cases, 12 Wall. 581, 20 L. ed. 322; Calder v. Bull, 3 Dall. 388, 1 L. ed. 649; Poindexter v. Greenhow, 114 U. S. 293, 297, 306, 29 L. ed. 193, 195, 198, 5 Sup. Ct. Rep. 903, 962; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 237,

41 L. ed. 985, 17 Sup. Ct. Rep. 581; Terrett v. Taylor, 9 Cranch, 50, 52, 3 L. ed. 653, 654; Wilkinson v. Leland, 2 Pet. 627, 658, 7 L. ed. 542, 553; Logan v. Postal Teleg. & Cable Co. 157 Fed. 571; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 331, 29 L. ed. 636, 644, 6 Sup. Ct. Rep. 334, 388, 1191; Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 593, 598, 50 L. ed. 596, 609, 611, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; United States v. Delaware & H. Co. 164 Fed. 225; Yesler v. Washington Harbor Line, 146 U. S. 655, 36 L. ed. 1122, 13 Sup. Ct. Rep. 190; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 658, 22 L. ed. 459; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 667, 29 L. ed. 516, 522, 6 Sup. Ct. Rep. 252; McGehee, Due Process of Law, p. 205; Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43; Davidson v. New Orleans, 96 U. S. 97, 101, 102, 24 L. ed. 616, 618, 619; Tracy v. Ginzberg, 205 U. S. 170, 178, 51 L. ed. 755, 760, 27 Sup. Ct. Rep. 461; New York ex rel. Silz v. Hesterberg, 211 U. S. 39, 53 L. ed. 79, 29 Sup. Ct. Rep. 10; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; United States v. Arredondo, 6 Pet. 691, 8 L. ed. 547; Mead v. Portland, 200 U. S. 148, 50 L. ed. 413, 26 Sup. Ct. Rep. 171; Society for Propagation of the Gospel v. New Haven, 8 Wheat. 492, 5 L. ed 669; Com. v. Alger, 7 Cush. 53; Doe ex dem. Gaines v. Buford, 1 Dana, 490; Com. v. International Harvester Co. 131 Ky. 551, 133 Am. St. Rep. 256, 115 S. W. 703; Litchfield v. Bond, 186 N. Y. 66, 78 N. E. 719; State v. Post, 55 N. J. L. 264, 26 Atl. 683; Harvey v. Hoffman, 108 Va. 626, 62 S. E. 371; California Reduction Co. v. Sanitary Reduction Works, 61 C. C. A. 91, 126 Fed. 29, affirmed in 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18, reversing 139 Cal. 179, 96 Am. St. Rep. 95, 72 Pac. 970; Daly v. Elton, 195 U. S. 242, 49 L. ed. 177, 25 Sup. Ct. Rep. 22, reversing 139 Cal. 216, 72 Pac. 1097.

If private property be taken, compensation must be made.

Pumpelly v. Green Bay & M. Canal Co 13 Wall. 166, 20 L. ed. 557.

Confiscation is justifiable only under the war power.

Miller v. United States (Page v. United States) 11 Wall. 268, 20 L. ed. 135; State v. Galveston, H. & S. A. R. Co. 100 Tex. 153, 97 S. W. 71.

Even treason does not justify confiscation.

Bigelow v. Forrest, 9 Wall. 339, 19 L. ed. 696; Day v. Micou, 18 Wall. 160, 162, 21 L. ed. 862; Ex parte Lange, 18 Wall. 176, 177, 21 L. ed. 878, 879; Wallach v. Van Riswick, 92 U. S. 202, 23 L. ed. 473; Miller v. United States (Page v. United States) 11 Wall. 268, 20 L. ed. 135; Jenkins v. Collard, 145 U. S. 552, 36 L. ed. 814, 12 Sup. Ct. Rep. 868; Doe ex dem. Gaines v. Buford, 1 Dana, 492; Louisville School Board v. King, 127 Ky. 824, 15 L.R.A.(N.S.) 379, 107 S. W. 247.

Mr. Hannis Taylor also filed a brief for plaintiff in error in Nos. 47 and 48:

When the highest court of a state authoritatively construes and enforces a state law in such manner as to take away a Federal right or immunity, this court may strike down such construction, so as to preserve such right or immunity without putting the stamp of nullity upon the state law in any other particular.

Twining v. New Jersey, 211 U. S. 90, 53 L. ed. 102, 29 Sup. Ct. Rep. 14; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676, 3 Am. Crim. Rep. 547; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

It has ever been axiomatic here that our entire state system rests upon English law, and that the sovereignty of the states is so limited and fettered by that law that no sovereign act that attempts to affect the security of life and property can be in accordance with the law of the land, or its equivalent, due process of law, if it finds no sanction in the history of English law as it existed in the mother country and in the colonies, prior to the adoption of our Federal Constitution.

Martin v. Waddell, 16 Pet. 410, 10 L. ed. 1012; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

No one who knows anything of the history of English law will for a moment contend that the state power in question to work a forfeiture or outlawry as a means of settling land titles, or as a means of collecting taxes, was ever exercised, either by the Crown or Parliament.

Martin v. Snowden, 18 Gratt. 100; Bennett v. Hunter, 9 Wall. 326, 19 L. ed. 672.

There can be no justification for the contention that this court has no jurisdiction to determine whether or no the transfer of property under the authority of a state, pretending to exercise this confiscatory power by "legislative fiat," is not an open violation of the 14th Amendment.

Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257.

No state has derived from English law the right to forfeit land or to outlaw the title thereto, by legislative fiat, as a means of collecting the taxes thereon.

Martin v. Snowden, 18 Gratt. 100; Bennett v. Hunter, 9 Wall. 336, 19 L. ed. 675.

There can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

Private rights cannot be devested except by the "law of the land,"—the ancient and customary laws of the English people.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

The 14th Amendment in question applies whenever there is an abuse of law amounting to confiscation of property or a deprivation of personal rights.

Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

The precise question was more exactly met in Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533, when this court, after declaring that a state legislature in the matter of taxation may impose "all such regulations, and those of like character, so long as they proceed within reasonable limits and general usages," held that it could not "make hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our government."

Under the due process of law clause of the 5th Amendment, no landowner can be deprived of his land under a tax proceeding, either by sale or forfeiture, when it is made to appear that such landowner stood ready to pay the tax prior to the proceeding by which his title was devested.

United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240.

The 14th Amendment operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property as is afforded by the 5th Amendment against similar legislation by Congress.

Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; McGehee, Due Process of Law, p. 35.

A state's full control over the procedure in its courts is subject to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution.

Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148, 5 Am. Crim. Rep. 218; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; West v. Louisiana, 194 U. S. 263, 48 L. ed. 969, 24 Sup. Ct. Rep. 650; Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841; McGehee, Due Process of Law, pp. 170, 425.

Mr. **David W. Baird** argued the cause, and, with Messrs. John F. Hager, J. W. M. Stewart, Z. T. Vinson, James Breathitt, James H. Jeffries, John H. Holt, and Aaron Kohn, filed a brief for defendant in error in Nos. 47 and 48. For their contentions, see their briefs as reported supra, p. 140.

Mr. Justice **Day** delivered the opinion of the court:

These are writs of error to the court of appeals of the state of Kentucky, and involve the constitutionality of an act of the legislature of the state, passed March 15, 1906, entitled, "An Act Relating to Revenue and Taxation." Acts of 1906, pp. 88–248. Article 3 is brought in question in these cases. It is set forth in full in the opinion of the court of appeals of Kentucky in case No. 47. 127 Ky. 667, 106 S. W. 260, 108 S. W. 1138. Its salient features are:

Section 1 of the article makes it the duty of every owner or claimant of land to pay the taxes which have been assessed, and which should have been assessed, against him, and those under whom he claims, as the owner or claimant *thereof, as of the[143 15th day of September, 1901, 1902, 1903, the 1st day of September, 1904, and the 1st day of September, 1905, and provides that if the owner or claimant, or those under whom he claims, have failed to list the land, or any part thereof, for taxation, as of said dates, or any of them, it shall be his duty to have the same assessed and listed for taxation as is provided in the act, as of each of said dates for which the assessment has been omitted, and to pay the taxes, interest, and penalties thereon. It is pro-

vided that the fact that the land has been listed for taxation, or the taxes paid thereon by another claimant, shall not relieve against the duty imposed by the act; and if any any such owner or claimant, or those under whom he claims, has failed to list the land for assessment and taxation, as of any three of said dates, or has failed to pay the taxes charged, or which should have been charged against him, or those under whom he claims, as the owner or claimant thereof upon said dates, for any three of the years for which said assessments were or should have been made, said owner and claimant and those under whom he claims are declared delinquent; and such failures, or either of them, shall be cause for forfeiture and transfer to the commonwealth of his said claim and title thereto, in a proceeding to be instituted for that purpose, as required in the act. But it is provided that the cause for forfeiture shall be extinguished if the owner or claimant, his heirs, representatives, or assigns, shall, within the time and in the manner provided in the article, cause the land to be assessed for taxation, and, on or before March 1, 1907, pay the taxes charged and which should have been charged against him, or against those under whom he claims, as the owner or claimant thereof, for each and all of said five years for which he or those under whom he claims are delinquent, together with the interest and penalties provided by law in the case of the redemption of land sold for the nonpayment of taxes.

144] *Section 2 provides for the ascertainment of the amount of taxes unpaid and the assessment required by the preceding section by a proceeding in the county court where the land lies, upon the application of the owner or claimant, by a petition filed in the court on or before January 1, 1907, in which the land sought to be charged shall be described, so as to be identified, and the years for which it was listed and the years for which the taxes were not paid shall be stated; in which petition shall also be stated the grant under which petitioner claims, if he derives title from a grant, and the instrument through or the manner in which the title devolved upon him. A hearing is provided upon a day to be fixed by the applicant, not less than ten nor more than twenty days after the filing of the petition, after notice to the county attorney, who is required to attend and represent the state and county.

The county court is required to decide upon the application in a summary manner, upon such evidence as may be offered, having regard to the value of adjacent property; to ascertain the amount of unpaid taxes which the applicant and those under whom he claims should have paid for any and all of said years, whether assessments were originally made as of said dates or not. The court is required to find the proportion of the taxes due the county and state, at the rates fixed by law for such years; and to make a record of its findings, and certify the same to the auditor of the state and county clerk. Should the court find that the land has been assessed against such owner or claimant, or those under whom he claims, as of any of said dates, it shall accept such assessment as a basis upon which to ascertain the amount of unpaid taxes for the year such assessment shall have been made.

Provision is made for an appeal to the circuit court of the county; also for the payment of the taxes as ascertained, and for compensation to the officers whose services are required.

*Section 3 provides the method of[145 procedure against the owner or claimant by the commonwealth's attorney, in case such owner or claimant fails to have the land assessed, or fails to pay the taxes charged or which should have been charged against him, or those under whom he claims, and it is made the duty of the commonwealth's attorney to institute in the circuit court of the county in which the land or any part thereof lies, a proceeding in equity in the name of the commonwealth of Kentucky, as plaintiff, against the said tract of land and the owners or claimants of said land, as defendants, naming them if their names are known to him, and if their names are unknown to him, designating them as the unknown owners and claimants thereof; which proceeding is for the purpose of declaring the title or claim of said defendants forfeited to the commonwealth, and for selling the same. It is provided that this suit shall be proceeded with to final judgment in all respects as other equity causes, so far as applicable.

Provision is made for posting the notice and a copy of the petition at the door of the courthouse.

The petition is required to allege the facts constituting the cause of forfeiture under the provisions of the article, and there shall be filed with the petition a copy of the grant or instrument upon which the title or claim sought to be forfeited is based; and no other title, claim, or possession, or continuity thereof, whether owned or claimed by the defendant or by others, is to be forfeited or in any manner affected by the proceeding. If judgment is in favor of forfeiture, it is provided that the judgment shall operate as a transfer to and vesting in the commonwealth of the

title and claim of each and all the defendants, and those under whom they claim, without execution of deed or other instrument. If the court finds the title is not subject to forfeiture under the provisions of the article, it shall so adjudge, and dismiss the petition of the plaintiff.

It is provided that judgments under the 146]article shall be *conclusive as against all defendants, including infants, lunatics, and married women, and shall not be subject to certain provisions of the Code of Practice.

An appeal is provided to the court of appeals within thirty days after judgment.

In § 4 provision is made for the purchase back of the forfeited title, and upon the proper pleadings and hearings the court is authorized to ascertain and adjudge the amount of unpaid taxes charged, and that ought to have been charged, against the defendant and those under whom he claims, as the owner or claimant of said land, for the fifty years immediately preceding the filing of such counterclaim, and if the court finds and adjudges that said defendant is the owner of the title so forfeited to and vested in the commonwealth, it shall enter judgment against such defendant for a sum equal to the amount of the unpaid taxes charged, and that ought to have been charged, against said defendant, and those under whom he claims as the owner or claimant of the land, for said fifty years, together with interest at the rate of 15 per centum per annum from the time the said unpaid taxes for said several years were due and the costs of the proceedings, including a reasonable fee to the commonwealth's attorney. No person is to be entitled to purchase back from the commonwealth the title so forfeited except such defendant as may, but for such forfeiture, establish in such proceeding a title thereto in himself upon which he could maintain an action of ejectment. Upon payment of the amount of the judgment, the court is required to enter a judgment retransferring to such defendant the title and claim so forfeited to and vested in the commonwealth.

Provision is made for the sale of the said title and claim in the event that the judgment is not paid.

The 5th section provides that any owner or claimant who institutes a proceeding allowed by § 2 of the article, who does not, within the time there limited, pay the 147]*amount ascertained as charged or chargeable against him and those under whom he claims, as the owner or claimant of the land, shall not be allowed to purchase back, under the proceedings authorized by § 4 of the article.

Section 6 of the article provides that all title and claim proceeded against under the article, and forfeited to and vested in the commonwealth, and not purchased back by the owner or claimant thereof, as authorized in § 4, whether such forfeiture be for past delinquencies or for future delinquencies, as authorized under § 10, is transferred to and vested in any person for so much thereof as such person, or those under whom he claims, has had the actual adverse possession for five years next preceding the judgment of forfeiture, under claim or color of title, derived from any source whatsoever, and who, or those under whom he claims, shall have paid taxes thereon for the five years in which such possession may have been or may be held; and in those in privity with such person, his heirs, representatives, or assigns, as to the mineral or other interests or rights in or appurtenant to such land.

Section 7 provides that all title and claim to land transferred to and vested in the commonwealth, under the provisions of this article, and not purchased back by the owner or claimant, as provided by § 4, and not vested in the occupant, as provided in § 6, shall be sold to the highest and best bidder for cash in hand, which sale shall be made pursuant to a judgment of the circuit court in said action, and shall be at public auction at the door front of the courthouse upon the first day of some regular term of the circuit or county court, after notice of sale shall have been advertised in the manner required by law in the case of the sales of land under execution. The commissioner shall report the sale to the court for its confirmation, and, when confirmed, the court shall order the commissioner to make a deed to the purchaser, which deed shall operate to transfer to the purchaser such title and claim to the land *so forfeited to and[148 vested in the commonwealth as remains in it after the operation of § 6 of the article.

The money realized from the sale is to be distributed for the payment of costs including the commissioner's and attorneys' fee; second, to the county and state the proportion to which each may be entitled, together with interest and penalty, as in this article provided; third, the remainder to be paid over to the former owner or claimant or his personal representative or assigns.

Section 8 provides that no action to enforce a forfeiture, as authorized and provided in the article, shall be instituted after the expiration of five years from the accrual of the right thereto.

Section 9 provides that no owner or claimant of any land in the commonwealth shall be allowed to prevent the operation of the article by the payment, after January 1, 1906, of any amount less than the whole

of the unpaid taxes, interest, and penalties provided by law, that were charged and that should have been charged against said owner or claimant of said land and those under whom he claims, as of each and all of said five dates first mentioned in § 1 of the article; and where such payment is made after the passage of the act, it is provided that the amount to be paid shall be ascertained and payment made as in the article provided.

Section 10 provides that when, for any five successive years after the 1st day of August, 1906, any owner or claimant of or to any land in the commonwealth shall fail to list the same for taxation and cause himself to be charged with the taxes properly chargeable thereon, or fail to pay the same, as provided by law, then such failure shall be cause for the forfeiture of his title and claim thereto, and the transfer of the same to the commonwealth of Kentucky; and it is made the duty of the commonwealth's attorney to institute an action in the circuit court of the county wherein the land or 149]any part thereof lies, for the *purpose of declaring the forfeiture, and for the sale of such parts thereof as, under the provisions of the article, are liable to sale, such actions and proceedings to conform to the provisions of article 3 as far as the same may be applicable.

Case No. 22 originated in a petition filed by the commonwealth of Kentucky through the commonwealth's attorney, against the Kentucky Union Company, for the forfeiture, for failure to list and pay taxes upon some 40,000 acres of land in Leslie county, Kentucky, granted by letters patent of the commonwealth of Kentucky, June 12, 1872, the proceedings resulting in a judgment of forfeiture, which was affirmed in the court of appeals of Kentucky, 128 Ky. 610, 108 S. W. 931, 110 S. W. 398.

Case No. 47 was a petition brought by the Eastern Kentucky Coal Lands Corporation under article 3, for the assessment and taxation of the tracts of land in controversy, consisting of large bodies of land which the Eastern Kentucky Coal Lands Corporation claimed to be the owners of under patents issued under Virginia warrants, principally antedating the year 1789; and while the petition was dismissed upon the ground that the same did not conform to the requirements of the law, the court of appeals of Kentucky found that the constitutionality of the act was necessarily involved, and in an elaborate opinion by the chief justice sustained the validity of the law. 127 Ky. 667, 106 S. W. 260, 108 S. W. 1138.

Case No. 48 was a proceeding by the commonwealth's attorney in behalf of the state, against the Eastern Kentucky Coal Lands Corporation and others, for the forfeiture of the lands described, for the failure to list the lands and pay taxes as required by article 3 of the act of March 15, 1906, which resulted in the affirmance of the judgment rendered in the lower court, forfeiting the title of the Eastern Kentucky Coal Lands Corporation to lands held in Pike county, Kentucky, under the old Virginia *titles, and aggregating over 300,000[150 acres; and while the case is not officially reported, the opinion of the Kentucky court of appeals is found in 33 Ky. L. Rep. 857, 111 S. W. 362.

The conditions which led to the passage of article 3 of the act of March, 1906, are elaborately set forth in the opinion of the chief justice in 127 Ky. supra. They are also more briefly stated in a report of the commission appointed by the legislature of Kentucky to investigate and revise the taxing laws of the state, upon whose recommendation the act in question was passed.

It would too greatly lengthen this opinion to quote the history of the legislation so fully set forth in the opinion of the court of appeals. It appears that the tracts in question were formerly a part of the state of Virginia, and prior to 1792, when Kentucky was admitted into the Union, the state of Virginia had granted large tracts of land in that part of the territory which is now eastern Kentucky. These grants, often conflicting and overlapping, were made for small sums and for large tracts, the grants ranging from 5,000 acres to 500,000 acres. Similar grants were made in what is now the southwestern portion of the state of West Virginia. The regions covered were at the time unsettled and the lands of little present value. They were not taken possession of by the original patentees or those claiming under them, nor were the taxes paid thereon, nor, up to the passage of the act of 1906, had taxes in any considerable amount been paid upon such lands.

A number of acts were passed by the legislature of Kentucky, seeking to reach these lands for taxation. Some of them were held unconstitutional, and up to the passage of this act no effectual means has been found of subjecting these lands to the payment of public taxes. Some of the same lands were afterwards granted by the state of Kentucky, and very considerable portions of them have been occupied under grants from that state, and have been continuously *occupied and cultivated by those[151 claiming under such grants.

With these lands thus covered by conflicting grants from the state of Virginia and the later grants under the authority of

the state of Kentucky, and in view of the failure of former legislation to require the same to be taxed, and the fact that the old grants were outstanding and affording no revenue to the state, and encumbering the titles of the occupants of the land and those under whom they claimed, it was sought by the act of 1906 to subject these lands to taxation, and to forfeit these old titles which had not been effectually subjected to the taxing laws of the state, and to make the forfeited titles inure to the benefit of the occupying claimants, who had paid the taxes thereon in the manner provided by the law. Similar legislation, as we shall have occasion to see, was adopted in the state of West Virginia.

In elaborate arguments at the bar, and in briefs covering many pages, a most severe arraignment is made of the drastic character of this legislation, and its alleged unfairness to the claimants of old titles under grants from the state of Virginia.

This court is concerned only with the constitutionality of the law in view of applicable provisions of the Federal Constitution. The state is left to choose its own methods of taxation and its form and manner of enforcing the payment of the public revenues, subject, so far as the Federal power is concerned, to the restricting regulations of the Constitution of the United States.

Passing questions which are purely of a state character, and which were ruled upon against the contentions of the plaintiffs in error by the court of appeals of Kentucky, we come to a consideration of the questions of a nature involving consideration of the Constitution of the United States.

It is first contended that the law in ques-
152]tion imposes *penalties of a character which could not theretofore have been imposed upon the owner of the land, as a condition of saving the title from forfeiture under the provisions of article 3. The court of appeals of Kentucky having intimated that the part of the law requiring the payment of penalty and interest was separable from the other features thereof, upon the rehearing, in 128 Ky. 610–624, 108 S. W. 931, 110 S. W. 398, held in answer to the contention that the taxes, interest, and penalties provided by the act visited upon the delinquent greater penalties than he was subject to prior to the passage of the act, that the article, in so far as it required the payment of interest and penalties for the years covered by the act, is inoperative, and the delinquents for those years would be required to pay only taxes, without interest or penalty; and that the elimination of the interest and penalies for those years did not affect the other provisions of the article with respect to those years or years subsequent thereto.

We must therefore take the act as the court of appeals of Kentucky has construed it, stripped of the requirement to pay interest and penalties as a condition of saving the lands from forfeiture.

It is nevertheless contended—and this is the first objection of a Federal nature—that the law is *ex post facto*. It is to be noted in this connection that the law does not undertake to forfeit the lands only because of things done or undone prior to its passage, but because of the failure of the claimant to comply with the provisions of the law; and he is given until the 1st of January, 1907, in which to file a petition for the ascertainment of the taxes assessable and due upon his title, and until March 1, 1907, to pay the back taxes. But an *ex post facto* law and a retroactive law are entirely different things.

Laws of a retroactive nature, imposing taxes or providing remedies for their assessment and collection, and not impairing vested rights, are not forbidden by the Federal *Constitution. League v. Texas,[153 184 U. S. 156, 46 L. ed. 478, 22 Sup. Ct. Rep. 475. This court had occasion in a very early case to consider the meaning of an *ex post facto* law as the term is used in the Federal Constitution, prohibiting the states from passing any law of that character. Calder v. Bull, 3 Dall. 386–390, 1 L. ed. 648–650. In that case it held that such laws, within the meaning of the Federal Constitution, had reference to criminal punishments, and did not include retrospective laws of a different character. That case has been cited and followed in later cases in this court. See Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443; Orr v. Gilman, 183 U. S. 278, 285, 46 L. ed. 196, 200, 22 Sup. Ct. Rep. 213.

In the latter case a former decision of this court, in Carpenter v. Pennsylvania, 17 How. 456, 463, 15 L. ed. 127, 129, opinion by Mr. Justice Campbell, was quoted with approval. It was therein said:

"The debates in the Federal convention upon the Constitution show that the terms '*ex post facto* laws' were understood in a restricted sense, relating to criminal cases only, and that the description of Blackstone of such laws was referred to for their meaning. 3 Madison's Papers, 1399, 1450, 1579.

"This signification was adopted in this court shortly after its organization, in opinions carefully prepared, and has been repeatedly announced since that time. Calder v. Bull, 3 Dall. 386, 1 L. ed. 648;

Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Watson v. Mercer, 8 Pet. 88, 8 L. ed. 876; Charles River Bridge v. Warren, 11 Pet. 420, 9 L. ed. 773."

The Kentucky statute, as construed by the court of appeals of Kentucky, imposes no penalty or punishment of a criminal nature, and is not an *ex post facto* law within the meaning of the Federal Constitution.

It is next contended that the Kentucky statute under consideration denies to the plaintiffs in error due process, of law, in violation of the 14th Amendment to the Constitution.

This court has had frequent occasion to comment upon the effect of this Amend-[154]ment in respect to laws of the *states for the levy and collection of taxes. A summary procedure has been sustained where the person taxed has been allowed opportunity to be heard in opposition to the enforcement of taxes and penalties against him. In McMillen v. Anderson, 95 U. S. 37, 41, 24 L. ed. 335, 336, this court said:

"The mode of assessing taxes in the states by the Federal government, and by all governments, is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary, or unequal, or illegal. It must, under our Constitution, be lawfully done."

See, in this connection, Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390; Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 Sup. Ct. Rep. 261, and cases therein cited.

Summary proceedings adapted to the circumstances, and permitting the taxpayer to appear and be heard at some stage of the proceedings, have been held to satisfy the requirements of due process of law. Security Trust & S. V. Co. v. Lexington, 203 U. S. 323, 51 L. ed. 204, 27 Sup. Ct. Rep. 87.

The state of West Virginia, by its Constitution, in 1872, inaugurated a system of forfeiture of lands for nonpayment of taxes in some respects analogous to the one under consideration now. The West Virginia system was before this court in King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925. In that case due process of law, in connection with the taxing system of the state, was given full consideration; and the Constitution of West Virginia, when read in connection with the statutes of the state, was held to afford due process of law. The Constitution of the state of 1872, by article 13, § 6, made it the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with the taxes thereon and pay the same; and when, for any five successive years after the year 1869, the owner of any tract of land containing 1,000 acres or more should not have been charged on such books with the state tax on said land, then, by operation of the Constitution, the land was forfeited and the title vested in the *state.[155] The statute of the state provided for proceedings by the commissioner of the school fund to subject forfeited lands to sale, in which proceeding the owner was permitted to intervene by petition and obtain a redemption of his land from the forfeiture claimed by the state; and after a full discussion of the subject and the bearings of the 14th Amendment of the Constitution upon the statute, Mr. Justice Harlan, who delivered the opinion of the court, said:

"For the reasons stated, we hold that the system established by West Virginia, under which lands liable to taxation are forfeited to the state by reason of the owner not having them placed or caused to be placed, during five consecutive years, on the proper land books for taxation, and caused himself to be charged with the taxes thereon, and under which, on petition required to be filed by the representative of the estate in the proper circuit court, such lands are sold for the benefit of the school fund, with liberty to the owner, upon due notice of the proceeding, to intervene by petition and secure a redemption of his lands from the forfeiture declared by paying the taxes and charges due upon them, is not inconsistent with the due process of law required by the Constitution of the United States or the Constitution of the state."

In the present case the statute does not undertake to forfeit the lands for the failure to register them and pay the taxes upon them for the years stated, without a judicial proceeding by which the owner of the title may have the taxes assessed, and, upon payment thereof, the forfeiture avoided; and the forfeiture is declared only after a judicial proceeding instituted by the commonwealth's attorney, in which there is opportunity for a hearing and after which the forfeiture may be declared.

The case of King v. Mullins, supra, was followed and approved in this court in King v. West Virginia, 216 U. S. 92, 54 L. ed. 396, 30 Sup. Ct. Rep. 225, and in Fay v. Crozer, 217 U. S. 455, 54 L. ed. 837, 30 Sup. Ct. Rep. 568.

*It is, however, insisted that although[156] a hearing before forfeiture is provided, the proceedings are so arbitrary and oppressive as to deprive the owner of due process of

law, notwithstanding there is opportunity to appear and contest the forfeiture.

As bearing upon this alleged lack of due process in this statute, it is contended that it cuts down the period of limitation in which actions may be brought by the holder of the title to recover against adverse claimants, and this because of the short time given in which to take proceedings against such claimants. The argument is that as § 6 of article 3 transfers the forfeited title to occupying claimants in actual adverse possession for five years next preceding the judgment of forfeiture, and as the statute of limitations for the recovery of real property in Kentucky is fifteen years, there were still ten years in which to have sued an occupying claimant of five years' standing, but because of the action required to prevent forfeiture under article 3, which it is contended under the Kentucky Constitution did not take effect until ninety days after the adjournment of the session at which it was passed, there was visited upon the owner the necessity of terminating the adverse possession by an action brought within six and one half months. But we do not perceive in this indirect effect upon the statute of limitations any deprivation of due process of law. The state statute limiting actions between individuals cannot operate to affect the right of the state to require the registration of the lands withheld from taxation, or prevent acts for the summary registration or forfeiture of such lands, wherein, as in the case at bar, an opportunity, not unreasonable in character, is given for compliance with the laws after the same go into effect, and the forfeiture is had upon a proceeding in which the owner of the title is summoned and heard.

A time not unreasonably short for the beginning of actions may be fixed by the legis-
157]lature, having in view particular *conditions, without violating the due process clause. Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365.

Much is said of the purpose of this law not being that of legitimate taxation, but intended to and in its operation having the practical effect of transferring the title of the owners to others. This argument is based upon the provision of the statute which makes the title, when forfeited to the state, inure to the benefit of occupants in possession who have paid the taxes as provided in the act. This feature of the law, in substance, is in the West Virginia Constitution, and was referred to in the opinion in King v. Mullins, supra.

It is not a valid objection to a law of this character that the title forfeited to the state as the result of proper proceedings and due notice to the owner of the title, who is in default for the payment of taxes, may be transferred to others occupying and paying taxes upon the lands, and not in default. That the similar feature of the West Virginia Constitution did not invalidate the law where opportunity was given for a hearing was held in King v. West Virginia, supra, to have been concluded by King v. Mullins, supra, and the same doctrine was applied in Fay v. Crozer, supra. This view may have the effect of subjecting the owner of the title which is forfeited to proceedings which devest his title, notwithstanding another claimant may have paid taxes upon a separate title in the same land; but this consideration does not affect the validity of the law. The state may, so far as the Federal Constitution is concerned, tax each claimant of title upon the same premises, and may, by a proper procedure, devest the owner of one in default.

Much comment is made upon the statement in the opinion of the learned chief justice of Kentucky, who spoke for the court in No. 47, as to the purpose of the state to incidentally "outlaw" the titles claimed under the old Virginia grants for the benefit of occupying claimants, but as *was held in King v. Mullins, and the[158 subsequent cases in this court, following that case, this effect of a valid law of the state having also for its object the subjection of the lands to taxation does not invalidate the law.

Nor do we find valid objection to the constitutionality of the law in the contention that the lands not transferred may be sold without adequate description.

This contention seems to have been made in case No. 22 by objections to the petition for failing to disclose that parts, if any, of the land, were held by occupants who had paid taxes for five years preceding, and by objection to the judgment as erroneous because it did not segregate the parts to which the forfeited title would inure.

No mention appears to have been made of the Federal Constitution in this connection until petition for a rehearing, when it was objected that the statute, in providing for the sale of the forfeited title, furnished no means of identification or description of the land to be sold, nor for such an ascertainment of the holdings of occupying claimants as would enable a purchaser to know what was being offered for sale; and it was urged that a judicial sale in pursuance of such a proceeding would be no less than a sacrifice of the defendant's property, and that such an order would vio-

late the due process of law secured by the Constitution.

In the opinion upon the petition for a rehearing, the court of appeals announced that it found nothing in the statute which deprived the owner of due process of law within the meaning of the 14th Amendment. The court having thus considered the Federal question, the objection is open here.

In the original opinion concerning this objection, the court said:

"So far as disclosed by the record, there is no part of the tract held by occupants. But the court judicially knows, and it was admitted in argument, that practically, if 159]not *quite, all the land described in the petition is adversely held by occupants under claim or color of title. The record shows only that the appellant is the owner or claimant of the title to the tract of land, which is specifically described by metes and bounds, courses and distances, and that appellant has failed to comply with the provisions of the article with respect to the listing of it for taxes and the payment of taxes thereon. The petition contains all the allegations necessary to show that the appellant was delinquent, and its title subject to forfeiture, and the demurrer thereto was therefore properly overruled. Nor is the judgment erroneous on that ground. Certainly the title to the tract of land described in the petition, and which is adjudged to be subject to forfeiture and sale, can be sold by the same description, the purchaser taking that which, under the article, passes at the sale. The doctrine of *caveat emptor* applies in this, as in other proceedings. And the purchaser, and not the occupant, as argued by counsel for appellant, would be required to show, in actions to recover under his purchase, that the land claimed by him was not of the excluded class. The rule is universal that where one seeks to recover under a grant or deed which does not convey all the land within the boundary described, he must show that the land sought to be recovered is within boundary, and without the exclusions. Hall v. Martin, 89 Ky. 9, 11 S. W. 953.

"The act provides that the deed shall transfer to the purchaser the title and claim 'so forfeited and transferred to, and vested in, the commonwealth, as remains in it after the operation of § 6 of this article, and shall so recite.'

"The article, taken as a whole, clearly shows that such was the legislative intent. It is not necessary for the petition to describe more than the tract of land the title to which is sought to be forfeited.

"After the judgment of forfeiture be-160]comes final, the *main purpose to be conserved is the interest of the commonwealth, and circumstances might arise or be shown to exist that would authorize different modes of executing it. We have no hesitancy in holding that it is not necessary for the judgment to ascertain and describe the parts of the tract held by occupants. If, at the hearing, it should be made manifest that the title as to certain parts only of the tract would pass to the purchaser under a sale, the statute would be complied with by a sale of the title covering those parts alone. In any event, it is the duty of the court to prescribe what parts thereof shall be sold, if less than the whole is to be sold. Therefore, the judgment appealed from, in so far as it authorizes the commissioner to sell the tract as a whole or in parcels, to suit the purchaser, is erroneous."

As we construe this part of the opinion, it means that it was not necessary in the petition for forfeiture to point out and describe the parts of the tract held by occupants. But from what is said in the latter part of the paragraph just quoted we think that it is apparent that the defendant might show what parts of the land were subject to sale, if less than the whole was to be sold. That is, while in the absence of a showing in this matter, a sale in gross would be ordered, it was nevertheless open for the defendant to show that only a part of the tract, in view of other provisions of the statute, would be subject to sale. With the opportunity to be thus heard, and have a definite ascertainment of the parts to be sold, we think the statute, as construed by the court of appeals of Kentucky, does not deprive the defendant of due process of law in this respect.

It is alleged that there was an offer to pay the taxes properly assessable against these lands, notwithstanding which they were declared forfeited; but an inspection of the record shows that such offer was in effect an offer of compromise, not justified by the statute, and not in accord with its terms.

*The denial of the prayer of the pe-[161 tition involved in case No. 47, because the same did not contain a description of the land sufficient to identify it, which was the basis of the decision of the Kentucky court of appeals, presents no Federal question. Whether that petition contained an adequate description was a question for the state to determine in the construction of its own statute. There is nothing to show that the ruling made upon that subject was so arbitrary and baseless as to amount to a deprivation of due process of law.

It is next contended that the statute denies the equal protection of the laws within the meaning of the 14th Amendment, be-157

cause it does not apply equally upon all the lands in the state. The fact that in its application it can only meet conditions such as are embraced within the law in a part of the counties of the state does not render it obnoxious to the 14th Amendment. Florida C. & P. R. Co. v. Reynolds, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176.

This court has frequently held that the state may classify the subjects of taxation, so long as all persons similarly situated are treated alike. Michigan C. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459. This law applies with equal force to all who are in a condition to come within its terms.

The fact that the plaintiff in error did not acquire the land until after the delinquencies had occurred cannot prevent the operation of the law against it. In such cases the doctrine of innocent purchasers does not apply. Citizens' Nat. Bank v. Kentucky, 217 U. S. 443, 54 L. ed. 832, 30 Sup. Ct. Rep. 532.

Another ground of objection under the Federal Constitution is insisted upon in the alleged violation of the Virginia compact of 1789, embodied in the Constitution of Kentucky, and held by this court to be a binding contract between the states. By the 7th section of that compact it is provided:

"Sec. 7. Third, that all private rights and interests of lands within the said district 162][Kentucky], derived from the *laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state."

Section 8 provides that a neglect of cultivation or improvement of any land within either the proposed state or the commonwealth of Virginia, belonging to nonresident citizens of the other, shall not subject such nonresidents to forfeiture or other penalty within the term of six years after the admission of the said state (Kentucky) into the Federal Union.

Section 9 provides that no grant of land or land warrant to be issued by the proposed state shall interfere with any warrant theretofore issued from the land office of Virginia, which shall be located on land within the said district, now liable thereto, on or before the 1st day of September, 1791.

This compact has been the subject of frequent consideration in the courts of Kentucky, and more than once in this court.

In the case of Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547, the effect of this compact upon certain laws of the state of Kentucky was considered and determined. The case was twice argued, on the first hearing the opinion being given by Mr. Justice Story, and upon rehearing the opinion was given by Mr. Justice Washington. In that case it was held that the seventh article of the compact meant to secure all private rights and interests derived from the laws of Virginia as they were under the then-existing laws of the state, and that laws of the state of Kentucky which undertook to prevent the owner of the land from a recovery thereof, without certain payments to the tenant in possession, impaired the obligation of the contract, and were therefore null and void.

Under the Kentucky statutes the owner could not recover his property without paying for improvements made by the occupying claimant, and making allowances in connection *therewith, which it was held[163 had the effect of depriving the true owner of the property vested in him under the laws of Virginia at the time the compact became operative in 1789. "He [the owner] is no more bound," said Mr. Justice Story, "by the laws of Virginia to pay for improvements which he has not authorized, which he may not want, or which he may deem useless, than he is to pay a sum to a stranger for the liberty of possessing and using his own property, according to the rights and interests secured to him by those laws. It is no answer that the acts of Kentucky, now in question, are regulations of the remedy, and not of the right to lands. If those acts so changed the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests."

These conclusions were adhered to upon a rehearing, and reaffirmed in the opinion of Mr. Justice Washington.

The Virginia compact came again before this court in the case of Hawkins v. Barney, 5 Pet. 457, 8 L. ed. 190. In that case the validity of a law of Kentucky which undertook to limit the right of bringing suits for the recovery of lands to seven years, instead of twenty, as was the case under the laws of Virginia at the time the compact was made, was sustained. The case of Green v. Biddle was reviewed, and it was said that, "looking through the course of legislation in Virginia, there was found no principle or precedent to support such laws; the court was induced to pass upon them as laws calculated in effect to annihilate the rights secured by the compact, while they avoided an avowed collision with its literal meaning. But in all their reasoning on the subject they will be found to acknowledge that whatever course of legislation could be sanctioned by the

principles and practice of Virginia would be regarded as an unaffected compliance with the compact."

164] *And Mr. Justice Johnson, who spoke for the court in that case, said:

"It can scarcely be supposed that Kentucky would have consented to accept a limited and crippled sovereignty; nor is it doing justice to Virginia to believe that she would have wished to reduce Kentucky to a state of vassalage. Yet it would be difficult, if the literal and rigid construction necessary to exclude her from passing this law were to be adopted,—it would be difficult, I say, to assign her a position higher than that of a dependent on Virginia. Let the language of the compact be literally applied, and we have the anomaly presented of a sovereign state governed by the laws of another sovereign; of one half the territory of a sovereign state hopelessly and forever subjected to the laws of another state. Or a motley multiform administration of laws, under which A would be subject to one class of laws, because holding under a Virginia grant; while B, his next-door neighbor, claiming from Kentucky, would hardly be conscious of living under the same government."

And the learned judge referred to the language of the eighth article of the compact, recognizing the power of Kentucky to pass similar laws to those which existed in Virginia, after the period of six years; referring to the laws of Virginia, where one who had received a grant of land had failed, at first in three and afterwards in five years, to seat and improve it, and was held to have abandoned it as lapsed and forfeited land, and anyone might take out a grant for it.

We think the effect of these decisions is to declare that while the Virginia compact prevents the cutting down of the titles secured under the state of Virginia prior to its date, so as to take away substantial rights incident to the title, as was the case in Green v. Biddle, supra, it did not mean to prevent the state, upon notice and hearing, from requiring the registration of land 165]titles for taxation, or, in *default thereof, from forfeiting such titles to the state. These laws do not have the effect of taking away legitimate rights secured by the old grants, but enable the new sovereign to enforce against such lands, as well as others, the taxing laws of the state. It was, of course, recognized that the land would pass under the dominion of a new state, which would require revenues for its support and while the title obtained from the state of Virginia was protected, it was not intended that it should be immune from constitutional laws having the effect to subject such lands to the taxing power of the new sovereignty, and to require their owners, by all proper methods, to contribute their share to the public burdens of the state.

As we have said, many considerations are urged against the policy and justice of this statute, and other objections are made which depend solely upon the laws of the state and their interpretation by the courts of the state. We are unable to find that rights secured by the Federal Constitution were denied by the judgments of the Court of Appeals of Kentucky.

The judgments in each and all of the cases are therefore affirmed.

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*SPOKANE & BRITISH COLUMBIA[166
RAILWAY COMPANY, Plff. in Err.,
v.
WASHINGTON & GREAT NORTHERN RAILWAY COMPANY, Washington Improvement & Development Company, John Hughes, et al.

(See S. C. Reporter's ed. 166–175.)

Public lands — railway land grants — forfeiture.

1. A breach of the conditions upon which a railway right of way was granted *in præsenti* by the act of June 4, 1898 (30 Stat. at L. 430, chap. 377),—*viz.*, that the railway company shall commence grading within six months after the approval of its map of definite location or its location shall be void, and that the right therein granted shall be forfeited unless the company shall construct 25 miles of road within two years after the passage of the act,—does not of itself work a forfeiture, but such conditions being conditions subsequent, there can be no forfeiture without some appropriate judicial or legislative action.

[For other cases, see Public Lands, 288–295, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — questions of local law.

2. Contentions in a suit between two railway companies, each claiming the same right of way through an Indian reservation, that the congressional grant to one company was abandoned by the grantee,

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NOTE.—As to land grants to railroads—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L. R. A. 571.

and that the circumstances show an estoppel to claim under it, do not present Federal questions which may be reviewed on a writ of error from the Federal Supreme Court to a state court.

[For other cases, see Appeal and Error, 2072–2123, in Digest Sup. Ct. 1908.]

[No. 49.]

Submitted November 29, 1910. Decided January 3, 1911.

IN ERROR to the Supreme Court of the State of Washington to review a decree which reversed a decree of the Superior Court for Ferry County in that state enjoining interference with the use of a railway right of way. Affirmed.

See same case below, 49 Wash. 280, 95 Pac. 64.

The facts are stated in the opinion.

Messrs. **William T. Beck** and **W. C. Keegin** submitted the cause for plaintiff in error. Mr. A. M. Craven was on the brief:

The fact that words of grant are found in the act of June 4, 1898, does not make the case other than one of statutory construction. Although a statute may contain the elements of a compact between the government and an individual, nevertheless it should be construed according to the rules for construction of statutes, and not according to those for construction of contracts.

Black, Const. & Interpretation of Laws, p. 315; Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551; 5 Thomp. Corp. § 6588. p. 5195.

A strict construction in favor of the government is demanded by public policy.

Sutherland, Stat. Constr. § 378; Black, Const. & Interpretation of Laws, p. 315; Rice v. Minnesota & W. R. Co. 1 Black, 358, 17 L. ed. 147; Dubuque & P. R. Co. v. Litchfield, 23 How. 66, 16 L. ed. 500.

It is not material to this inquiry that the words "there is hereby granted" are used. The use of such language could hardly be avoided. Acts containing such or other language importing a grant *in præsenti* have been construed not to be grants *in præsenti;* and *vice versa*, acts without any terms of conveyance at all have been construed to be grants *in præsenti.*

New York Indians v. United States, 170 U. S. 1, 42 L. ed. 927, 18 Sup. Ct. Rep. 531; Heydenfeldt v. Daney Gold & S. Min. Co. 93 U. S. 634, 23 L. ed. 995, 13 Mor. Min. Rep. 204.

Congress intended that before the grant should attach, maps showing location must be filed; but such location was to be of no effect without commencement of work. The doing of two things by the grantee was essential to devest the government of title; to wit, location and commencement of work; the former, without the latter, to be void.

United States ex rel. Search v. Choctaw, O. & G. R. Co. 3 Okla. 404, 41 Pac. 729; New York, H. & N. R. Co. v. Boston, H. & E. R. Co. 36 Conn. 196; 5 Thomp. Corp. §§ 6586–6589, pp. 5193 et seq.

Mr. **Thomas R. Benton** submitted the cause for defendants in error:

The grant made by the act of June 4, 1898, is a grant *in præsenti.* It passed to the Washington Improvement & Development Company a present interest in the right of way granted, requiring only a definite location of the line of railway to identify the lands granted. When the line of the proposed railway was definitely located, and a map thereof filed with and approved by the Secretary of the Interior, the title to the lands granted vested in the grantee as of the date of the granting act.

Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551; St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578; Noble v. Union River Logging Co. 147 U. S. 165–176, 37 L. ed. 123–127, 13 Sup. Ct. Rep. 271; New York Indians v. United States, 170 U. S. 1–17, 42 L. ed. 927–933, 18 Sup. Ct. Rep. 531; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; Denver & R. G. R. Co. v. Alling, 99 U. S. 463–474, 25 L. ed. 438–443; St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389; Jamestown & N. R. Co. v. Jones, 177 U. S. 125, 44 L. ed. 698, 20 Sup. Ct. Rep. 568.

The condition that when a map showing that any portion of the company's located line is filed, the company shall commence grading the located line within six months thereafter, or such location shall be void, contained in § 3 of the act of 1898, and the condition that the right granted by that act shall be forfeited unless at least 25 miles of the railroad shall be constructed through the Indian reservation within two years after the passage of the act, contained in § 5 of such act, are conditions subsequent, of which no one can take advantage but the United States, the grantor. Until the United States has asserted its right to enforce a forfeiture for the breach of these conditions, either by legislation declaring a forfeiture, or by judicial proceedings authorized by law, the title remains unimpaired in the grantee.

Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551; Grinnell v. Chicago, R. I. & P. R. Co. 103 U. S. 739, 26 L. ed. 456;

Van Wyck v. Knevals, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336; St. Louis, I. M. & S. R. Co. v. McGee, 115 U. S. 469, 29 L. ed. 446, 6 Sup. Ct. Rep. 123; Bybee v. Oregon & C. R. Co. 139 U. S. 663, 35 L. ed. 305, 11 Sup. Ct. Rep. 641; Utah, N. & C. R. Co. v. Utah & C. R. Co. 110 Fed. 879; New York Indians v. United States, 170 U. S. 1, 42 L. ed. 927, 18 Sup. Ct. Rep. 531.

Mr. Justice Day delivered the opinion of the court:

In this case the Spokane & British Columbia Railway Company, plaintiff in error, began an action in the superior court of the state of Washington for Ferry county, to enjoin the Washington & Great Northern Railway Company, the Washington Improvement & Development Company, and others, from interfering with the use of a certain right of way for railway purposes through the Colville Indian Reservation in the state of Washington, which, it was alleged, belonged to the plaintiff. The plaintiff had judgment in its favor in the superior court. Upon proceedings in error, the judgment was reversed and a judgment entered in favor of the present defendants in error, defendants below. 49 Wash. 280, 95 Pac. 64. To that judgment a writ of error was sued out from this court.

The case presents a conflict between the right of way of the Spokane & British Co-
170]lumbia Railway Company *and a right of way therctofore granted by the United States to the Washington Improvement & Development Company, grantor of the Washington & Great Northern Railway Company. The case is stated in the supreme court of Washington as follows:

"By an act of Congress approved June 4, 1898 [30 Stat. at L. 430, chap. 377], there was granted to the appellant Washington Improvement & Development Company, and to its assigns, a right of way for its railway, telegraph, and telephone lines through the Colville Indian Reservation, beginning on the Columbia river near the mouth of the Sans Poil river, running thence northerly through said reservation toward the international line. There was also granted grounds adjacent for the purposes of stations, other buildings, side tracks, and switch tracks. The act provided for the filing of maps showing the route when determined upon, said maps of definite location to be approved by the Secretary of the Interior. These maps were subsequently filed, and were approved by the Honorable Secretary prior to November 27, 1899. Before the commencement of this action, the Washington Improvement & Development Company transferred all of its rights, privileges, and immunities acquired under this act of Congress to the appellant Washington & Great Northern Railway Company. Since the filing and approval of the maps of definite location, as aforesaid, this respondent [plaintiff in error here], acting under authority of the act of Congress of March 3, 1875 [18 Stat. at L. 482, chap. 152, U. S. Comp. Stat. 1901, p. 1568], and the act of Congress of March 2, 1899 [30 Stat. at L. 990, chap. 374, U. S. Comp. Stat. 1901, p. 1581], located a route for its railway over practically the same line indicated by the maps filed by the Washington Improvement & Development Company, as aforesaid, and filed its maps with the Secretary of the Interior, who approved the same on October 17, 1905. The act of June 4, 1898, under which appellants [defendants in error here] claim, contained the following provision:

*" 'Provided, That when a map show-[171
ing any portion of said railway company's located line is filed herein, as provided for, said company shall commence grading said located line within six months thereafter or such location shall be void, and said location shall be approved by the secretary of the Interior in sections of twenty-five miles before the construction of any such section shall be begun.'

"Section 5 of the statute reads as follows:

" 'That the right herein granted shall be forfeited by said company unless at least twenty-five miles of said railroad shall be constructed through the said reservation within two years after the passage of this act.'

"Neither the Washington Improvement & Development Company nor its successor, the Washington & Great Northern Railway Company, commenced grading within six months after the approval of its maps of definite location, nor did it construct 25 miles of railroad, nor any, within two years after the passage of the act. For these reasons the respondent claims that appellant's location of the strip indicated by its map became void and forfeited, and that respondent had a right to go upon the same strip of land, and survey and locate its line of railway; that having surveyed and marked out its proposed line of railway upon substantially this same strip of ground after the expiration of two years, and its said maps of location having been approved by the Secretary of the Interior, respondent claims that its location thereupon is legal, and that appellants have no rights whatever in the premises, and should be enjoined from in any manner interfering (which appellants were doing) with the respondent's use and occupancy thereof."

From this statement it is apparent that

the case turns upon the rights of the defendants in error, the Washington & Great Northern Railway Company, in the right of way, as the successor of the Washington Improvement & Development Company, in view of the facts just stated.

172] *The grant to the Washington Improvement & Development Company, to it and its assigns, by the act of Congress of June 4, 1898 (30 Stat. at L. 430, chap. 377), was of the right of way for its railway, telegraph, and telephone lines in and through the Colville Indian Reservation in the state of Washington, and its language is:

"That there is hereby granted to the Washington Improvement & Development Company, a corporation organized and existing under the laws of the state of Washington, and to its assigns, a right of way for its railway, telegraph, and telephone lines through the Colville Indian Reservation in the state of Washington."

A description of the right of way is inserted, and in § 3 of the act it is provided that maps of the route of its located lines through the reservation shall be filed in the office of the Secretary of the Interior, and after the filing of the maps no claim for a subsequent settlement and improvement upon the right of way shown by said maps shall be valid as against said company; the act then cites the proviso already quoted from the opinion of the supreme court of Washington, requiring the company to commence grading the located lines within six months "or such location shall be void."

Section 4 authorized the company to enter upon the reservation for the purpose of surveying and locating the line.

Section 5 provided that the right therein granted should be forfeited by said company unless at least 25 miles of said railroad shall be constructed through the said reservation withing two years after the passage of the act.

As found by the supreme court of Washington, the grading was not begun within the six months provided, nor were 25 miles of said railroad constructed through the reservation within two years after the passage of the act, as provided in § 5.

173] *Subscquently the maps of location of the plaintiff in error were approved by the Secretary of the Interior, and the contention is on its behalf that the rights of the defendant in error, as successors of the original grantee, had terminated because of the failure to keep the conditions of the granting act. On the part of the defendant in error it is contended that, inasmuch as the grant was *in præsenti*, and there has been no subsequent act of Congress or direct proceeding in behalf of the United States to forfeit the title of the grantee, its rights are unimpaired and superior in the conflicting right of way to those of the plaintiff in error.

The supreme court of Washington, reviewing the decisions in this court, was of opinion that the rights granted in the act of June 4, 1898, had not been forfeited, and inured to the benefit of the Washington & Great Northern Railway Company as successor of the Washington Improvement & Development Company.

This court has had frequent occasion to consider acts of this character, and a brief review of its decisions will, we think, establish the rule to be applied. The leading case is Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551. In that case there was an act of Congress making a grant of lands, conditioned that all lands remaining unsold after ten years should revert to the United States. It was there held that notwithstanding this condition, no one could take advantage of its nonperformance except the grantor or his heirs, or the successors of the grantor, if the grant proceeded from an artificial person, and that unless such persons asserted the right to forfeiture, the title remained unimpaired in the grantee; and it was further held that if the grant be a public one, the right to forfeiture must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, or there must be some legislative assertion of ownership for the breach of the condition. This doctrine was approved *in Grinnell v. Chicago, R. I. [174 & P. R. Co. 103 U. S. 739, 26 L. ed. 456; Van Wyck v. Knevals, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336; and St. Louis I. M. & S. R. Co. v. McGee, 115 U. S. 469, 29 L. ed. 446, 6 Sup. Ct. Rep. 123.

In New York Indians v. United States, 170 U. S. 1, 42 L. ed. 927, 18 Sup. Ct. Rep. 531, this court, after referring to Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551, said:

"It has always been held that these were grants *in præsenti*, although the lands could not be identified until the map of definite location of the road was filed, when the title which was previously imperfect acquired precision and became attached to the land. The doctrine of this case has been affirmed so many times that the question is no longer open to argument here."

In Bybee v. Oregon & C. R. Co. 139 U. S. 663, 35 L. ed. 305, 11 Sup. Ct. Rep. 641, the grant provided that not only the lands should revert to the United States for failure to perform the conditions, but the grant itself should be null and void for noncompliance with the conditions. It was

nevertheless held that the conditions were subsequent, and the title could not be forfeited except upon proper proceedings by the government, judicial in their character, or an act of Congress, competent for that purpose.

Applying the principles of those cases to the grant in question, we find that in its terms the granting clause is clear and distinct, and conveys an estate *in præsenti*. There is nothing in the conditions inconsistent with the vesting of the title, or requiring things to be done before the title can be vested. The company is required to commence grading its located line within six months, and the grant is to be forfeited unless at least 25 miles shall be constructed within two years after the passage of the act. These things may be done after the vesting of the title, and do not necessarily precede the vesting of the estate.

Reading this grant in the light of the former adjudications of this court, we think 175]it must be held that it was *the intention of Congress that the grantee should perform these conditions after acquiring title and taking possession, and therefore that the conditions were subsequent. This being true, there could be no forfeiture on the part of the United States without some appropriate judicial or legislative action, which it is not claimed was taken in this case. We think the supreme court of the state of Washington was right in its construction of the grant under the circumstances shown.

The contention that the grant was abandoned by the grantee, or that the circumstances show estoppel to make claim under it, do not present questions reviewable here. The state court having, in our view, properly decided the Federal question made, upon which this court alone could take jurisdiction, its judgment must be affirmed.

FORE RIVER SHIPBUILDING COMPANY, Plff. in Err.,
v.
SELMA T. HAGG.

(See S. C. Reporter's ed. 175–179.)

Appeal — jurisdiction — considering question on own motion.

1. The Federal Supreme Court will inquire whether it has jurisdiction of the writ of error before it, although counsel do not raise that question.

[For other cases, see Appeal and Error, 3994–4012, in Digest Sup. Ct. 1908.]

NOTE.—On direct review in Federal Supreme Court of circuit or district court decrees, see note to Gwin v. United States, 46 L. ed. U. S. 741.

Error to circuit court — jurisdiction below.

2. The question whether a Federal circuit court, in a suit in which the requisite diversity of citizenship exists, may enforce a cause of action based on a state statute alleged to be penal in its nature, does not involve the jurisdiction of the court as a Federal court, which alone can support a direct writ of error from the Federal Supreme Court, under the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, Comp. Stat. 1901, p. 549), § 5, as a case in which the jurisdiction of the circuit court was in issue.

[For other cases, see Appeal and Error, 895–902, in Digest Sup. Ct. 1908.]

[No. 75.]

Submitted December 16, 1910. Decided January 3, 1911.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts to review a judgment in favor of plaintiff in a suit to recover damages under the state employers' liability act. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Messrs. **John Lowell** and **James A. Lowell** submitted the cause for plaintiff in error.

Mr. **Asa P. French** submitted the cause for defendant in error. Mr. James S. Allen, Jr., was on the brief.

Mr. Justice **Day** delivered the opinion of the court:

This case is here upon a question involving the jurisdiction of the circuit court of the United States for the district of Massachusetts to entertain the action. It was begun in the circuit court by Selma T. Hagg, a citizen of Sweden, against the Fore River Shipbuilding Company, a corporation of the commonwealth of Massachusetts. The object of the suit was to recover damages under the employers' liability act of Massachusetts (Revised Laws, chap. 106, § 73), and was for the death, without conscious suffering, of her husband, Charles A. Hagg, an employee of the defendant company, resulting from an injury received in the defendant's forge shop in Quincy, Massachusetts. The action resulted in a verdict and judgment for the plaintiff below. The defendant below moved the court to dismiss the action on the ground that it was without jurisdiction, for the reason that the Massachusetts statute was of a penal character, and therefore an action upon it could be maintained only in the courts of Massachusetts. The case comes here upon certificate of the judge of the

circuit court, and the question stated is "whether or not the statute under which the plaintiff's action was brought was of such a penal character that the circuit court did not have jurisdiction of said action."

In behalf of the defendant company, now plaintiff in error, it is contended that a 177]penal action of this character *can be brought only in the courts of Massachusetts, and it is insisted that such is the rule applicable to cases of this character as between separate and distinct sovereignties. It is argued that the act under which the suit was brought is a penal statute, and it is insisted that the wrong done as primarily an offense against the public, and the relief sought not of the class of actions remedial in their nature, wherein recovery is given in the form of compensation to the widow or children of the deceased, which actions have been sustained in the courts of states other than those enacting the statute.

The question presented, therefore, is whether, owing to the character of the Massachusetts act, the courts of another sovereignty will enforce its provisions, or whether the sole remedy is under the laws of the commonwealth enacting the statute.

This court takes notice of its own jurisdiction, and whether the question is raised by the counsel or not, inquires of its own motion whether there is jurisdiction to entertain any given case before it. Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379–382, 28 L. ed. 462, 463, 4 Sup. Ct. Rep. 510, 511.

In that case Mr. Justice Matthews, who spoke for the court, said:

"On every writ of error or appeal, the first and fundamental question is that of jurisdiction; first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

We shall then inquire, Has this court jurisdiction to entertain this attempt at a direct review of the circuit court's judgment certified here upon the question of jurisdiction? By the court of appeals act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 549), a writ of error may be taken directly from a circuit court to this court in certain cases, among which is "any case in which the 178]jurisdiction of *the court is in issue;" and it is further provided: "In such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." The question then is, Does this case involve a question of jurisdiction reviewable in the manner sought in this case by writ of error to the circuit court?

The court has had frequent occasion to determine what is meant in the statute providing for review of cases in which the jurisdiction of the court is in issue, and it has been held that the statute means to give a review, not of the jurisdiction of the court upon general grounds of law or procedure, but of the jurisdiction of the court as a Federal court.

A leading case on this subject, and one frequently cited with approval since its decision, is Louisville Trust Company v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119. In that case a state court had taken jurisdiction of an action in equity in which a receiver was asked for, and none had been appointed at the time when another suit was begun in the circuit court of the United States, and a receiver appointed therein. Thereafter the state court which had first taken jurisdiction appointed a receiver, and upon its direction that receiver intervened in the Federal court and asked to have the property turned over to him. The circuit court of the United States maintained its own jurisdiction, and refused to give the property to the state receiver. The case came to this court upon certificate of a question involving the jurisdiction of the circuit court of the United States. This court dismissed the writ of error for want of jurisdiction, holding that the question presented was one of the equity jurisdiction of one court as against the like jurisdiction in another court, and did not present a distinctive question as to the jurisdiction of the Federal court as such. The former cases were reviewed, and Mr. Justice Harlan, who spoke for the court, said:

"The question of jurisdiction which the statute permits *to be certified to this [179 court directly must be one involving the jurisdiction of the circuit court as a Federal court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other."

See also, in this connection, Bache v. Hunt, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547, in which the same principle is announced.

Applying the rule thus settled to the case under consideration, there was jurisdiction in the circuit court of the United States for the district of Massachusetts under the judiciary act, as the plaintiff was a citizen of Sweden and the defendant shipbuilding company a corporation of Massachusetts. Thus having jurisdiction, it was at liberty to decide all questions

properly before it, including the one whether, under the applicable principles of law, a court of another sovereignty would enforce a cause of action based upon the Massachusetts statute. But the determination of that question did not involve the jurisdiction of the circuit court as a Federal court. It was a question to be decided upon the application of the same principles as would apply had the action been brought in a court of another state or nation. Whether other sovereignties would enforce penal actions of the character alleged to arise under the Massachusetts statute was not a question peculiar to the Federal jurisdiction of the court. It was general in its nature, and to be determined upon principles controlling in other courts as well as those of Federal creation.

Without enlarging the discussion, and applying principles thoroughly settled in this court, we are of opinion that a direct writ of error will not lie from the determination of the Circuit Court of the United States to exercise its jurisdiction in the present case. The writ of error is therefore dismissed for want of jurisdiction.

Dismissed.

180] *UNITED STATES, Plff. in .Err.,
v.
LUCINDA GRIZZARD, William Grizzard, Mrs. Lila Chaney, and Wilson Chaney.

(See S. C. Reporter's ed. 180–186.)

Damages — in eminent domain — injury to land not taken — access.

Just compensation to the owner of a farm, a part of which is taken by the United States by permanently flooding it in improving navigation, as an incident to which a public highway crossing the flooded land is also flooded, demands an award of the damages to that part of the farm not taken by reason of the destruction of the easement of access to the turnpike by way of the highway thus destroyed.

[For other cases, see Damages, VI. m, in Digest Sup. Ct. 1908.]

[No. 66.]

Argued December 6, 1910. Decided January 3, 1911.

IN ERROR to the Circuit Court of the United States for the Eastern District of Kentucky to review a judgment awarding damages to the owners of a farm, a part of which was taken by the government for public purposes. Affirmed.

The facts are stated in the opinion.

Assistant Attorney General **John Q. Thompson** argued the cause, and, with Mr. P. M. Cox, filed a brief for plaintiff in error.

No appearance for defendants in error.

Mr. Justice **Lurton** delivered the opinion of the court:

Action by the owners of a farm for a taking of a part thereof by the United States for public purposes. Judgment for the plaintiffs below.

The farm of the defendants in error lies upon Tates creek, a tributary of the Kentucky river. For the purpose of improving the navigation of that stream, the government *has erected a series of locks [182 and dams. As a consequence, the waters of Tates creek are backed up to such an extent as to flood or submerge a strip of the Grizzard farm, permanently destroying its use for agricultural purposes. The court below, a jury being waived, found that 7½ acres of land had been actually taken. He then added:

1. "That in addition there is taken an easement of access from plaintiff's land by way of the county road to the Tates creek pike.

2. "That the whole land was worth $3,000 before said taking, and what was left after the taking was worth $1,500.

3. "I divide the damage by reason of the taking between the land taken and the easement of access, taken equally; *i. e.*, I allow $750 for the land taken, and a like sum of $750 for the easement of access taken.

"I therefore conclude as a matter of law that plaintiffs are entitled to a judgment for $1,500."

The errors assigned relate only to so much of the judgment as allows damages for the "easement of access," referred to in the findings above set out. That there was a taking by flooding permanently the 7½ acres, valued at $750 by the court below, is not contested. Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; United States v. Welch, 217 U. S. 333, 54 L. ed. 787, 30 Sup. Ct. Rep. 527; High Bridge

NOTE.—On interference with access to highway from the part of parcel not taken, by the taking of another part, as element of damages in condemnation—see note to United States v. Welch, 28 L.R.A.(N.S.) 385.

On cutting off access to a highway as a taking—see note to Ranson v. Sault Ste. Marie, 15 L.R.A.(N.S.) 49.

As to what lands are to be deemed part of the tract damaged by taking a portion thereof under eminent domain—see note to Sharpe v. United States, 57 L.R.A. 932.

Lumber Co. v. United States, 16 C. C. A. 460, 37 U. S. App. 234, 69 Fed. 323.

The contention is that the "easement of access" destroyed, and therefore taken, was not a private right of way constituting property such as that for which compensation was allowed in United States v. Welch, but was a public county road; and reference has been made to the well-known class of cases touching an injury to land not taken by the construction of a railroad along and upon an abutting public road, or 183]a change of grade, to the damage *of adjacent property, and like indirect injuries to the use of property adjacent, but of which no part was taken from the owner. Northern Transp. Co. v. Chicago, 99 U. S. 635; 25 L. ed. 336; Sharp v. United States, 191 U. S. 341, 48 L. ed. 211, 24 Sup. Ct. Rep. 114.

But here there has been an actual taking by permanently flooding a part of the farm of the defendants in error. An incident of that flooding is that a public road running across the flooded land is also flooded. But if this were not so, and the roadway had simply been cut off by the interposition of the flooded portion of the farm, the damage would be the same. Since, therefore, there has been a taking of a part of the owners' single tract, and damage has resulted to the owners' remaining interest by reason of the relation between the taken part and that untaken, or by reason of the use of the taken land, the rule applied in the cases cited does not control this case.

That the petition laid stress upon the flooding of the highway which crossed the flooded land, and sought to recover for a deterioration of an easement in the public road, is not fatal. The damage to the land not appropriated is the obvious consequence of the taking of a part of the whole by flooding,—a manner of appropriating which has made the village market, church, and school so inconvenient of access as to add some 3 miles of travel by an unimproved and roundabout country road. Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting form that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted. Thus, in Sharp v. United States, 191 U. S. 341, 353, 48 L. ed. 211, 215, 24 Sup. Ct. Rep. 114, damage resulting to adjacent but distinct parcels was denied because there had been no actual appropriation of any part of such separate parcel, but the principle was conceded as to 184]injury, from the character of the *use of that taken, to that untaken, of the same tract. Upon this distinction the court said:

"Upon the facts which we have detailed, we think the plaintiff in error was not entitled to recover damages to the land not taken because of the probable use to which the government would put the land it proposed to take. If the remaining land had been part of the same tract which the government seeks to condemn, then the damage to the remaining portion of the tract taken, arising from the probable use thereof by the government would be a proper subject of award in these condemnation proceedings. But the government takes the whole of one tract."

To the same effect see Cooley, Const. Lim. pages 565, 566.

There is nothing in United States v. Welch, cited above, which conflicts with the conclusion we have reached, but, upon the contrary, the trend of the opinion is toward the decision we announce.

The constitutional limitation upon the power of eminent domain possessed by the United States is that "private property shall not be taken for public use without just compensation." The "just compensation" thus guaranteed obviously requires that the recompense to the owner for the loss caused to him by the taking of a part of a parcel, or single tract of land, shall be measured by the loss resulting to him from the appropriation. If, as the court below found, the flooding and taking of a part of the plaintiff's farm has depreciated the usefulness and value of the remainder, the owner is not justly compensated by paying for only that actually appropriated, and leaving him uncompensated for the depreciation over benefits to that which remains. In recognition of this principle of justice it is required that regard be had to the effect of the appropriation of a part of a single parcel upon the remaining interest of the owner, by taking into account *both the benefits which accrue [185 and the depreciation which results to the remainder in its use and value. Thus, in Bauman v. Ross, 167 U. S. 548, 574, 42 L. ed. 270, 283, 17 Sup. Ct. Rep. 966, 976, it is said:

"Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially

and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened."

In Sharp v. United States, 191 U. S. 341, 354, 48 L. ed. 211, 215, 24 Sup. Ct. Rep. 114, and High Bridge Lumber Co. v. United States, 16 C. C. A. 460, 37 U. S. App. 234, 69 Fed. 320, 323, as well as in United States v. Welch, supra, the principle is recognized as settled law.

Both the petition and the finding show that access to the public road has been cut off by the intervention of flooded land actually taken.

That the trial judge found the damages for the land and for the easement of access separately is not controlling. The determining factor was that the value of that part of the Grizzard farm not taken was $1,500, when the value of the entire place before the taking was $3,000. A judgment for a less sum will not be that "just compensation" to which the defendants are entitled. The case is not different in legal consequence from what it would have been if a railway had been constructed across one's lawn, cutting the owner off from his road and outbuildings, etc. To say that such an owner would be compensated by paying him only for the narrow strip actually appropriated, and leaving out of consideration the depreciation to the remain-
186]ing *land by the manner in which the part was taken, and the use to which it was put, would be a travesty upon justice.

Judgment affirmed.

ATLANTIC COAST LINE RAILROAD COMPANY, Plff. in Err.,
v.
RIVERSIDE MILLS.

(See S. C. Reporter's ed. 186–208.)

Commerce — Federal power generally.

1. No question with reference to the power of Congress to enact a regulation of interstate commerce can arise if the regulating act be one directly applicable to such commerce, not obnoxious to any other provision of the Federal Constitution, and reasonably adapted to the purpose by reason of legitimate relation between such commerce and the rule provided.

[For other cases, see Commerce, 1–36, in Digest Sup. Ct. 1908.]

Commerce — Federal power — regulating liability of connecting carriers.

2. The imposition upon an interstate carrier voluntarily receiving property for transportation from a point in one state to a point in another state, of liability to the holder of the bill of lading for a loss anywhere *en route*, with a right of recovery over against the carrier actually causing the loss, which is made by the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), § 20, as amended by the act of June 29, 1906 (34 Stat. at L. 584, 595, chap. 3591, U. S. Comp. Stat. Supp. 1909, pp. 1149, 1166), in spite of any agreement or stipulation limiting liability to its own line, is a valid regulation of interstate commerce.

[For other cases, see Commerce, 328–333, in Digest Sup. Ct. 1908.]

Constitutional law — freedom to contract — regulating liability of connecting carriers.

3. The liberty of contract secured by U. S. Const., 5th Amend., was not unconstitutionally denied by the enactment by Congress, in the exercise of its power under the commerce clause, of the Carmack amendment of June 29, 1906, to the act of February 4, 1887, § 20, by which an interstate carrier voluntarily receiving property for transportation from a point in one state to a point in another state is made liable to the holder of the bill of lading for a loss anywhere *en route*, in spite of any agreement or stipulation to the contrary, with a right of recovery over against the carrier actually causing the loss.

[For other cases, see Constitutional Law, 591–604, 870–876, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — regulating liability of connecting carriers.

4. The property of the initial carrier is not taken in violation of U. S. Const., 5th Amend., to pay the debt of an independent connecting carrier whose negligence may have been the sole cause of a loss, by the Carmack amendment of June 29, 1906, to the act of February 4, 1887, § 20, under which an interstate carrier voluntarily receiving property for transportation from a point in one state to a point in another state is made liable to the holder of the bill of lading for a loss anywhere *en route*, in spite of any agreement or stipulation to

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NOTE.—On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

On the constitutionality of statutes restricting contracts and business—see note to State v. Loomis, 21 L.R.A. 789.

As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed.

the contrary, with a right of recovery over against the carrier actually causing the loss, since the liability of the receiving carrier which results in such a case is that of a principal, for the negligence of his own agents.

[For other cases, see Constitutional Law, 441–499, in Digest Sup. Ct. 1908.]

Costs — attorneys' fees — under act to regulate commerce.

5. The attorneys' fee taxable as a part of the costs under the act of February 4, 1887, § 8, where the cause of action is the doing of something made unlawful by some provision of the act, or the omission to do something required by the act, and there is a recovery of damages sustained in consequence of any such violation of the act, may not be taxed to the successful plaintiff in an action by a shipper against an initial carrier for a loss on a connecting line, in which the carrier's liability is dependent upon the Carmack amendment of June 29, 1906, since the cause of action is the loss of property which is in no way traceable to the violation of any provision of the statute.

[For other cases, see Costs and Fees, 104–108, in Digest Sup. Ct. 1908.]

[No. 215.]

Argued October 19, 20, 1910. Decided January 3, 1911.

IN ERROR to the Circuit Court of the United States for the Southern District of Georgia to review a judgment holding an initial carrier in an interstate shipment liable to the shipper for a loss on a connecting line. Affirmed.

See same case below, 168 Fed. 990.

U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

Validity of statutes regulating liability of connecting carrier for loss beyond its own line.

The so-called Carmack amendment to the Hepburn act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1149), § 7, under which a carrier receiving property for interstate transportation is made liable for a loss anywhere *en route*, and may not contract against such liability, is the most important, because the widest in its application, of the many statutes in various jurisdictions, which attempt to regulate the liability of a connecting carrier for a loss beyond its own line.

This statute has been made the subject of vigorous attack, but the decisions had so uniformly upheld its validity that the formal approval by the Federal Supreme Court in the principal case was confidently expected. It had previously been sustained as a valid regulation of commerce in Smeltzer v. St. Louis & S. F. R. Co. 158 Fed. 649; Central R. Co. v. Sims, — Ala. —, 53 Co. 826; St. Louis & S. F. R. Co. v. Heyser, — Ark. —, 130 S. W. 562; Pittsburg, C. C. & St. L. Co. v. Mitchell, — Ind. —, 91 N. E. 735; Dodge v. Chicago, St. P. M. & O. R. Co. 111 Minn. 123, 126 N. W. 627; Welch Lumber Co. v. Norfolk & W. R. Co. 137 App. Div. 248, 121 N. Y. Supp. 985; Houston & T. C. R. Co. v. Lewis, — Tex. —, 129 S. W. 594; Norfolk & W. R. Co. v. Dixie Tobacco Co. 111 Va. 813, 69 S. E. 1106.

It does not take property without due process of law. St. Louis & S. F. R. Co. v. Heyser, — Ark. —, 130 S. W. 562; Pittsburg, C. C. & St. L. R. Co. v. Mitchell, — Ind. —, 91 N. E. 735; Galveston, H. & S. A. R. Co. v. F. A. Piper Co. 52 Tex. Civ. App. 568, 115 S. W. 107; Galveston, H. & S. A. R. Co. v. Wallace, — Tex. Civ. App. —, 117 S. W. 169; Galveston, H. & S. A. R. Co. v. Crow, — Tex. Civ. App. —, 117 S. W. 170; Galveston, H. & S. A. R. Co. v. Johnson, — Tex. Civ. App. —, 133 S. W. 725.

It does not unconstitutionally interfere with the liberty of contract. Louisville & N. R. Co. v. Scott, 219 U. S. 209, post, 183, 31 Sup. Ct. Rep. 171; St. Louis & S. F. R. Co. v. Heyser, — Ark. —, 130 S. W. 562; Welch Lumber Co. v. Norfolk & W. R. Co. 137 App. Div. 248, 121 N. Y. Supp. 985.

It does not take private property for public purposes. Louisville & N. R. Co. v. Scott, 133 Ky. 724, 118 S. W. 990, affirmed in 219 U. S. 209, post, 183, 31 Sup. Ct. Rep. 171; Houston & T. C. R. Co. v. Lewis, — Tex. —, 129 S. W. 594.

The property of the initial carrier is not taken, in violation of U. S. Const. 5th Amend., to pay the debt of an independent connecting carrier whose negligence may have been the sole cause of a loss, by the Carmack amendment. Louisville & N. R. Co. v. Scott, 219 U. S. 209, post, 183, 31 Sup. Ct. Rep. 171.

The statute is valid as against the objection that it takes the carrier's property without compensation, and deprives the carrier of the equal protection of the laws. Galveston, H. & S. A. R. Co. v. Wallace, — Tex. —, 117 S. W. 169; Galveston, H. & S. A. R. Co. v. Crow, — Tex. Civ. App. —, 117 S. W. 170; Galveston, H. & S. A. R. Co. v. Johnson, — Tex Civ. App. —, 133 S. W. 725.

It does not invade the rights of the states. Galveston, H. & S. A. R. Co. v. F. A. Piper Co. 52 Tex. Civ. App. 568, 115 S. W. 107; Galveston, H. & S. A. R. Co. v. Wallace, — Tex. Civ. App. —, 117 S. W. 169; Galveston, H. & S. A. R. Co. v. Crow, — Tex. Civ. App. —, 117 S. W. 170.

State statutes affecting the carrier's liability in this regard have frequently been attacked as unconstitutional regulations of interstate commerce, with varying results.

Interstate commerce is not unconstitutionally interfered with by the provisions of the Missouri statute, under which the receipt by a carrier of goods marked for a point beyond its own line imports a contract for through transportation, unless by specific agreement the carrier contracts to carry the shipment only over its own line. Dimmitt v. Kansas City, St. J. & C. B. R.

Statement by Mr. Justice Lurton:

This was an action to recover the value of goods received by the Atlantic Coast Line Railroad at a point on its line in the state of Georgia for transportation to points in other states. The agreed statement of facts showed that the goods were safely delivered by the Atlantic Coast Line Railroad to connecting carriers, and were lost while in the care of such carriers, and the question is whether the initial carrier is liable for such loss.

The stipulated facts showed that the goods were tendered to the Atlantic Coast Line Railroad, and through bills of lading demanded therefor, which were duly issued, as averred, on the dates named in the petition. That the goods so received were forwarded over the lines of the receiving road and in due course delivered to a connecting carrier engaged in interstate shipment for continuance of the transportation. It was also stipulated "that the Riverside Mill made constant and frequent shipments over the Atlantic Coast Line, and had a blank form of receipt, like the attached, marked 'A,' which the *Riverside Mill [188 filled out, showing what goods it had loaded into cars, and the name of the consignee; said receipt containing a stipulation that the shipment is 'per conditions of the company's bill of lading,' and that the Atlantic Coast Line Railroad Company, on said receipts prepared by the Riverside Mill, issued, for each of the shipments hereinbefore referred

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Co. 103 Mo. 433, 15 S. W. 761; Nines v. St. Louis, I. M. & S. R. Co. 107 Mo. 475, 18 S. W. 26; Missouri, K. & T. R. Co. v. McCann, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755, affirming 133 Mo. 59, 35 L.R.A. 110, 33 S. W. 71.

And construing this statute as preventing a carrier undertaking through carriage from limiting liability for negligence of connecting lines does not make the statute invalid as applied to interstate shipments. Missouri, K. & T. R. Co. v. McCann, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755, affirming 133 Mo. 59, 35 L.R.A. 110, 33 S. W. 71; Marshall & M. Grain Co. v. Kansas City, Ft. S. & M. R. Co. 176 Mo. 480, 98 Am. St. Rep. 508, 75 S. W. 638; Western Sash & Door Co. v. Chicago, R. I. & P. R. Co. 177 Mo. 641, 76 S. W. 998.

Making the initial railway carrier liable for loss or damage to goods shipped over its own and connecting lines, as is done by S. C. Civ. Code 1902, § 2176, unless a receipt in writing is produced from the next succeeding carrier, is not unconstitutional as applied to interstate commerce. Jonesville Mfg. Co. v. Southern R. Co. 77 S. C. 480, 58 S. E. 422; Skipper v. Seaboard Air Line R. Co. 75 S. C. 276, 7 L.R.A.(N.S.) 388, 117 Am. St. Rep. 901, 55 S. E. 454, 9 A. & A. Ann. Cas. 808.

The Virginia statute making a carrier which accepts anything for transportation to a point beyond its own lines liable for its safe carriage to such point of destination, in the absence of a written contract to the contrary, signed by the owner or his agent, and imposing upon the carrier the duty, even in case of such contract, to inform the shipper where the loss happened beyond its own line, is not an unconstitutional interference with interstate commence. Richmond & A. R. Co. v. R. A. Patterson Tobacco Co. 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335, affirming 92 Va. 670, 41 L.R.A. 511, 24 S. E. 261.

Each carrier in a contract of shipment under which the responsibility of each carrier was to cease upon delivery to the connecting carrier in good order must, under S. C. Code 1902, § 1710, within forty days after notice, adjust any loss or damage, or give information as to where it occurred; or it will be liable therefor as though the loss or damage occurred on its own line, unless it can show that, by the exercise of due diligence, it has been unable to trace the loss. This statute is valid as to interstate shipments. Skipper v. Seaboard Air Line R. Co. 75 S. C. 276, 7 L.R.A.(N.S.) 388, 117 Am. St. Rep. 901, 55 S. E. 454, 9 A. & E. Ann. Cas. 808; Venning v. Atlantic Coast Line R. Co. 78 S. C. 42, 12 L.R.A. (N.S.) 1217, 125 Am. St. Rep. 768, 58 S. E. 983.

But the Georgia statute under which, before the initial or connecting carrier can avail itself of a valid contract of exemption from liability beyond its own line, it must, if requested, trace the freight, and inform the shipper in writing when, where, and how, and by which carrier, the freight was lost, damaged, or destroyed, and give the names of the parties and their official position, if any, and by whom the truth of the facts set out in the information can be established, while otherwise valid (Savannah, F. & W. R. Co. v. Austin, 101 Ga. 629, 29 S. E. 11), is not so as applied to interstate shipments when it runs counter to the commerce clause of the Federal Constitution. Central R. Co. v. Murphey, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 A. & E. Ann. Cas. 514, reversing 116 Ga. 863, 60 L.R.A. 817, 43 S. E. 265. The court distinguished Richmond & A. R. Co. v. R. A. Patterson Tobacco Co. supra, saying that the duty imposed upon the carrier was much more onerous than the obligation created by the Virginia statute involved in the earlier case.

The requirement of S. C. act May 13, 1903, under which all carriers recognizing a contract for through shipment are made the agents of each other, and each is made liable to the consignee for loss or damage, whether occurring on its own line or not, with a right of recovery over against the carrier in fault, is invalid as to interstate shipments. Venning v. Atlantic Coast Line R. Co. 78 S. C. 42, 12 L.R.A.(N.S.) 1217, 125 Am. St. Rep. 768, 58 S. E. 983, over-

to, bills of lading on forms like that attached, marked exhibit 'B.'"

Upon the reverse side of the bill of lading were certain conditions, one of which was that "no carrier shall be liable for loss or damage not occurring on its portion of the route." The tenth clause thereof was in these words:

"This bill of lading is signed for the different carriers who may engage in the transportation, severally, but not jointly, each of which is to be bound by and have the benefits of the provisions thereof, and in accepting this bill of lading the shipper, owner, and consignee of the goods, and the holder of the bill of lading, agree to be bound by all its stipulations, exceptions, and conditions, whether printed or written."

The court below, upon this state of facts, instructed a verdict for the plaintiff, upon which there was judgment for the amount of the verdict, and, upon motion of the plaintiff, an attorney's fee of $100 was ordered to be taxed as part of the costs in the case. Thereupon error was assigned, and this writ of error sued out by the railroad company.

Mr. Joseph R. Lamar argued the cause and filed a brief for plaintiff in error:

At common law, except as to gross negligence, the carrier could contract for exemption from liability.

1 Hutchinson, Carr. 3d ed. 153, 405; Cau v. Texas & P. R. Co. 194 U. S. 427, 48 L. ed. 1053, 24 Sup. Ct. Rep. 663.

It is just and reasonable that, beyond its line, it shall not be liable unless by virtue of a special contract.

Myrick v. Michigan C. R. Co. 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. Rep. 425.

If, then, in the absence of a contract, it is not liable, it can, *a fortiori*, and to save

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ruling Skipper v. Seaboard Air Line R. Co. 75 S. C. 276, 7 L.R.A.(N.S.) 388, 117 Am. St. Rep. 901, 55 S. E. 454, 9 A. & E. Ann. Cas 808; Winslow Bros. v. Atlantic Coast Line R. Co. 79 S. C. 344, 60 S. E. 709; Burress v. Atlantic Coast Line R. Co. 79 S. C. 250, 60 S. E. 692.

Interstate commerce is not unconstitutionally regulated by applying to shipments from outside the state the provisions of the Georgia statute, under which liability is imposed on the last connecting carrier receiving goods as in good order, for damages sustained, whether sustained on its own line or not. Kavanaugh v. Southern R. Co. 120 Ga. 62, 47 S. E. 526, 1 A. & E. Ann. Cas. 705.

The Texas statute permitting joint actions applies to interstate shipments, and when so applied, does not impose any such burden upon interstate commerce, as distinguished from commerce within the state, as amounts to an infringement upon the power of Congress to regulate interstate commerce. St. Louis Southwestern R. Co. v. Wester, — Tex. Civ. App. —, 96 S. W. 769.

Of course, any of the provisions of the statutes just considered, which may conflict with the "Carmack amendment," are superseded by that act, and, even if consistent with the congressional enactment, such statutes will probably now be held invalid as to interstate shipments, under the doctrine that, Congress having undertaken to regulate the matter, the states cannot make additional regulations.

A few other constitutional objections have been urged, but unsuccessfully, against statutes of this character.

The South Carolina statute, under which all carriers recognizing, acquiescing, or acting upon a contract for through shipment, are made the agents of each other with respect to the transportation, a through bill of lading being made prima facie evidence of the agency and contract, and any of the carriers may be sued for loss or damage occurring on any part of the route, being given the right of recovery over against the carrier in fault, is valid as to intrastate shipments so far, at least, as any objection founded on the denial of the equal protection of the laws is concerned. Venning v. Atlantic Coast Line R. Co. 78 S. C. 42, 12 L.R.A.(N.S.) 1217, 125 Am. St. Rep. 768, 58 S. E. 983.

The Texas statute (Tex. Rev. Stat. 1895, arts, 331a, 331b) is identical with, and evidently served as the model for, the South Carolina statute just noted, except that the Texas statute by its express terms applies to transportation only between points in the state.

This Texas statute is not open to the objection that it denies due process of law or the equal protection of the laws, or abridges constitutional privileges and immunities, since it does not prevent each carrier from receiving and carrying the freight under an independent contract of its own. Texas & P. R. Co. v. Randle, 18 Tex. Civ. App. 348, 44 S. W. 603.

An invasion of the right of contract cannot be deemed produced by this statute, under which the terminal carrier acquiescing in a through shipment may be held liable for a loss on the initial carrier's line, although every railroad company in the state is required by arts. 4535–4539 to receive all freight coming to it from a connecting line, and carry it at rates fixed by the railroad commission, and the fact of its doing so is, by arts. 331a, 331b, made prima facie evidence of its participation in the through shipment as a joint carrier, any stipulation to the contrary notwithstanding, since both under the common law and Tex. Const. art. 10, § 1, it is the duty of the connecting carrier to receive such freight under such regulations as shall be prescribed by law. Texas & P. R. Co. v. Bigham, — Tex. Civ. App. —, 47 S. W. 814.

any question, contract for exemption from liability beyond its own line.

Ibid.; 1 Hutchinson, Car. § 233.

The statute depriving the carrier of this ancient right to make a "just and reasonable" contract is contrary to the 5th Amendment.

Allgeyer v. Louisiana, 165 U. S. 589, 41 L. ed. 835, 17 Sup. Ct. Rep. 427; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Adair v. United States, 208 U. S. 161, 174, 52 L. ed. 436, 442, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764.

The statute, in providing that the initial carrier shall issue a bill of lading, and shall be liable to the holder of the bill of lading for any damage caused by any connecting carrier, makes the initial carrier liable for the debts of the connecting carrier, in violation of the 5th Amendment.

Atty. Gen. v. Old Colony R. Co. 160 Mass. 62, 22 L.R.A. 112, 35 N. E. 252; Norfolk & W. R. Co. v. Stuart's Draft Mill. Co. 109 Va. 184, 63 S. E. 415; McCann v. Eddy, — Mo. —, 27 S. W. 542; Cooley, Const. Lim. 7th ed. 150; Lindsay & P. Co. v. Mullen. 176 U. S. 143, 155, 44 L. ed. 400, 411, 20 Sup. Ct. Rep. 325; Camp v. Rogers, 44 Conn. 297; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 303; Ohio & M. R. Co. v. Lackey, 78 Ill. 55; Knoxville Traction Co. v. McMillan, 111 Tenn. 521, 65 L.R.A. 296, 77 S. W. 665; Woodward v. Central Vermont R. Co. 180 Mass. 599, 62 N. E. 1053; Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 205, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 A. & E. Ann. Cas. 989; Dirkin v. Kingston Coal Co. 171 Pa. 203, 29 L.R.A. 808, 50 Am. St. Rep. 805, 33 Atl. 237; Williams v. Thacker Coal & Coke Co. 44 W. Va. 599, 40 L.R.A. 812, 30 S. E. 107.

Making the initial carrier pay the connecting carrier's debt, so as to serve the convenience of the holder of the bill of lading, is to "take private property for private purposes," contrary to the provision of the 5th Amendment.

Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 A. & E. Ann. Cas. 989.

And giving the initial carrier "its day in court" does not save the statute, for the legislature cannot pass a law for the purpose of working the wrong. No provision for hearing will support a statute that takes the property of A to pay the debt of B.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 234, 41 L. ed. 983, 17 Sup. Ct. Rep. 581; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 695, 41 L. ed. 1168, 17 Sup. Ct. Rep. 718; Taylor v. Porter, 4 Hill, 140, 40 Am. Dec. 278.

But the act does not even give the connecting carrier "its day in court." It is bound by the judgment without notice, and if it had notice, the connecting carrier is not estopped from showing that it was free from negligence.

Chicago v. Robbins, 2 Black, 418, 17 L. ed. 298; Boston v. Worthington, 10 Gray, 496, 71 Am. Dec. 678; Lincoln v. First Nat. Bank, 67 Neb. 401, 60 L.R.A. 924, 108 Am. St. Rep. 690, 93 N. W. 698.

Even if the judgment against the initial carrier did bind the connecting carrier, that could not satisfy the requirement of the Constitution, for a subsequent and contingent right to an action at law against corporations or individuals of undefined responsibility is not the compensation which the Constitution requires.

Bloodgood v. Mohawk & H. River R. Co. 18 Wend. 9, 31 Am. Dec. 313; Atty. Gen. v. Old Colony R. Co. 160 Mass. 62, 22 L.R.A. 120, 35 N. E. 252; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 144, 53 L. ed. 441, 446, 29 Sup. Ct. Rep. 246; Haverhill Bridge v. Essex County, 103 Mass. 120, 4 Am. Rep. 518; Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 661, 34 L. ed. 303, 10 Sup. Ct. Rep. 965.

Citizens have the right to engage in interstate commerce.

Crutcher v. Kentucky, 141 U. S. 57, 35 L. ed. 652, 11 Sup. Ct. Rep. 851.

They are not obliged to yield to an unconstitutional statute as a condition precedent to doing interstate business. Nor can Congress treat the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even though the conditions would be otherwise beyond the power of Congress.

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 502, 52 L. ed. 310, 28 Sup. Ct. Rep. 141; Adair v. United States, 208 U. S. 161, 174, 52 L. ed. 436, 442, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764.

The right of the national government, under its grant of power, to regulate commerce, is subject to the limitations imposed by the 5th Amendment.

Monongahela Nav. Co. v. United States, 148 U. S. 345, 37 L. ed. 474, 13 Sup. Ct. Rep. 622.

The power to regulate commerce is the power to facilitate and expedite commerce, including transportation of goods. It does not authorize the prohibition of reasonable

and just contracts under which commerce has been developed, which do not in fact impede transportation, and which were not intended to form an impediment to commerce.

Dubuque & S. C. R. Co. v. Richmond, 19 Wall. 589, 590, 22 L. ed. 173, 176; Central R. Co. v. Murphey, 196 U. S. 204, 205, 49 L. ed. 448, 449, 25 Sup. Ct. Rep. 218, 2 A. & E. Ann. Cas. 514; Lottery Case (Champion v. Ames) 188 U. S. 362, 47 L. ed. 503, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561.

The making of through and joint rates is essentially contractual.

Star Grain & Lumber Co. v. Atchison, T. & S. F. R. Co. 14 Inters. Com. Rep. 364; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 630.

And the courts have never decided to what extent the carrier can be required to make through and joint rates.

Southern P. R. Co. v. Interstate Commerce Commission, 200 U. S. 553, 50 L. ed. 593, 26 Sup. Ct. Rep. 330; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 680, 28 L. ed. 296, 4 Sup. Ct. Rep. 185; Coles v. Central R. & Bkg. Co. 86 Ga. 255, 12 S. E. 749; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 499, 48 N. W. 98; Jacobson v. Wisconsin, M. & P. R. Co. 71 Minn. 519, 40 L.R.A. 389, 70 Am. St. Rep. 364, 74 N. W. 893, affirmed in 179 U. S. 292, 45 L. ed. 196, 21 Sup. Ct. Rep. 115; Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 571, 48 L. ed. 569, 24 Sup. Ct. Rep. 339.

But wherever through and joint rates are made, it does not make one carrier liable for the contracts of another,—does not bind road to road in the sense that the two are used or operated by either corporation. There is neither unity of ownership nor unity of operation, but only a singleness of charge, and a continuity of transportation over connecting roads.

Chicago & N. W. R. Co. v. Osborne, 4 Inters. Com. Rep. 257, 3 C. C. A. 347, 10 U. S. App. 430, 52 Fed. 915; Interstate Commerce Commission v. Stickney, 215 U. S. 98, 106, 54 L. ed. 112, 114, 30 Sup. Ct. Rep. 66; Penn Ref. Co. v. Western New York & P. R. Co. 208 U. S. 208, 222, 52 L. ed. 456, 462, 28 Sup. Ct. Rep. 268.

Limited liability acts of Congress, whether passed in pursuance of the admiralty jurisdiction or the commerce clause, or both, were primarily intended to prevent the making of unreasonable stipulations in bills of lading (The Delaware, 161 U. S. 472, 40 L. ed. 776, 16 Sup. Ct. Rep. 516), and at most only related to the liability of owners for their own negligence, and did not make them or the vessel liable for injuries occasioned by the negligence of another vessel by which the goods might be forwarded.

The initial carrier is not liable on the ground stated in Smeltzer v. St. Louis & S. F. R. Co. 158 Fed. 661, that the act became a part of the contract, for if the act is void, it imposes no duties, and is as though it had never been passed.

Norton v. Shelby County, 118 U. S. 426, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121; Cleveland v. Clements Bros. Constr. Co. 67 Ohio St. 197, 59 L.R.A. 775, 93 Am. St. Rep. 670, 65 N. E. 885; People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716.

Nor has the company voluntarily made itself liable. This is a suit on the statute, and what the company may choose voluntarily to do furnishes no measure of the power of Congress. Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 697, 43 L. ed. 864, 19 Sup. Ct. Rep. 565. But there was no voluntary acceptance, as suggested in Louisville & N. R. Co. v. Scott, 133 Ky. 724, 118 S. W. 992, 19 A. & E. Ann. Cas. 392, because at common law the carrier was obliged to accept the goods when tendered, and thereupon, *eo instanti*, came within the circle of the Carmack amendment, and subject to the command that the company receiving the goods shall issue a bill of lading, and shall be liable for damages caused by the connecting carrier, and that no contract should exempt it from the liability hereby imposed.

The contract under which the goods were received is an entirety. Part of it cannot be laid hold of to acquire interstate jurisdiction, and the balance ignored, whereby interstate relation is stipulated to cease in law when it ceases in fact by delivery to the next carrier.

McCarn v. International & G. N. R. Co. 84 Tex. 352, 16 L.R.A. 39, 31 Am. St. Rep. 51, 19 S. W. 549; Hartley v. St. Louis, K. & N. W. R. Co. 115 Iowa, 612, 89 N. W. 88; Duhuque & S. C. R. Co. v. Richmond, 19 Wall. 589, 22 L. ed. 176; Myrick v. Michigan C. R. Co. 107 U. S. 110, 27 L. ed. 327, 1 Sup. Ct. Rep. 425.

The Carmack amendment was intended to compel the initial carrier to issue a bill of lading, to make it liable for damages by connecting carrier, and to prevent the contract of exemption from the liability hereby imposed; and thereby to change the common law, which required no bill of lading (1 Hutchinson, Carr. § 152), which permitted contracts for exemption from liability, and also to legislate directly contrary to the Missouri statute, which the courts held did not require the initial carrier to asume lia-

bility beyond its line, but permitted contracts of exemption.

Missouri, K. & T. R. Co. v. McCann, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755.

The provision as to attorneys' fees also takes property without due process of law.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 160, 162, 41 L. ed. 666, 670, 671, 17 Sup. Ct. Rep. 255.

Messrs. Joseph R. Lamar, Charles H. Moorman, Benjamin D. Warfield, and Henry Lane Stone also filed a supplemental brief for plaintiff in error:

The Carmack amendment, read with the whole statute, may conceivably be construed as declaratory of the English rule of evidence.

Burtis v. Buffalo & State Line R. Co. 24 N. Y. 269; Root v. Great Western R. Co. 45 N. Y. 524.

If the Carmack amendment is susceptible of such a construction, then we agree that it is the duty of the courts to give it such a construction, as that construction will avoid constitutional objection.

United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075.

Messrs. John Maynard Harlan and Lewis W. McCandless filed a brief as *amici curiæ*:

Under the terms of the bill of lading, taking no account of the Hepburn law, the defendant was entitled to a judgment herein; and the judgment for plaintiffs was predicated directly and solely on the Hepburn law.

Palmer v. Atchison, T. & S. F. R. Co. 101 Cal. 187, 35 Pac. 630; Myrick v. Michigan C. R. Co. 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. Rep. 425; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; Pennsylvania R. Co. v. Jones, 155 U. S. 333, 39 L. ed. 176, 15 Sup. Ct. Rep. 136; Coats v. Chicago, R. I. & P. R. Co. 239 Ill. 154, 87 N. E. 929; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; St. Louis Ins. Co. v. St. Louis, V. T. H. & I. R. Co. 104 U. S. 146, 26 L. ed. 679; Mather v. American Exp. Co. 9 Biss. 293, 2 Fed. 49; North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 31 L. ed. 287, 8 Sup. Ct. Rep. 266; 3 Hutchinson, Carr. 3d ed. 1906, § 1348; Beard v. St. Louis, A. & T. H. R. Co. 79 Iowa, 518, 44 N. W. 803; St. Louis, I. M. & S. R. Co. v. Renfroe, 82 Ark. 143, 10 L.R.A.(N.S.) 317, 118 Am. St. Rep. 58, 100 S. W. 889.

The construction which the trial court put upon the provisions of the Hepburn law involved in this case was the correct construction.

Root v. Great Western R. Co. 45 N. Y. 524; Burtis v. Buffalo & State Line R. Co. 24 N. Y. 269; Missouri, K. & T. R. Co. v. McCann, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755; Cau v. Texas & P. R. Co. 194 U. S. 427, 48 L. ed. 1053, 24 Sup. Ct. Rep. 663; Bachman v. Clyde S. S. Co. 81 C. C. A. 529, 152 Fed. 403; Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. Rep. 561; Despeaux v. Pennsylvania R. Co. 133 Fed. 1009; Robinson v. Baltimore & O. R. Co. 64 W. Va. 406, 63 S. E. 323; Halliday Mill. Co. v. Louisiana & N. W. R. Co. 80 Ark. 536, 98 S. W. 374; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. ed. 465; Michigan C. R. Co. v. Mineral Springs Mfg. Co. 16 Wall. 318, 21 L. ed. 297; Peoria & R. I. R. Co. v. Coal Valley Min. Co. 68 Ill. 489; Peoria & P. Union R. Co. v. Chicago, R. I. & P. R. Co. 109 Ill. 135, 50 Am. Rep. 605; Chicago, B. & Q. R. Co. v. Jones. 149 Ill. 361, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247; Myrick v. Michigan C. R. Co. 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. Rep. 425; Seasongood, S. K. Co. v. Tennessee & O. River Transp. Co. 21 Ky. L. Rep. 1142, 49 L.R.A. 270, 54 S. W. 193; Inman v. St. Louis Southwestern R. Co. 14 Tex. Civ. App. 39, 37 S. W. 37; Brintnall v. Saratoga & W. R. Co. 32 Vt. 665; Erie R. Co. v. Wilcox, 84 Ill. 239, 25 Am. Rep. 451; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; People ex rel. Livergood v. Greer, 43 Ill. 213; Smith v. Townsend, 148 U. S. 490, 37 L. ed. 533, 13 Sup. Ct. Rep. 634; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 227, 12 Sup. Ct. Rep. 511; United States v. Union P. R. Co. 91 U. S. 72, 23 L. ed. 224; Kohlsaat v. Murphy, 96 U. S. 153. 24 L. ed. 844; United States v. Jessup, 15 Fed. 790; Baltimore & O. R. Co. v. Maryland, 21 Wall. 456, 22 L. ed. 678; Dubuque & S. C. R. Co. v. Richmond, 86 U. S. 584, 22 L. ed. 173; Southern P. Co. v. Interstate Commerce Commission, 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. Rep. 330; Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; Oregon Short Line & U. N. R. Co. v. Northern P. R. Co. 4 Inters. Com. Rep. 249, 51 Fed. 465; Little Rock & M. R. Co. v. St. Louis South-

western R. Co. 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567; Central Stock Yards Co. v. Louisville & N. R. Co. 112 Fed. 823; Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co. 2 Inters. Com. Rep. 763, 41 Fed. 559; Interstate Commerce Commission v. Baltimore & O. R. Co. 3 Inters. Com. Rep. 192, 43 Fed. 37; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896.

The provision of the Hepburn law here in question is not a regulation of commerce within the purview of the Constitution, and Congress had no power to enact this provision.

Cummings v. Missouri, 4 Wall. 277, 18 L. ed. 356; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health, 186 U. S. 380, 46 L. ed. 1209, 22 Sup. Ct. Rep. 811; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Hepburn v. Griswold, 8 Wall. 603, 19 L. ed. 513; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 A. & E. Ann. Cas. 1103; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896; Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; State Tax on R. Gross Receipts, 15 Wall. 284, 21 L. ed. 164; Nathan v. Louisiana, 8 How. 73, 12 L. ed. 992; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 470; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Reid v. Southern R. Co. 149 N. C. 423, 63 S. E. 112; Reid v. Southern R. Co. 150 N. C. 753, 64 S. E. 874, 17 A. & E. Ann. Cas. 247; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Davis v. Cleveland, C. C. & St. L. R. Co. 217 U. S. 157, 54 L. ed. 708, 27 L.R.A.(N.S.) 823, 30 Sup. Ct. Rep. 463.

The provisions of the Hepburn law here in question are void because repugnant to the 5th Amendment to the Constitution.

Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 388, 1191; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Interstate Commerce Commission v. Baltimore & O. R. Co. 3 Inters. Com. Rep. 192, 43 Fed. 37; Lochner

v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539; 3 A. & E. Ann. Cas. 1133; People v. Steele, 231 Ill. 340, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321, 83 N. E. 236; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Freeland v. Williams, 131 U. S. 405, 33 L. ed. 193, 9 Sup. Ct. Rep. 763; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 A. & E. Ann. Cas. 1103; Oregon Short Line & U. N. R. Co. v. Northern P. R. Co. 4 Inters. Com. Rep. 249, 51 Fed. 465; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493; Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co. 2 Inters. Com. Rep. 763, 41 Fed. 559; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; Vincent v. Chicago & A. R. Co. 49 Ill. 33; People ex rel. Hempstead v. Chicago & A. R. Co. 55 Ill. 95, 8 Am. Rep. 631; Chicago & N. W. R. Co. v. People, 56 Ill. 365, 8 Am. Rep. 690; Hoyt v. Chicago, B. & Q. R. Co. 93 Ill. 601; Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission, 21 C. C. A. 103, 43 U. S. App. 308, 74 Fed. 803; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567; Little Rock & M. R. Co. v. St. Louis Southwestern R. Co. 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775; Atty. Gen. v. Boston & A. R. Co. 160 Mass. 92, 22 L.R.A. 112, 35 N. E. 252; Central R. Co. v. Murphey, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 A. & E. Ann. Cas. 514; St. Louis Ins. Co. v. St. Louis, V. T. H. & I. R. Co. 104 U. S. 146, 26 L. ed. 679; United States Exp. Co. v. Kountze Bros. 8 Wall. 342, 19 L. ed. 457; Hinckley v. New York C. & H. R. R. Co. 56 N. Y. 429; Ackley v. Kellogg, 8 Cow. 223; Johnson v. New York C. & H. R. R. Co. 33 N. Y. 610, 88 Am. Dec. 416; Maghee v. Camden & A. R. Co. 45 N. Y. 514, 6 Am. Rep. 124; Fisher v. Boston & M. R. Co. 99 Me. 338, 68 L.R.A. 390, 105 Am. St. Rep. 283, 59 Atl. 532; Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co. 94 Minn. 269, 69 L.R.A. 509, 110 Am. St. Rep. 361, 102 N. W. 709, 3 A. & E. Ann. Cas. 450; Merchants' Despatch Transp. Co. v. Kahn, 76 Ill. 520; Wald v. Pittsburg, C. C. & St. L. R. Co. 162 Ill. 545, 35 L.R.A. 356, 53 Am. St. Rep. 332, 44 N. E. 888; Wells, F. & Co's Express v. Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412; Homer Ramsdell Transp. Co. v. LaCompagnie Générale Transatlantique, 182 U. S. 406, 45 L. ed. 1155, 21 Sup. Ct. Rep. 831; James v. San Francisco, 6 Cal. 528, 65 Am. Dec. 526; McCann v. Eddy, — Mo. —, 27 S. W. 541; Missouri, K. & T. R. Co. v. McCann, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755; Pennsylvania R. Co. v. Jones, 155 U. S. 333, 39 L. ed. 176, 15 Sup. Ct. Rep. 136; Durkin v. Kingston Coal Co. 171 Pa. 193, 29 L.R.A. 808, 50 Am. St. Rep. 801, 33 Atl. 237; Williams v. Thacker Coal & Coke Co. 44 W. Va. 599, 40 L.R.A. 812, 30 S. E. 107; Henrietta Coal Co. v. Martin, 221 Ill. 460, 77 N. E. 902; Fulton v. Wilmington Star Min. Co. 68 L.R.A. 168, 66 C. C. A. 247, 133 Fed. 193, 205 U. S. 60, 51 L. ed. 708, 27 Sup. Ct. Rep. 412; Gibbs v. Tally, 133 Cal. 373, 60 L.R.A. 815, 65 Pac. 970; Ohio & M. R. Co. v. Lackey, 78 Ill. 55; Jensen v. Union P. R. Co. 6 Utah, 253, 4 L.R.A. 724, 21 Pac. 994; Catril v. Union P. R. Co. 2 Idaho, 576, 21 Pac. 416; Bielenberg v. Montana Union R. Co. 8 Mont. 271, 2 L.R.A. 813, 20 Pac. 314; Oregon R. & Nav. Co. v. Smalley, 1 Wash. 206, 22 Am. St. Rep. 143, 23 Pac. 1008; Schenck v. Union P. R. Co. 5 Wyo. 430, 40 Pac. 840; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Woodward v. Central Vermont R. Co. 180 Mass. 599, 62 N. E. 1051; People ex rel. Griffin v. Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; Cary Library v. Bliss, 151 Mass. 364, 7 L.R.A. 765, 25 N. E. 92; Levy v. Dunn, 160 N. Y. 504, 73 Am. St. Rep. 699, 55 N. E. 288.

Mr. Alexander Akerman submitted the cause for defendant in error. Messrs. Charles Akerman and R. J. Southall were on the brief:

The mischief sought to be remedied by the statute was the trouble, delay, and expense to the shipper in collecting claims for loss or damage by the carriers. This court had, only a short time prior to the enactment of the Hepburn bill, decided that the state legislatures could give no relief in matters of interstate shipment.

Central R. Co. v. Murphey, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 A. & E. Ann. Cas. 514.

The Constitution gives Congress full power to regulate interstate commerce.

Gibbons v. Ogden, 9 Wheat. 196, 6 L. ed. 70; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Smeltzer v. St. Louis & S. F. R. Co. 158 Fed. 649; Lottery Case (Champion v. Ames) 188 U. S. 321,

47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561.

Section 20 of the Hepburn bill was only intended to compel the carriers to return to the common-law rule which made the initial carriers liable, in the absence of contract limiting the carrier to liability for loss occurring on its own line, and to prohibit such contracts, as being contrary to the declared public policy of the United States.

Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 686, 28 L. ed. 298, 4 Sup. Ct. Rep. 185; Southern P. Co. v. Crenshaw Bros. 5 Ga. App. 675, 63 S. E. 865; Smeltzer v. St. Louis & S. F. R. Co. 158 Fed. 649.

The liberty of contract guaranteed by the Constitution is subject to such reasonable restraints as may be imposed by Congress for the public good and general welfare.

Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764; United States v. Joint Traffic Asso. 171 U. S. 571, 43 L. ed. 288, 19 Sup. Ct. Rep. 25; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

Railroad companies are subject to legislative control for the protection of the public.

New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Georgia, R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 364, 37 L. ed. 769, 13 Sup. Ct. Rep. 870.

Congress may fix a new rule of civil liability in matters of interstate commerce.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158.

The power of Congress to regulate the liability of carriers and others engaged in interstate commerce for injury to person or property has been distinctly recognized in a number of cases.

Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Martin v. Pittsburg & L. E. R. Co. 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100, 8 A. & E. Ann. Cas. 87.

It is for Congress to determine what public policy requires with respect to common carriers engaged in interstate commerce.

United States v. Joint Traffic Asso. 171 U. S. 569, 571, 573, 43 L. ed. 287–289, 19 Sup. Ct. Rep. 25; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

The allowance of attorneys' fees was proper.

Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307.

Assistant to the Attorney General Kenyon argued the cause, and, with Attorney General Wickersham, filed a brief for the government as *amicus curiæ*:

At the time of the passage of the Hepburn act, railroads were not compelled to establish through routes or to make joint tariffs.

Myrick v. Michigan C. R. Co. 107 U. S. 102, 106, 27 L. ed. 325, 326, 1 Sup. Ct. Rep. 425; Southern P. Co. v. Interstate Commerce Commission, 200 U. S. 536, 553, 50 L. ed. 585, 593, 26 Sup. Ct. Rep. 330; Interstate Commerce Commission v. Baltimore & O. R. Co. 3 Inters. Com. Rep. 192, 43 Fed. 50; Michigan C. R. Co. v. Mineral Springs Mfg. Co. 16 Wall. 318, 324, 21 L. ed. 297, 301.

By the enactment of the statute in question, the shipper in interstate commerce was to be relieved from following a claim through the various departments of numerous carriers until not only his patience, but his money, was entirely exhausted.

Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28.

Congress, under the commerce clause of the Constitution, has plenary power with reference to interstate commerce, complete in itself, acknowledging no limitations other than those prescribed in the Constitution.

Gibbons v. Ogden, 9 Wheat. 1, 196, 6 L. ed. 23, 70; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Buttfield v. Stranahan, 192 U. S. 470, 492, 48 L. ed. 525, 534, 24 Sup. Ct. Rep. 349.

That there may be an apparent harshness resulting to the initial carrier is no concern of the courts.

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 295, 52 L. ed. 1061, 1068, 28 Sup. Ct. Rep. 616.

There is no such thing as absolute liberty of contract.

The Irrawaddy (Flint v. Christall) 171 U. S. 187, 43 L. ed. 130, 18 Sup. Ct. Rep. 831; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; State v. Brown & S. Mfg. Co. 18 R. I. 16, 17 L.R.A. 856, 25 Atl. 246; Harbison v. Knoxville Iron Co. 103 Tenn. 421, 56 L.R.A. 316, 76 Am. St. Rep. 682, 53 S. W. 955, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; Kilpatrick v. Grand Trunk R. Co. 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, — L.R.A.(N.S.) —, 108 N. W. 902; Frisbie v. United States, 157 U. S. 160, 165, 39 L. ed. 657, 658, 15 Sup. Ct. Rep. 586; Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Shaffer v. Union Min. Co. 55 Md. 74, 15 Mor. Min. Rep. 59; International Text-Book Co. v. Weissinger, 160 Ind. 349, 65 L.R.A. 599, 98 Am. St. Rep. 334, 65 N. E. 521; Maloney v. Newton, 85 Ind. 565, 44 Am. Rep. 46; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168.

The business of the shipper and the railroad cannot be carried on except by virtue of through routes and joint rates.

Smeltzer v. St. Louis & S. F. R. Co. 158 Fed. 649, 656; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 143, 53 L. ed. 445, 29 Sup. Ct. Rep. 246.

The statute does not take the property of the initial carrier without due process of law.

Clark v. Russell, 38 C. C. A. 541, 97 Fed. 900; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Fidelity & C. Co. v. Dorough, 46 C. C. A. 364, 107 Fed. 389; Farmers & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; Great Southern Fire-Proof Hotel Co. v. Jones, 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576; Lambert v. Davis, 116 Cal. 292, 48 Pac. 123.

Statutes should be declared unconstitutional only after every reasonable presumption has been indulged in favor of their validity.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 88, 52 L. ed. 116, 28 Sup. Ct. Rep. 26, 12 A. & E. Ann. Cas. 555.

No court, as far as we are able to learn, has held the act to be unconstitutional.

Smeltzer v. St. Louis & S. F. R. Co. 158 Fed. 649; Galveston, H. & S. A. R. Co. v. F. A. Piper Co. 52 Tex. Civ. App. 568, 115 N. W. 107; Louisville & N. R. Co. v. Scott, 133 Ky. 724, 118 S. W. 992, 19 A. & E. Ann. Cas. 392; Pittsburg, C. C. & St. L. R. Co. v. Mitchell, — Ind. —, 91 N. E. 740, Greenwald v. Weir, 130 App. Div. 696, 115 N. Y. Supp. 311; Riverside Mills v. Atlantic Coast Line R. Co. 168 Fed. 987.

Corporations created by the states are as much under the control of Congress in the regulation of interstate commerce as if they existed by virtue of acts of Congress.

Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370.

It has not seemingly been questioned that Congress has the right to establish through routes and joint rates.

Interstate Commerce Commission v. Delaware, L. & W. R. Co. 216 U. S. 531, 54 L. ed. 605, 30 Sup. Ct. Rep. 415.

The right of a corporation, particularly a railroad corporation, of one state, to carry on business in interstate commerce, depends upon the will of Congress.

Paul v. Virginia, 8 Wall. 168, 181, 19 L. ed. 357, 360; Northwestern Nat. L. Ins. Co. v. Riggs, 203 U. S. 243, 51 L. ed. 168, 27 Sup. Ct. Rep. 126, 7 A. & E. Ann. Cas. 1104; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Hale v. Henkel, 201 U. S. 75, 50 L. ed. 665, 26 Sup. Ct. Rep. 370; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 143, 53 L. ed. 445, 29 Sup. Ct. Rep. 246.

After making the above statement, Mr. Justice **Lurton** delivered the opinion of the court:

The goods of the defendants in error were

lost by a connecting carrier to whom they had been safely delivered. Though received for a point beyond its own line, and for a point on the line of a succeeding carrier, there was no agreement for their safe carriage beyond the line of the plaintiff in error, but, upon the contrary, an express 195]*agreement that the initial carrier should not be liable for "a loss or damage not occurring on its own portion of the route." Such a provision is not a contract for exemption from a carrier's liability as such, but a provision making plain that it did not assume the obligation of a carrier beyond its own line, and that each succeeding carrier in the route was but the agent of the shipper for a continuance of the transportation. It is therefore obvious that at the common law an initial carrier under such a state of facts would not be liable for a loss through the fault of a connecting carrier to whom it had, in due course, safely delivered the goods for further transportation. Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. 123, 22 L. ed. 827; Myrick v. Michigan C. R. Co. 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. Rep. 425; Southern P. R. Co. v. Interstate Commerce Commission, 200 U. S. 536, 554, 50 L. ed. 585, 593, 26 Sup. Ct. Rep. 330. Liability is confessedly dependent upon the provision of the act of Congress regulating commerce between the states, known as the Carmack amendment of June 29, 1906 (34 Stat. at L. 584, 595, chap. 3591, U. S. Comp. Stat. Supp. 1909, pp. 1149, 1166). The 20th section of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), as changed by the Carmack amendment, reads as follows:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property, caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed. Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

196] *"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

The power of Congress to enact this legislation has been denied, first, because it is said to deprive the carrier and the shipper of their common-law power to make a just and reasonable contract in respect to goods to be carried to points beyond the line of the interstate carrier; and, second, that in casting liability upon the initial carrier for loss or damage upon the line of a connecting carrier, the former is deprived of its property without due process of law.

The indisputable effect of the Carmack amendment is to hold the initial carrier engaged in interstate commerce and "receiving property for transportation from a point in one state to a point in another state" as having contracted for through carriage to the point of destination, using the lines of connecting carriers as its agents.

Independently of the Carmack amendment the carrier, when tendered property for such transportation, might elect to contract to carry to destination, in which case it necessarily agreed to do so through the agency of other and independent carriers in the line; or, it might elect to carry safely over its own lines only, and then deliver to the next carrier, who would then become the agent of the shipper. In the first case the receiving carrier's liability as carrier extends over the whole route, for, on obvious grounds, the principal is liable for the acts of its agent. In the other case its carrier liability ends at its own terminal, and its further liability is merely that of a forwarder. Having this power to make the one or the *other contract, the [197 only question which has occasioned a conflict in the decided cases was whether it, in the particular case, made the one or the other.

The general doctrine accepted by this court, in the absence of legislation, is, that a carrier, unless there be a special contract, is only bound to carry over its own line, and then deliver to a connecting carrier. That such an initial carrier might contract to carry over the whole route was never doubted. It is equally indisputable that if it does so contract, its common-law carrier liability will extend over the entire route. Ohio & M. R. Co. v. McCarthy, 96 U. S. 258, 266, 24 L. ed. 693, 696; Ogdensburg & L. C. R. Co. v. Pratt, supra; Northern P. R. Co. v. American Trading Co. 195 U. S. 439, 49 L. ed. 269, 25 Sup. Ct. Rep. 84; Muschamp v. Lancaster & P. R. Co. 8 Mees. & W. 421.

The English cases beginning with Mus-

champ v. Lancaster & P. R. Co. supra, decided in 1841, down to Bristol & E. R. Co. v. Collins, 7 H. L. Cas. 194, have consistently held that the mere receipt of property for transportation to a point beyond the line of the receiving carrier, without any qualifying agreement, justified an inference of an agreement for through transportation, and an assumption of full carrier liability by the primary carrier. The ruling is grounded upon considerations of public policy and public convenience, and classes the receipt of goods so designated for a point beyond the carrier line as a holding out to the public that the carrier has made its own arrangements for the continuance by a connecting carrier of the transportation after the goods leave its own line. There are American cases which take the same view of the question of evidence thus presented. Some of them are Louisville & N. R. Co. v. Campbell, 7 Heisk. 257; Alabama & G. S. R. Co. v. Mt. Vernon Co. 84 Ala. 175, 4 So. 356; Central R. Co. v. Hasselkus, 91 Ga. 384, 44 Am. St. Rep. 37, 17 S. E. 838; Beard v. St. Louis, A. & T. H. R. Co. 79 Iowa, 531, 44 N. W. 803; Kyle v. Laurens R. Co. 10 Rich. L. 382, 70 Am. Dec. 231; Erie R. Co. v. Wilcox, 84 Ill. 240, 25 Am. Rep. 451; East Tennessee & V. R. Co. v. Rogers, 6 Heisk. 143, 19 Am. Rep. 589.

198] *Upon the other hand, many American courts have repudiated the English rule which holds the carrier to a contract for transportation over the whole route, in the absence of a contract clearly otherwise, and have adopted the rule that unless the carrier specifically agrees to carry over the whole route, its responsibility as a carrier ends with its own line; and that, for the continuance of the shipment, its liability is only that of a forwarder. The conflict has therefore been one as to the evidence from which a contract for through carriage to a place beyond the line of the receiving carrier might be inferred.

In this conflicting condition of the decisions as to the circumstances from which an agreement for through transportation of property designated to a point beyond the receiving carrier's line might be inferred, Congress, by the act here involved, has declared, in substance, that the act of receiving property for transportation to a point in another state, and beyond the line of the receiving carrier, shall impose on such receiving carrier the obligation of through transportation, with carrier liability throughout. But this uncertainty of the nature and extent of the liability of a carrier receiving goods destined to a point beyond its own line was not all which might well induce the interposition of the regulating power of Congress. Nothing has perhaps contributed more to the wealth and prosperity of the country than the almost universal practice of transportation companies to co-operate in making through routes and joint rates. Through this method, a situation has been brought about by which, though independently managed, connecting carriers become in effect one system. This practice has its origin in the mutual interests of such companies and in the necessities of an expanding commerce.

In the leading case of Muschamp v. Lancaster & P. R. Co. cited above, Lord Abinger defended the inference of a contract for through carriage from the mere *re-[199 ceipt of a package destined to a point beyond the line of the receiving carrier upon the known practice in his day of such carriers. Upon this subject, in speaking of connecting lines of railway, he said: "These railway companies, though separate in themselves, are in the habit, for their own advantage, of making contracts, of which this was one, to convey goods along the whole line, to the ultimate terminus, each of them being agents of the other to carry them forward, and each receiving their share of the profits from the last."

The tenth clause of the conditions annexed to this bill of lading, and shown elsewhere, affords a fair illustration of the customary methods of connecting carriers to co-operate for their mutual benefit in carrying on transportation begun by one which must be continued by other lines over which the thing to be transported must go. The receiving carrier makes the rate and the route, and as the agent of every such connecting carrier executes a contract which is to bind each of them, "severally, but not jointly," one of the terms of the agreement being that each carrier shall be liable only for loss or damage occurring on its own line. Through this well known and necessary practice of connecting cariers there has come about, without unity of ownership or physical operation, a singleness of charge and a continuity of transportation greatly to the advantage of the carrier, and beneficial to the great and growing commerce of the country.

Along with this singleness of rate and continuity of carriage there grew up the practice by receiving carriers, illustrated in this case, of refusing to make a specific agreement to transport to points beyond its own line, whereby the connecting carrier, for the purpose of carriage, would become the agent of the primary carrier. The common form of receipt, as the court may judicially know, is one by which the shipper is compelled to make with each carrier in the route over which his package

200] *must go a separate agreement limiting the carrier liability of each separate company to its own part of the through route. As a result the shipper could look only to the initial carrier for recompense for loss, damage, or delay occurring on its part of the route. If such primary carrier was able to show a delivery to the rails of the next succeeding carrier, although the packages might and usually did continue the journey in the same car in which they had been originally loaded, the shipper must fail in his suit. He might, it is true, then bring his action against the carrier so shown to have next received the shipment. But here, in turn, he might be met by proof of safe delivery to a third separate carrier. In short, as the shipper was not himself in possession of the information as to when and where his property had been lost or damaged, and had no access to the records of the connecting carriers who, in turn, had participated in some part of the transportation, he was compelled in many instances to make such settlement as should be proposed.

This burdensome situation of the shipping public in reference to interstate shipments over routes including separate lines of carriers was the matter which Congress undertook to regulate. Thus, when this Carmack amendment was reported by a conference committee, Judge William Richardson, a congressman from Alabama, speaking for the committee of the matter which it was sought to remedy, among other things, said:

"One of the great complaints of the railroads has been—and, I think, a reasonable, just, and fair complaint—that when a man made a shipment, say, from Washington, for instance, to San Francisco, California, and his shipment was lost in some way, the citizen had to go thousands of miles, probably, to institute his suit. The result was that he had to settle his damages at what he could get. What have we done? We have made the initial carrier, the carrier that takes and receives the shipment, re-
201] sponsible *for the loss of the article in the way of damages. We save the shipper from going to California or some distant place to institute his suit. Why? The reasons inducing us to do that were that the initial carrier has a through-route connection with the secondary carrier, on whose route the loss occurred, and a settlement between them will be an easy matter, while the shipper would be at heavy expense in the institution of a suit. If a judgment is obtained against the initial carrier, no doubt exists but that the secondary carrier would pay it at once. Why? Because the arrangement, the concert, the co-operation, the through route courtesies between them, would be broken up if prompt payment were not made. We have done that in conference." (40 Cong. Rec. Pt. 10, p. 9580.)

It must be conceded that the effect of the act in respect of carriers receiving packages in one state for a point in another, and beyond its own lines, is to deny to such an initial carrier the former right to make a contract limiting liability to its own line. This, it is said, is a denial of the liberty of contract secured by the 5th Amendment to the Constitution. To support this, counsel cited such cases as Allgeyer v. Louisiana, 165 U. S. 589, 41 L. ed. 835, 17 Sup. Ct. Rep. 427; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; and Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764.

This power to regulate is the right to prescribe the rules under which such commerce may be conducted. "It is," said Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat. 1, 196, 6 L. ed. 23, 70, "the power . . . vested in Congress as absolutely as it would be in a single government having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." It is a power which extends to the regulation of the appliances and machinery and agencies by which such commerce is conducted. Thus, in Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, an act prescribing safety appliances *was upheld. And in Interstate [202 Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155, it was held that the equipment of an interstate railway, including cars used for the transportation of its own fuel, was subject to the regulation of Congress. In Interstate Commerce Commission v. Chicago & A. R. Co. 215 U. S. 479, 54 L. ed. 291, 30 Sup. Ct. Rep. 163, it was held to extend to the distribution of coal cars to the shipper, so as to prevent discrimination. In the Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, power to pass an act which regulated the relation of master and servant, so as to impose on the carrier, while engaged in interstate commerce, liability for the negligence of a fellow servant, for which at common law there was no liability, and depriving such carrier of the common-law defense of contributory negligence save by way of reduction of damages, was upheld. In Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96, and Northern Securities Co. v. United ed States, 193 U. S. 197, 48 L. ed. 679, 24

Sup. Ct. Rep. 436, it was held that this power of regulation extended to and embraced contracts in restraint of trade between the states.

It is obvious, from the many decisions of this court, that there is no such thing as absolute freedom of contract. Contracts which contravene public policy cannot be lawfully made at all; and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests. Undoubtedly the United States is a government of limited and delegated powers, but in respect of those powers which have been expressly delegated, the power to regulate commerce between the states being one of them, the power is absolute, except as limited by other provisions of the Constitution itself.

Having the express power to make rules [203] for the conduct *of commerce among the states, the range of congressional discretion as to the regulation best adapted to remedy a practice found inefficient or hurtful is a wide one. If the regulating act be one directly applicable to such commerce, not obnoxious to any other provision of the Constitution, and reasonably adapted to the purpose by reason of legitimate relation between such commerce and the rule provided, the question of power is foreclosed. "The test of power," said Mr. Justice White, speaking for this court in the Employers' Liability Cases, cited above, "is not merely the matter regulated, but whether the regulation is directly one of interstate commerce, or is embraced within the grant [of power] conferred on Congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce."

That a situation had come about which demanded regulation in the public interest was the judgment of Congress. The requirement that carriers who undertook to engage in interstate transportation, and as a part of that business held themselves out as receiving packages destined to places beyond their own terminal, should be required, as a condition of continuing in that traffic, to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies, was not beyond the scope of the power of regulation. The rule is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility. The regulation is one which also facilitates the remedy of one who sustains a loss, by localizing the responsible carrier. Neither does the regulation impose an unreasonable burden upon the receiving carrier. The methods in vogue, as the court may judicially know, embrace not only the voluntary arrangement of through routes and rates, but the collection of the single charge made by the carrier at one or the other end of the route. This involves frequent and prompt settlement of traffic *bal-[204] ances. The routing in a measure depends upon the certainty and promptness of such traffic balance settlements, and such balances have been regarded as debts of a preferred character when there is a receivership. Again, the business association of such carriers affords to each facilities for locating primary responsibility as between themselves which the shipper cannot have. These well-known conditions afford a reasonable security to the receiving carrier for a reimbursement of a carrier liability which should fall upon one of the connecting carriers as between themselves.

But it is said that any security resulting from a voluntary agreement constituting a through route and rate is destroyed if the receiving carrier is not at liberty to select his own agencies for a continuance of the transportation beyond his own line. This is an objection which has no application to the present case. This action was for loss and damage arising from several distinct shipments to different places beyond the line of the plaintiff in error, who was the initial or receiving carrier. The presumption, from the absence of anything to the contrary in the record, is that the routing was over connecting lines with whom the plaintiff in error had theretofore made its own arrangements and rate. This record presents no question as to the right of the initial carrier to refuse a shipment designated for a point beyond its own line, nor its right to refuse to make a through route or joint rate when such route and rate would involve the continuance of a transportation over independent lines. We therefore refrain from any consideration of the large question thus suggested. The shipments involved in the present case were voluntarily received by an initial carrier who undertook to escape carrier's liability beyond its own line by a provision limiting liability to loss upon its own line. This was forbidden by the Carmack amendment, and any stipulation and condition in the *special receipt which contravenes the [205] rule in question is invalid.

Reduced to the final results, the Congress has said that a receiving carrier, in spite of any stipulation to the contrary, shall be deemed, when it receives property in one state, to be transported to

a point in another, involving the use of a connecting carrier for some part of the way, to have adopted such other carrier as its agent, and to incur carrier liability throughout the entire route, with the right to reimbursement for a loss not due to his own negligence. The conditions which justified this extension of carrier liability we have already adverted to. The rule of the common law which treated a common carrier as an insurer grew out of a situation which required that kind of security for the protection of the public. To quote the quaint but expressive words of Lord Holt, in Coggs v. Bernard, 2 Ld. Raym. 909, when defending and applying the doctrine of absolute liability against loss not due to the act of God or the public enemy, "This rule," said he, "is a politick establishment contrived by the policy of the law for the safety of all persons the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing."

If it is to be assumed that the ultimate power exerted by Congress is that of compelling co-operation by connecting lines of independent carriers for purposes of interstate transportation, the power is still not beyond the regulating power of Congress, since, without merging identity of separate lines or operation, it stops with the requirement of oneness of charge, continuity of transportation, and primary liability of the receiving carrier to the shipper, with the right of reimbursement from the guilty agency in the route. That there is some chance that this right of recoupment may not be always effective may be conceded without invalidating the regulation. If the 206] *power existed and the regulation is adapted to the purpose in view, the public advantage justifies the discretion exercised, and upholds the legislation as within the limit of the grant conferred upon Congress. Touching the range of legislative discretion of the states in respect to occupations or trades which are affected by a public use, this court, in Gundling v. Chicago, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633, 635, said:

"Unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference. As stated in Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13: 'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community.'"

But it is said that the act violates the 5th Amendment by taking the property of the initial carrier to pay the debt of an independent connecting carrier whose negligence may have been the sole cause of the loss. But this contention results from a surface reading of the act, and misses the true basis upon which it rests. The liability of the receiving carrier which results in such a case is that of a principal for the negligence of his own agents.

In substance Congress has said to such carriers: "If you receive articles for transportation from a point in one state to a place in another, beyond your own terminal, you must do so under a contract to transport to the place designated. If you are obliged to use the services of independent carriers in the continuance of the transit, you must use them as your own agents, and not as agents of the shipper." It is therefore not the case of making one pay the debt of another. The receiving *carrier is, as principal, liable not[207 only for its own negligence, but for that of any agency it may use, although, as between themselves, the company actually causing the loss may be primarily liable.

In Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 78, 52 L. ed. 108, 110, 28 Sup. Ct. Rep. 28, 30, legislation by the state of Georgia imposing a penalty on common carriers for failure to adjust damage claims within forty days was held to neither deny due process nor the equal protection of the law. Speaking by Mr. Justice Brewer, the court said of the reasonableness of the requirement and classification, that "the matter to be adjusted is one peculiarly within the knowledge of the carrier. It receives the goods and has them in its custody until the carriage is completed. It knows what it received and what it delivered. It knows what injury was done during the shipment, and how it was done. The consignee may not know what was in fact delivered at the time of the shipment, and the shipper may not know what was delivered to the consignee at the close of the transportation. The carrier can determine the amount of the loss more accurately and promptly and with less delay and expense than anyone else, and for the adjustment of loss or damage to shipments within the state forty days cannot be said to be an unreasonably short length of time."

The conclusion we reach in respect to the validity of the amendment has the support of some well-considered cases. Among them we cite: Smeltzer v. St. Louis & S. F. R.

Co. 158 Fed. 649; Pittsburg, C. C. & St. L. R. Co. v. Mitchell (Ind.) 91 N. E. 735; Louisville & N. R. Co. v. Scott, 133 Ky. 724, 118 S. W. 992.

The judgment included an attorneys' fee, taxed as part of the costs. The authority for this is supposed to be found in the 8th section of the act to regulate commerce of February 4, 1887 (24 Stat. at L. pp. 379, 382, chap. 104, U. S. Comp. Stat. 1901, pp. 3154, 3159). The section reads as follows:

"That in case any common carrier sub-
208] ject to the provisions *of this act shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorneys' fee, to be fixed by the court in every case of recovery, which attorneys' fees shall be taxed and collected as part of the costs in the case."

But that section applies to cases where the cause of action is the doing of something made unlawful by some provision of the act, or the omission to do something required by the act, and there is a recovery "of damages sustained in consequence of any such violation of this act," etc. The cause of action in the present case is not for damages resulting from "any violation of the provisions of this act." True, the plaintiff in error attempted by contract to stipulate for a limitation of liability to a loss on its own line, and in this action has defensively denied liability for a loss not occurring on its own line. But the cause of action was the loss of the plaintiff's property which had been intrusted to it as a common carrier, and that loss is in no way traceable to the violation of any provision of the act to regulate commerce. Having sustained no damage which was a consequence of the violation of the act, the section has no application to this case.

The judgment was erroneous to this extent, and the provision for an attorneys' fee is stricken out, and the judgment thus modified is affirmed.

209] *LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plff. in Err.,

v.

N. P. SCOTT.

(See S. C. Reporter's ed. 209.)

This case is governed by the decision in Atlantic Coast Line R. Co. v. Riverside Mills, ante, 167.

[No. 286.]

Argued October 19, 20, 1910. Decided January 3, 1911.

IN ERROR to the Court of Appeals of the Commonwealth of Kentucky to review a judgment which affirmed a judgment of the Henry Circuit Court in that commonwealth, in favor of the shipper, in an action against an interstate carrier for a loss on the line of a connecting carrier. Affirmed.

See same case below, 133 Ky. 724, 118 S. W. 990, 19 A. & E. Ann. Cas. 392.

Mr. **Charles H. Moorman** argued the cause, and, with Messrs. Benjamin D. Warfield and Henry Lane Stone, filed a brief for plaintiff in error:

To construe § 20 of the act of June 29, 1906, as making the carrier liable for loss, damage, or injury to freight on such carrier's connecting lines, would render such section unconstitutional, because it is not a regulation of interstate commerce.

Adair v. United States, 208 U. S. 161, 176, 52 L. ed. 436, 443, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764.

To interpret said section so as to hold the initial carrier liable for loss, injury, or damage to freight on the lines of connecting carriers, when the carrier has not expressly agreed to transport the shipment through to destination, but, on the contrary, has, by contract, limited its liability to its own line, would be to make the statute unconstitutional and void because obnoxious to the 5th Article of the Amendments to the Constitution of the United States.

Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; McCann v. Eddy, — Mo. —, 27 S. W. 541; Atty. Gen. v. Old Colony R. Co. 160 Mass. 62, 22 L.R.A. 112, 35 N. E. 252; Dubuque & S. C. R. Co. v. Richmond, 19 Wall. 584, 22 L. ed. 173; Lottery Case (Champion v. Ames) 188 U. S. 353, 47 L. ed. 499, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Monongahela Nav. Co. v. United States, 148 U. S. 336, 37 L. ed. 471, 13 Sup. Ct. Rep. 622; Texas & P. R. Co. v. Lynch, 97 Tex. 25, 75 S. W. 486; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 593, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; Interstate Commerce Com-

mission v. Stickney, 215 U. S. 109, 110, 54 L. ed. 115, 30 Sup. Ct. Rep. 66; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 144, 53 L. ed. 441, 446, 29 Sup. Ct. Rep. 246, 133 Ky. 148, 97 S. W. 778; Inman v. St. Louis Southwestern R. Co. 14 Tex. Civ. App. 39, 37 S. W. 37; Fremont, E. & M. Valley R. Co. v. Waters, 50 Neb. 592, 70 N. W. 225; York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107, 18 L. ed. 170.

Assistant to the Attorney General **Kenyon** argued the cause for the government as *amicus curiæ*.

For additional contentions of counsel, see their briefs as reported in Atlantic Coast Line R. Co. v. Riverside Mills, ante, 167.

No counsel for defendant in error.

Mr. Justice **Lurton** delivered the opinion of the court:

This case was heard with No. 215, Atlantic Coast Line R. Co. v. Riverside Mills, just decided. [219 U. S. 186, ante, 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164.] Like that case it presents only the question of the constitutionality of the Carmack amendment of the act to regulate commerce.

The facts are not substantially different, and the judgment of the Court of Appeals of the Commonwealth of Kentucky is affirmed upon the authority of that case.

Affirmed.

210]*IN THE MATTER OF WALTER J. GREGORY, Petitioner.

(See S. C. Reporter's ed. 210–218.)

Habeas corpus — scope of review — sufficiency of information or agreed case.

1. A Federal court will not consider on habeas corpus questions of the sufficiency of the information on which the conviction of the accused was had, or whether the acts set out in the agreed statement of facts, which it is stipulated should be considered as a part of the information, constituted a crime.

[For other cases, see Habeas Corpus, II., in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — punishing gift enterprise.

2. Liberty and property are not taken without due process of law, contrary to U. S. Const., 5th Amend., by the provisions of D. C. Rev. Stat. § 1177, making it a crime to engage in any manner in any gift enterprise business in the District.

[Due process of law as to criminal matters, see Constitutional Law, in Digest Sup. Ct. 1908.]

Gift enterprise — what constitutes.

3. The definition of a gift enterprise as the business of selling merchandise, coupled with a promise to give any other article in consideration of the purchase, which is made by D. C. Laws 1871–72, pt. 2, pp. 96, 97, licensing various trades and businesses, was not imported into D. C. Rev. Stat. § 1177, making it a crime in any manner to engage in any gift enterprise business in the District, by the provisions of § 1176, disapproving and repealing the earlier legislation for the licensing of gift enterprises, and declaring it thereafter to be unlawful for any person or persons to engage in said business in any manner, as defined in the repealed act or otherwise.

Habeas corpus — scope of remedy — want of jurisdiction.

4. The business of issuing and redeeming trading stamps is not so manifestly outside the range of judicial consideration, under D. C. Rev. Stat. § 1177, making it a crime to engage in any manner in any gift-enterprise business in the District, as to justify relief by habeas corpus to a person convicted of that offense, on the theory that the trial court was without jurisdiction.

[For other cases, see Habeas Corpus, II., in Digest Sup. Ct. 1908.]

[No. 17, Original.]

Argued December 5, 1910. Decided January 3, 1911.

PETITION for a writ of habeas corpus to inquire into a detention under a conviction in the police court of the District of Columbia of engaging in a gift enterprise business within the District. Rule discharged and petition dismissed.

The facts are stated in the opinion.

Messrs. **John Hall Jones** and **W. Benton Crisp** argued the cause and filed a brief for petitioner:

The police power extends only to such legislation as will promote the public health, public safety, or public morals, or to business affected with a public interest.

Note.—On habeas corpus in the Federal courts—see notes to Re Reinitz, 4 L.R.A. 236; State ex rel. Cochran v. Winters, 10 L.R.A. 616; Re Huse, 25 C. C. A. 4; and Tinsley v. Anderson, 43 L. ed. U. S. 91.

As to habeas corpus to test constitutionality of statute—see note to Hovey v. Elliott, 39 L.R.A. 449.

As to questions reviewable by habeas corpus—see notes to State v. Jackson, 1 L.R.A. 373; Bion's Appeal, 11 L.R.A. 694; Glass v. The Betsey, 1 L. ed. U. S. 489; United States v. Hamilton, 1 L. ed. U. S. 490; Re Carll, 27 L. ed. U. S. 288; Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464; and Pearce v. Texas, 39 L. ed. U. S. 164.

On the validity of legislation regulating or forbidding the use of trading stamps—see notes to District of Columbia v. Kraft, 30 L.R.A.(N.S.) 957; Denver v. Frueauff, 7 L.R.A.(N.S.) 1131; and Ex parte Drexel, 2 L.R.A.(N.S.) 588.

Lochner v. New York, 198 U. S. 47–53, 49 L. ed. 937–940, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Mugler v. Kansas, 123 U. S. 623, 661, 669, 31 L. ed. 205, 210, 213, 8 Sup. Ct. Rep. 273; Lawton v. Steele, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; McLean v. Arkansas, 211 U. S. 539, 547, 53 L. ed. 315, 319, 29 Sup. Ct. Rep. 206; Otis v. Parker, 187 U. S. 606, 608, 47 L. ed. 323, 327, 23 Sup. Ct. Rep. 168; O'Keeffe v. Somerville, 190 Mass. 114, 112 Am. St. Rep. 316, 76 N. E. 457, 5 A. & E. Ann. Cas. 684; Young v. Com. 101 Va. 863, 45 S. E. 327; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497; State v. Hyman, 98 Md. 613, 64 L.R.A. 637, 57 Atl. 6, 1 A. & E. Ann. Cas. 742; Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 40, 16 Am. Rep. 611; State v. Loomis, 115 Mo. 313, 21 L.R.A. 789, 22 S. W. 350; Ex parte Drexel, 147 Cal. 767, 2 L.R.A.(N.S.) 588, 82 Pac. 429, 3 A. & E. Ann. Cas. 878; State v. Dalton, 22 R. I. 80, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234.

Petitioner's business was legal.

Humes v. Little Rock, 138 Fed. 929; Territory v. M. A. Gunst & Co. 18 Haw. 196; Sperry & H. Co. v. Louis Weber & Co. 161 Fed. 219; Sperry & H. Co. v. Temple, 137 Fed. 992; Ex parte Hutchinson, 137 Fed. 950; Sperry & H. Co. v. Mechanics' Clothing Co. 135 Fed. 833; John D. Park & Sons Co. v. Hartman, 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24; Sperry & H. Co. v. Mechanics' Clothing Co. 128 Fed. 800. Bitterman v. Louisville & N. R. Co. 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. Rep. 91, 12 A. & E. Ann. Cas. 693; Sperry & H. Co. v. Brady, 134 Fed. 691; State v. Shugart, 138 Ala. 86, 100 Am. St. Rep. 17, 35 So. 28; Montgomery v. Kelly, 142 Ala. 552, 70 L.R.A. 209, 110 Am. St. Rep. 43, 38 So. 67; Ex parte McKenna, 126 Cal. 429, 58 Pac. 916; Ex parte Drexel, 147 Cal. 763, 2 L.R.A.(N.S.) 588, 82 Pac. 429, 3 A. & E. Ann. Cas. 878; Denver v. Frueauff, 39 Colo. 20, 7 L.R.A.(N.S.) 1131, 88 Pac. 389, 12 A. & E. Ann. Cas. 521; Hewin v. Atlanta, 121 Ga. 731, 67 L.R.A. 795, 49 S. E. 765, 2 A. & E. Ann. Cas. 296; O'Keeffe v. Somerville, 190 Mass. 110, 112 Am. St. Rep. 316, 76 N. E. 457, 5 A. & E. Ann. Cas. 684; Com. v. Emerson, 165 Mass. 146, 42 N. E. 559; Com. v. Sisson, 178 Mass. 578, 60 N. E. 385; Long v. State, 74 Md. 565, 12 L.R.A. 425, 28 Am. St. Rep. 268, 22 Atl. 4; State ex rel. Simpson v. Sperry & H. Co. 110 Minn. 378, 30 L.R.A.(N.S.) 966, 126 N. W. 120; State v. Ramseyer, 73 N. H. 31, 58 Atl. 958, 6 A. & E. Ann. Cas. 445; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; People ex rel. Madden v. Dycker, 72 App. Div. 308, 76 N. Y. Supp. 111; People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497; Winston v. Beeson, 135 N. C. 271, 65 L.R.A. 167, 47 S. E. 457; Com. v. Moorhead, 7 Pa. Co. Ct. 513; State v. Dalton, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; State v. Dodge, 76 Vt. 197, 56 Atl. 983, 1 A. & E. Ann. Cas. 47; Young v. Com. 101 Va. 853, 45 S. E. 327.

A "gift enterprise" is a transaction wherein the element of chance determines how property shall be distributed.

1 Bouvier's Law Dict. Rawle's Rev. p. 884; Black's Law Dict. p. 539; Anderson's Law Dict. p. 488.

As the trading stamp business is not a species of lottery, or a "gift enterprise," Congress cannot prohibit as a "gift enterprise" something that is not such.

Com. v. Moorehead, 7 Pa. Co. Ct. 519; Perry v. Keene, 56 N. H. 514; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

The term "gift enterprise" can be applied properly only to lotteries; the trading stamp business is not a "gift enterprise," as there is in it no element of chance.

State v. Shugart, 138 Ala. 86, 100 Am. St. Rep. 17, 35 So. 28; Humes v. Little Rock, 138 Fed. 929; Denver v. Frueauff, 39 Colo. 20, 7 L.R.A.(N.S.) 1131, 88 Pac. 389, 12 A. & E. Ann. Cas. 521; Territory v. M. A. Gunst & Co. 18 Haw. 196; Long v. State, 74 Md. 565, 12 L.R.A. 425, 28 Am. St. Rep. 268, 22 Atl. 4; Com. v. Emerson, 165 Mass. 146, 42 N. E. 559; Com. v. Sisson, 178 Mass. 578, 60 N. E. 385; O'Keeffe v. Somerville, 190 Mass. 110, 112 Am. St. Rep. 316, 76 N. E. 457, 5 A. & E. Ann. Cas. 684; People ex rel. Madden v. Dycker, 72 App. Div. 308, 76 N. Y. Supp. 111; Winston v. Beeson, 135 N. C. 271, 65 L.R.A. 167, 47 S. E. 457; Com. v. Moorhead, 7 Pa. Co. Ct. 513; State v. Dalton, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; Young v. Com. 101 Va. 853, 45 S. E. 327.

The courts have uniformly held unconstitutional statutes which prohibited the giving of trading stamps by a merchant, to be redeemed by a third party, while allowing the giving of stamps by a merchant, redeemable himself.

People ex rel. Madden v. Dycker, 72 App. Div. 308, 76 N. Y. Supp. 111; People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497; State v. Walker, 105 La. 492, 29 So. 973; State v. Dalton, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; State v. Dodge, 76 Vt.

197, 56 Atl. 983, 1 A. & E. Ann. Cas. 47; Young v. Com. 101 Va. 853, 45 S. E. 327.

In the following cases, the case of Lansburgh v. District of Columbia, 11 App. D. C. 512, was referred to, and either disregarded or expressly disapproved:

State v. Shugart, 138 Ala. 86, 100 Am. St. Rep. 17, 35 So. 28; Montgomery v. Kelly, 142 Ala. 552, 70 L.R.A. 209, 110 Am. St. Rep. 43, 38 So. 67; Humes v. Little Rock, 138 Fed. 929; Ex parte Drexel, 147 Cal. 763, 2 L.R.A.(N.S.) 588, 82 Pac. 429, 3 A. & E. Ann. Cas. 878; Denver v. Frueauff, 39 Colo. 20, 7 L.R.A.(N.S.) 1131, 88 Pac. 389, 12 A. & E. Ann. Cas. 521; Hewin v. Atlanta, 121 Ga. 731, 67 L.R.A. 795, 49 S. E. 765, 2 A. & E. Ann. Cas. 296; Territory v. M. A. Gunst & Co. 18 Haw. 196; State ex rel. Simpson v. Sperry & H. Co. 110 Minn. 378, 30 L.R.A.(N.S.) 966, 126 N. W. 120; State v. Ramseyer, 73 N. H. 31, 58 Atl. 958, 6 A. & E. Ann. Cas. 445; Winston v. Beeson, 135 N. C. 271, 65 L.R.A. 167, 47 S. E. 457; State v. Dalton, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; Leonard v. Bassindale, 46 Wash. 301, 89 Pac. 879.

Messrs. **Edward H. Thomas** and **William Henry White** argued the cause, and, with Mr. Francis H. Stephens, filed a brief for respondent:

Nothing but the constitutionality of the statute is before the court in this proceeding.

Wales v. Whitney, 114 U. S. 564, 571, 29 L. ed. 277, 279, 5 Sup. Ct. Rep. 1050; Ex parte Siebold, 100 U. S. 371, 374, 375, 25 L. ed. 717, 718, 719; Ex parte Hung Hang, 108 U. S. 552, 553, 27 L. ed. 811, 812, 2 Sup. Ct. Rep. 863; Ex parte Kearney, 7 Wheat. 38, 43, 5 L. ed. 391, 392; Ex parte Watkins, 3 Pet. 193, 203, 7 L. ed. 650, 653; Ex parte Carll, 106 U. S. 521, 522, 27 L. ed. 288, 289, 1 Sup. Ct. Rep. 535, 4 Am. Crim. Rep. 253; Re Eckart, 166 U. S. 481, 483, 41 L. ed. 1085, 1086, 17 Sup. Ct. Rep. 638; Ex parte Parks, 93 U. S. 18–20, 23 L. ed. 787–788; Hyde v. Shine, 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760; United States v. Pridgeon, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. Rep. 746; Ex parte Bigelow, 113 U. S. 330, 28 L. ed. 1006, 5 Sup. Ct. Rep. 542; Re Belt, 159 U. S. 95, 99, 100, 40 L. ed. 88, 90, 15 Sup. Ct. Rep. 987; Davis v. Beason, 133 U. S. 333, 33 L. ed. 637, 10 Sup. Ct. Rep. 297, 8 Am. Crim. Rep. 89; Toy Toy v. Hopkins, 212 U. S. 542, 548, 53 L. ed. 644, 646, 29 Sup. Ct. Rep. 416; Ex parte Terry, 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77; Kaizo v. Henry, 211 U. S. 146, 53 L. ed. 125, 29 Sup. Ct. Rep. 41; Ex parte Harding, 120 U. S. 782, 30 L. ed. 824, 7 Sup. Ct. Rep. 780; Re Moran, 203 U. S. 96, 51 L. ed. 105, 27 Sup. Ct. Rep. 25.

The phrase (gift enterprise) has attained such notoriety as to justify us in taking judicial notice of what is meant and understood by the use of it. Lohman v. State, 81 Ind. 18.

A gift enterprise is a species of lottery. 19 Am. & Eng. Enc. Law, 2d ed. p. 590; Meyer v. State, 112 Ga. 20, 51 L.R.A. 496, 81 Am. St. Rep. 17, 37 S. E. 96; Reg. v. Harris, 10 Cox, C. C. 352; Reg. v. Freeman, 18 Ont. Rep. 524; Cross v. People, 18 Colo. 321, 36 Am. St. Rep. 292, 32 Pac. 821; Davenport v. Ottawa, 54 Kan. 711, 45 Am. St. Rep. 303, 39 Pac. 708; State v. Moren, 48 Minn. 555, 51 N. W. 618; United States v. Wallis, 58 Fed. 942; State v. Mumford, 73 Mo. 647, 39 Am. Rep. 532; Queen v. Parker, 9 Manitoba L. Rep. 203; Dunn v. People, 40 Ill. 465; Randle v. State, 42 Tex. 580; State v. Bryant, 74 N. C. 207.

A gift enterprise is, in common parlance, a scheme for the distribution of certain articles of property, to be determined by chance, among those who have taken shares in the scheme.

20 Cyc. Law & Proc. p. 1188.

Since the offense is clear and the act is complete without the definition, the question as to the constitutionality of the expunged part is immaterial.

State Freight Tax Case, 15 Wall. 232, 282, 21 L. ed. 146, 163; Albany County v. Stanley, 105 U. S. 305, 313, 26 L. ed. 1044, 1050; Poindexter v. Greenhow, 114 U. S. 270, 304, 305, 29 L. ed. 185, 197, 198, 5 Sup. Ct. Rep. 903, 962; White v. Greenhow, 114 U. S. 307, 29 L. ed. 199, 5 Sup. Ct. Rep. 923, 962; Re Chapman, 166 U. S. 661, 666, 667, 41 L. ed. 1154, 1157, 1158, 17 Sup. Ct. Rep. 677; Erie R. Co. v. Pennsylvania, 15 Wall. 282, 283, 21 L. ed. 164; Trade Mark Cases, 100 U. S. 82, 98, 25 L. ed. 550, 553; Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 424, 32 L. ed. 229, 232, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; Postal Teleg. Cable Co. v. Charleston, 153 U. S. 692, 698, 38 L. ed. 871, 874, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; Baldwin v. Franks, 120 U. S. 678, 688, 689, 30 L. ed. 766, 769, 770, 7 Sup. Ct. Rep. 656, 763; Pollock v. Farmers' Loan & T. Co. 158 U. S. 636, 39 L. ed. 1125, 15 Sup. Ct. Rep. 912; Presser v. Illinois, 116 U. S. 252, 263, 29 L. ed. 615, 618, 6 Sup. Ct. Rep. 580; Keokuk Northern Line Packet Co. v. Keokuk, 95 U. S. 80, 89, 24 L. ed. 377, 381; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 96, 54 L. ed. 106, 111, 30 Sup. Ct. Rep. 21; Penniman's Case, 103 U. S. 714, 717, 26 L. ed. 602, 604; Hyde v. Southern R. Co. 31 App. D. C. 466;

Unity v. Burrage, 103 U. S. 447, 459, 26 L. ed. 405, 409.

Congress can exercise the full police power of the national government in the District of Columbia, and its power is at least coextensive with that of the legislature of a state.

Loughborough v. Blake, 5 Wheat. 324, 5 L. ed. 100; Cohen v. Virginia, 6 Wheat. 424, 5 L. ed. 296; Kendall v. United States, 12 Pet. 619, 9 L. ed. 1218; Mattingly v. District of Columbia, 97 U. S. 690, 24 L. ed. 1099; Shoemaker v. United States, 147 U. S. 300, 37 L. ed. 185, 13 Sup. Ct. Rep. 361; Parsons v. District of Columbia, 170 U. S. 52, 42 L. ed. 946, 18 Sup. Ct. Rep. 521; Capitol Traction Co. v. Hof, 174 U. S. 5, 43 L. ed. 874, 19 Sup. Ct. Rep. 580; Wight v. Davidson, 181 U. S. 384, 45 L. ed. 906, 21 Sup. Ct. Rep. 616; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 96, 54 L. ed. 106, 111, 30 Sup. Ct. Rep. 21.

The language of the definition is so comprehensive as to embrace, possibly, acts perfectly harmless, as well as acts detrimental. There are two ways of meeting this situation: First, by applying the rule that a possible application to extreme cases is not the test of the reasonableness of public rules and regulations.

Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174.

Second, by construction the statute will be allowed its full force and operation as applicable to all cases rightfully and constitutionally within its provisions, but such application will be restrained as to those objects simply to which the statute is forbidden to extend. This is the rule, as we understand it, upon which the Supreme Court acted in the State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146; Albany County v. Stanley, 105 U. S. 305, 313, 26 L. ed. 1044, 1050; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; and other cases that could be cited.

Chapman v. United States, 5 App. D. C. 131; Re Chapman, 166 U. S. 667, 41 L. ed. 1158, 17 Sup. Ct. Rep. 677; Erie R. Co. v. Pennsylvania, 15 Wall. 282, 283, 21 L. ed. 164; Trade Mark Cases, 100 U. S. 82, 98, 25 L. ed. 550, 553; Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 424, 32 L. ed. 229, 232, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; Postal Teleg. Cable Co. v. Charleston, 153 U. S. 692, 698, 38 L. ed. 871, 874, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; Baldwin v. Franks, 120 U. S. 678, 688, 689, 30 L. ed. 766, 769, 770, 7 Sup. Ct. Rep. 656, 763; Pollock v. Farmers' Loan & T. Co. 158 U. S. 636, 39 L. ed. 1125, 15 Sup. Ct. Rep. 912; Presser v. Illinois, 116 U. S. 252, 263, 29 L. ed. 615, 618, 6 Sup. Ct. Rep. 580; Keokuk Northern Line Packet Co. v. Keokuk, 95 U. S. 80, 89, 24 L. ed. 377, 381; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 96, 54 L. ed. 106, 111, 30 Sup. Ct. Rep. 21; Penniman's Case, 103 U. S. 714, 717, 26 L. ed. 602, 604; Unity v. Burrage, 103 U. S. 447, 459, 26 L. ed. 405, 409; Hyde v. Southern R. Co. 31 App. D. C. 466.

The police power is certainly ample to prohibit the conduct of the trading-stamp business.

Barbier v. Connolly, 113 U. S. 27, 31, 32, 28 L. ed. 923–925, 5 Sup. Ct. Rep. 357; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 292, 43 L. ed. 702, 704, 19 Sup. Ct. Rep. 465; Gilman v. Philadelphia, 3 Wall. 713, 729, 18 L. ed. 96, 100; Pound v. Turck, 95 U. S. 459, 464, 24 L. ed. 525, 527; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 470, 24 L. ed. 530; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; Bacon v. Walker, 204 U. S. 311, 317, 51 L. ed. 499, 502, 27 Sup. Ct. Rep. 289; Booth v. Illinois, 184 U. S. 425, 429, 46 L. ed. 623, 626, 22 Sup. Ct. Rep. 425; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; Western Turf Asso. v. Greenberg, 204 U. S. 359, 364, 51 L. ed. 520, 522, 27 Sup. Ct. Rep. 384; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; State ex rel. Simpson v. Sperry & H. Co. 110 Minn. 378, 30 L.R.A.(N.S.) 966, 126 N. W. 120; Clark v. Nash, 198 U. S. 361, 369, 49 L. ed. 1085, 1088, 25 Sup. Ct. Rep. 676, 4 A. & E. Ann. Cas. 1171; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 409, 43 L. ed. 746, 748, 19 Sup. Ct. Rep. 419; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Butchers Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746–750, 28 L. ed. 585–587, 4 Sup. Ct. Rep. 652; McLean v. Arkansas, 211 U. S. 539, 547, 548, 53 L. ed. 315, 319, 320, 29 Sup. Ct. Rep. 206.

The element of chance in the trading stamp scheme makes it a species of lottery.

Horner v. United States, 147 U. S. 449, 37 L. ed. 237, 13 Sup. Ct. Rep. 409; State v. Hawkins, 95 Md. 143, 93 Am. St. Rep.

328, 51 Atl. 850; 14 Am. & Eng. Enc. Law, 2d ed. p. 601, note, 1.

Where a contract which is entire contains an illegal stipulation or agreement which is not severable from the balance of the contract, such illegal stipulation or agreement cannot be ignored and the other provisions of the contract enforced. The illegal stipulation or agreement in such a case penetrates and corrupts the whole contract, and vitiates it as an entirety.

15 Am. & Eng. Enc. Law, p. 988; Williams v. Hastings, 59 N. H. 373.

Where the consideration of a contract consists of several different elements, and no apportionment or separate valuation, or means of apportionment or valuation, of the different elements of the consideration, is made by the parties, the entire contract will be held illegal if one of the elements of the consideration is immoral or against public policy.

15 Am. & Eng. Enc. Law, p. 989; Robinson v. Gueen, 3 Met. 159; 9 Cyc. Law & Proc. p. 566; Bishop v. Palmer, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299.

Where intoxicating liquors are sold contrary to law, a note made for liquors and other articles sold in a lump, for a fixed price, is void in the hands of the payee, or of an assignee having notice of the circumstances. The illegal part of the consideration cannot be separated from the legal.

Braitch v. Guelick, 37 Iowa, 212.

A contract by which, in consideration of a gross sum, S. leased the bar of his hotel to G., and sold G. the right to sell liquors under a license obtained by S., and agreed to board G. during the lease, is totally void. The legal part of the contract cannot be separated from the illegal.

Sanderson v. Goodrich, 46 Barb. 616.

We find but two habeas corpus cases in the Federal courts, and one equity case, all depending on the validity of license laws, and all entirely inapplicable on the facts which have any bearing on the case at bar, except to show that city councils have regarded the trading-stamp business as a business which needed regulation, if not prohibition, in the interest of the common welfare and of the public morals.

Ex parte Hutchinson, 137 Fed. 949, 950; Humes v. Little Rock, 138 Fed. 931; Sperry & H. Co. v. Mechanics' Clothing Co. 135 Fed. 833; Sperry & H. Co. v. Louis Weber & Co. 161 Fed. 219; Sperry & H. Co. v. Temple, 137 Fed. 993.

None of the state habeas corpus cases held that a statute prohibiting "gift enterprises" is not within the police power.

State v. Shugart, 138 Ala. 86, 100 Am. St. Rep. 17, 35 So. 28; Ex parte McKenna, 126 Cal. 429, 58 Pac. 916; Ex parte Drexel, 147 Cal. 763, 2 L.R.A.(N.S.) 588, 82 Pac. 429, 3 A. & E. Ann. Cas. 878; People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497; People ex rel. Madden v. Dycker, 72 App. Div. 308, 76 N. Y. Supp. 111.

And this conclusion is not denied in any of the following state cases:

Montgomery v. Kelly, 142 Ala. 552, 70 L.R.A. 209, 110 Am. St. Rep. 43, 39 So. 67; Hewin v. Atlanta, 121 Ga. 723, 67 L. R.A. 795, 49 S. E. 765, 2 A. & E. Ann. Cas. 296; Winston v. Beeson, 135 N. C. 271, 65 L.R.A. 167, 47 S. E. 457; State v. Dodge, 76 Vt. 197, 56 Atl. 983, 1 A. & E. Ann. Cas. 47; State v. Ramseyer, 73 N. H. 37. 58 Atl. 958, 6 A. & E. Ann. Cas. 445; State v. Dalton, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; State ex rel. Simpson v. Sperry & H. Co. 110 Minn. 378, 30 L.R.A.(N.S.) 966, 126 N. W. 120; Com. v. Sisson, 178 Mass. 578, 60 N. E. 385; Com. v. Emerson, 165 Mass. 146, 42 N. E. 559; O'Keeffe v. Somerville, 190 Mass. 110, 112 Am. St. Rep. 316, 76 N. E. 457, 5 A. & E. Ann. Cas. 684; Young v. Com. 101 Va. 853, 45 S. E. 327; Com. v. Gibson Co. 125 Ky. 440, 101 S. W. 385; Long v. State, 74 Md. 565, 12 L.R.A. 425, 28 Am. St. Rep. 268, 22 Atl. 4; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Denver v. Frueauff, 39 Colo. 20, 7 L.R.A. (N.S.) 1131, 88 Pac. 389, 12 A. & E. Ann. Cas. 521.

The policy of the particular piece of legislation is a matter for the legislature; and the courts will not interfere "unless the act in question is unmistakably and palpably in excess of legislative power."

McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206.

Mr. Justice **Hughes** delivered the opinion of the court:

This is a petition for a writ of habeas corpus. By information filed in the police court of the District of Columbia, the petitioner was charged with engaging "in *the business of a gift enterprise,"[213 in violation of § 1177 of the Revised Statutes relating to the District of Columbia. Thereupon an agreed statement of facts was filed, by which it appeared that the petitioner, as the managing officer of the Sperry & Hutchinson Company, was conducting, within the District, its business of issuing and redeeming so-called "trading stamps" in the particular manner set forth. It was stipulated that the statement should be considered as a part of the information, and the petitioner made a motion to quash. This motion was sustained and the petitioner was discharged.

On writ of error, the court of appeals of the District of Columbia reversed the judgment of the police court, and ordered the cause to be remanded for further proceedings in conformity with its opinion. Application was made to this court for a writ of certiorari, which was refused. 218 U. S. 673, 54 L. ed. 1205, 31 Sup. Ct. Rep. 223. The petitioner was then arraigned in the police court, pleaded not guilty, and waived trial by jury; and the case was submitted to the court upon the agreed statement. Judgment of guilty was entered, and the petitioner was sentenced to pay a fine. He then obtained leave of this court to file the present petition.

The only question before us is whether the police court had jurisdiction. A habeas corpus proceeding cannot be made to perform the function of a writ of error, and we are not concerned with the question whether the information was sufficient, or whether the acts set forth in the agreed statement constituted a crime, that is to say, whether the court properly applied the law, if it be found that the court had jurisdiction to try the issues and to render the judgment. Ex parte Kearney, 7 Wheat. 38, 5 L. ed. 391; Ex parte Watkins, 3 Pet. 193, 7 L. ed. 650; Ex parte Parks, 93 U. S. 18, 23 L. ed. 787; Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; Re Coy, 127 U. S. 731, 32 L. ed. 274, 8 Sup. Ct. Rep. 1263; Gonzales v. Cunningham, 164 U. S. 612, 41 L. ed. 572, 17 Sup. Ct. Rep. 182; Re Eckart, 166 U. S. 481, 41 L. ed. 1085, 17 Sup. Ct. Rep. 638; Storti v. Massachusetts, 183 U. S. 138, 46 L. ed. 121, 22 Sup. Ct. Rep. 72; Dimmick v. Tompkins, 194 U. S. 540, 48 L. ed. 1110, 24 Sup. Ct. Rep. 780; Hyde v. Shine, 199 U. S. 62, 83, 50 L. ed. 90, 97, 25 Sup. Ct. 214]Rep. 760; *Whitney v. Dick, 202 U. S. 132, 136, 50 L. ed. 963, 964, 26 Sup. Ct. Rep. 584; Kaizo v. Henry, 211 U. S. 146, 148, 53 L. ed. 125, 126, 29 Sup. Ct. Rep. 41. This rule has recently been applied in a case where it was contended in a habeas corpus proceeding that the record should be examined to determine whether there was any testimony to support the accusation. And this court, affirming the judgment which discharged the writ, said by Mr. Justice Day: "The contention is that, in the respects pointed out, the testimony wholly fails to support the charge. The attack is thus not upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge, but upon the sufficiency of the evidence to show the guilt of the accused. This has never been held to be within the province of a writ of habeas corpus. Upon habeas corpus the court examines only the power and authority of the court to act, not the correctness of its conclusions." Harlan v. McGourin, 218 U. S. 448, 54 L. ed. 1101, 31 Sup. Ct. Rep. 47.

We come, then, to the grounds upon which the jurisdiction of the police court is assailed. It is urged that the prohibition contained in the statute under which the information was brought is unconstitutional, in that it violates the 5th Amendment of the Constitution of the United States by depriving the petitioner of liberty and property without due process of law The information rested on § 1177 of the Revised Statutes relating to the District of Columbia, which makes it a crime "in any manner" to engage "in any gift-enterprise business" in the District. If this section be read alone, no basis appears for the argument of invalidity. It cannot be said that the words "gift-enterprise business" are so uncertain as to make the prohibition nugatory, or that they necessarily include conduct which lies outside the range of legislative interference in the exercise of the police power. While these words are general, they may be regarded as embracing a class of transactions which the legislature is competent to condemn. Thus, a "gift *enterprise" has been defined to be "a[215 scheme for the division or distribution of certain articles of property, to be determined by chance, amongst those who have taken shares in the scheme." Bouvier's Law Dict. (Rawle's Rev.) p. 884; Black's Law Dict. p. 539; Anderson's Law Dict. p. 488. See also Lohman v. State, 81 Ind. 15, 17; Winston v. Beeson, 135 N. C. 271, 279, 65 L.R.A. 167, 47 S. E. 457; Randle v. State, 42 Tex. 580.

But it is said that § 1177 must be read in connection with § 1176, which in turn has reference to the act of the legislative assembly of the District of Columbia, approved August 23, 1871. The argument in substance is that these statutes furnish a controlling definition of the words "gift-enterprise business," as used in § 1177, and that if this be so, the section must be held unconstitutional.

The act passed in 1871 by the legislative assembly of the District of Columbia, to which reference is made, was entitled, "An Act Imposing a License on Trades, Business, and Professions Practised or Carried on in the District of Columbia." It provided as follows:

"The proprietors of gift enterprises shall pay $1,000 annually. Every person who shall sell or offer for sale any real estate or article of merchandise of any description whatever, or any ticket of admission to any exhibition or performance, or other place of amusement, with the promise, expressed or

implied, to give or bestow, or in any manner hold out the promise of gift or bestowal, of any article or thing, for and in consideration of the purchase by any person of any other article or thing, whether the object shall be for individual gain or for the benefit of any institution, of whatever character, or for any purpose whatever, shall be regarded as a gift enterprise: Provided, That no such proprietor, in consequence of being thus taxed, shall be exempt from paying any other taxes imposed by law, and the license 216]herein *required shall be in addition thereto." Laws of the District of Columbia, 1871-72, Part 2, pages 96, 97.

Congress, by act of February 17, 1873, chap. 148, 17 Stat. at L. 464, disapproved and repealed this legislation, and enacted the prohibitions which later were incorporated in § 1176 and 1177 of the Revised Statutes relating to the District of Columbia, as follows:

"Sec. 1176. So much of the act of the legislative assembly of the District of Columbia entitled, 'An Act Imposing a License on Trades, Business, and Professions Practised or carried on in the District of Columbia,' approved August twenty-third, eighteen hundred and seventy-one, as authorizes gift enterprises therein, and licenses to be issued therefor, is disapproved and repealed, and hereafter it shall be unlawful for any person or persons to engage in said business in any manner as defined in said act or otherwise.

"Sec. 1177. Every person who shall in any manner engage in any gift-enterprise business in the District shall, on conviction thereof in the police court, on information filed for and on behalf of the District, pay a fine not exceeding one thousand dollars, or be imprisoned in the District jail not less than one nor more than six months, or both, in the discretion of the court."

It will be observed that while § 1176 refers to the District act of 1871, and to "gift enterprises" as therein described, it does not treat that description as exclusive. It assumes that there are other gift enterprises than those defined in the act of 1871. It denounces the former not less than the latter. It does not limit its provisions to the transactions which previously had been licensed under the act of 1871, but expressly includes gift enterprises conducted *"in any manner, as defined in said act or otherwise."*

The purpose of the provision of §1176 was to disapprove and repeal the former author-217]ization, but not to establish *an exclusive definition based upon it. The language of § 1176 conclusively negatives such an intention. It follows that § 1177 is not controlled by the definition to be found in the act of 1871. Even if it were assumed that the condemnation contained in § 1176 of the transactions particularly described in the act of 1871 was too sweeping, and that Congress went beyond its power in giving the prohibition so wide a scope, this would not affect the provision of § 1177, relating, as we have seen, to a recognized category of offenses for which it was within the power of Congress to prescribe punishment. Whether it be read alone or in the light of its context, § 1177 cannot be adjudged invalid. And it is upon this section that the information in question was based.

We have, then, a statute with valid operation. This being established, there can be no question that it conferred upon the police court, by its express terms, jurisdiction of the offense, and that court tried and convicted the petitioner.

But it is insisted that the facts do not support the conviction. The argument ignores the nature of this proceeding, unless it be meant that no colorable question was presented; that on the agreed statement of facts, and viewing the statute as prohibiting transactions involving the element of chance, there was such an obvious and palpable want of criminality that the judicial judgment cannot be said to have been invoked, and that therefore the court had no jurisdiction to determine whether or not the statute had been violated.

Such a contention is without merit. It is by no means manifest that the scheme or enterprise in which the petitioner was engaged lay outside the range of judicial consideration under the statute. On the contrary, the agreed statement of facts presented questions requiring the exercise of judicial judgment, and the case falls within the well-established rule. Given a valid enactment, the *question (assuming[218 it to be one demanding judicial examination) whether a particular case falls within the prohibition is for the determination of the court to which has been confided jurisdiction over the class of offenses to which the statute relates.

As said by Chief Justice Marshall in Ex parte Watkins, 3 Pet. 193, on page 203, 7 L. ed. 650, 653: "The judgment of such a tribunal has all the obligations which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable or not is among the most unquestionable of its power and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case and in the other; and must remain in full force unless reversed regularly by a superior court capable of reversing it." And in Ex parte Parks, 93 U. S. 18, on page

20, 23 L. ed. 787, 788, the court said: "Whether an act charged in an indictment is or is not a crime by the law which the court administers (in this case the statute law of the United States) is a question which has to be met at almost every stage of criminal proceedings; on motions to quash the indictment, on demurrers, on motions to arrest judgment, etc. The court may err, but it has jurisdiction of the question."

In hearing this application, this court does not sit to review the correctness of the conclusion of the police court as to the violation of the statute by the petitioner, or of the decision of the court of appeals of the District as to the sufficiency of the information filed against him. The question here is not one of guilt or innocence, but simply whether the court below had jurisdiction to try the issues. And as we find that the statute conferred that jurisdiction, the application for a writ of habeas corpus must be denied.

Rule discharged and petition dismissed.

219]*ALONZO BAILEY, Plff. in Err.,
v.
STATE OF ALABAMA.

(See S. C. Reporter's ed. 219–250.)

Constitutional law — involuntary servitude — peonage — punishing breach of labor contract.

So far as the refusal without just cause to perform the labor called for in a written contract of employment under which the employee has obtained money which was not refunded, or property which was not paid for, is made prima facie evidence of an intent to defraud by Ala. Code 1896, § 4730, as amended by Gen. Acts 1903, p. 345, and Gen. Acts 1907, p. 636, and therefore punishable as a criminal offense, such legislation offends against the prohibition of the 13th Amendment to the Federal Constitution against involuntary servitude, except as punishment for crime, and against the provisions forbidding peonage, found in U. S. Rev. Stat. §§ 1990, 5526, U. S. Comp. Stat. 1901, pp. 1266, 3715, enacted to secure the enforcement of such Amendment,—especially since, under the local practice, the accused may not, for the purpose of rebutting the statutory presumption, testify as to his uncommunicated motives, purposes, or intentions.

[For other cases, see Constitutional Law, 1581–1587, in Digest Sup. Ct. 1908.]

[No. 300.]

Argued October 20, 21, 1910. Decided January 3, 1911.

IN ERROR to the Supreme Court of the State of Alabama to review a judgment which affirmed a judgment of the Montgomery City Court, in that state, convicting an employee of a breach of a contract of employment, with intent to injure or defraud the employer. Reversed and remanded for further proceedings.

See same case below, 161 Ala. 75, 49 So. 886.

The facts are stated in the opinion.

Mr. **Edward S. Watts** argued the cause, and, with Mr. Daniel W. Troy, filed a brief for plaintiff in error:

"Due process of law" requires that a party shall be properly brought into court, and when there, shall have a right to set up any lawful defense.

Wright v. Cradlebaugh, 3 Nev. 341.

"Due process of law" includes an opportunity to answer.

Huber v. Reily, 53 Pa. 112.

"Due process of law" means a law which hears before it condemns.

Clark v. Mitchell, 64 Mo. 564.

Both as a matter of law and fact, every person is presumed to be innocent until his guilt is proved beyond a reasonable doubt; and it is the high and solemn duty of the court to see that all elements of the crime are proved, or that testimony is adduced which justifies the jury in finding these elements.

Clyatt v. United States, 197 U. S. 207–222, 49 L. ed. 726–731, 25 Sup. Ct. Rep. 429.

On account of a rule of evidence in Alabama which prevents a person from testifying as to his uncommunicated motives, purposes, or intent, plaintiff in error was unable to show by his own testimony that he entered into the contract in good faith, and that he rescinded the contract for reasons other than those constituting a crime.

McCormick v. Joseph, 77 Ala. 240; Holmes v. State, 136 Ala. 84, 34 So. 180; Bailey v. State, 161 Ala. 75, 49 So. 886; Johnson v. State, 102 Ala. 16, 16 So. 99; Brown v. State, 79 Ala. 54; Harrison v. State, 78 Ala. 11; Alexander v. Alexander, 71 Ala. 298; Burns v. Campbell, 71 Ala. 291; Burke v. State, 71 Ala. 382; Wheless v. Rhodes, 70 Ala. 419.

There was no witness to the execution of the contract by whom plaintiff in error could prove his good faith, nor was there any witness to the rescission of the contract by whom he could prove that he terminated the contract for reasons other than those constituting a crime. Any declaration made by him as to his motives

NOTE.—On the constitutionality of statutes providing for imprisonment for breach of contract of labor or rental—see note to Ex parte Hollman, 21 L.R.A.(N.S.) 242.

either in entering into the contract, or in failing or refusing to perform the contract, was inadmissible as evidence in his favor on the trial, for it has been established in Alabama that a defendant cannot thus make evidence for himself.

Harkness v. State, 129 Ala. 71, 30 So. 73.

The legislature denied "due process of law" when it authorized the court to convict of fraud on no other evidence than that of the execution of a contract, the failure to return the consideration therefor in case of its breach, or the failure to perform the services provided for in the contract.

State v. Norman, 110 N. C. 484, 14 S. E. 968; State v. Williams, 150 N. C. 802, 63 S. E. 949.

The legislature, under the guise of enacting a prima facie rule of evidence, fixed a conclusive one; and by so doing plaintiff in error was denied the opportunity of establishing his case of defense. The act of the legislature creating the rule of evidence denies "due process of law," and is void.

Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841; Ex parte Wall, 107 U. S. 289, 27 L. ed. 562, 2 Sup. Ct. Rep. 569; Galpin v. Page, 18 Wall. 350, 21 L. ed. 959; Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629.

There is no criterion laid down by the statute by which one can regulate his actions so as to know that he is abiding by the law.

United States v. Reese, 92 U. S. 214, 23 L. ed. 563; James v. Bowman, 190 U. S. 127–140, 47 L. ed. 979–983, 23 Sup. Ct. Rep. 678; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 876; Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 919; Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L.R.A 209, 59 Am. St. Rep. 457, 35 S. W. 129.

"Equal protection of the laws" prohibits class legislation where unreasonable, and where imposing arbitrary, unjust, or odious discrimination.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Ex parte Hollman, 79 S. C. 9, 21 L.R.A. (N.S.) 242, 60 S. E. 20, 14 A. & E. Ann. Cas. 1105; Peonage Cases, 123 Fed. 671; Ex parte Drayton, 153 Fed. 986; State v. Williams, 32 S. C. 123, 10 S. E. 876; Stockton Laundry Case, 26 Fed. 611; Re Sam Kee, 31 Fed. 681; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas 764; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Grand Rapids Chair Co. v. Runnels, 77 Mich. 105, 43 N. W. 1006; Wilder v. Chicago & W. M. R. Co. 70 Mich. 384, 38 N. W. 289; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

It is, of course, proper that Bailey should have performed his part of the contract, or should have placed the other party *in statu quo*.

But it is more improper and unjust to have him burdened as the statute provides.

Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150–159, 41 L. ed. 666–669, 17 Sup. Ct. Rep. 255; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 579; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232–237, 33 L. ed. 892–895, 10 Sup. Ct. Rep. 533; Yick Wo v. Hopkins, 118 U. S. 356–369, 30 L. ed. 220–226, 6 Sup. Ct. Rep. 1064; Barbier v. Connolly, 113 U. S. 27–31, 28 L. ed. 923–925, 5 Sup. Ct. Rep. 357.

Peonage sanctioned involuntary servitude as an obligation growing out of a contract; it sanctioned the exercise of a dominion over the person and liberty of the peon by the master to coerce a liquidation of the obligation under the contract. Even if the entering into the peonage system was voluntary, it became involuntary the moment the peon desired to withdraw, and was coerced to perform the services against his will.

Peonage Cases, 123 Fed. 673; Jaremillo v. Romero, 1 N. M. 190; 30 Cyc. Law & Proc. pp. 1382, et seq.

The statute, in violation of the 13th Amendment, enforces involuntary servitude not in punishment for a crime, and is also repugnant to the peonage statutes in that it violates the 14th Amendment, and is therefore unconstitutional and void, and in no manner authorizes the holding of the plaintiff in error.

Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429; Ex parte Hollman, 79 S. C. 9, 21 L.R.A. (N.S.) 242, 60 S. E. 20, 14 A. & E. Ann. Cas. 1105; Ex parte Drayton, 153 Fed. 986, Re Lewis, 114 Fed. 963; 30 Cyc. Law & Proc. p. 1382.

Mr. Fred S. Ball also filed a brief for plaintiff in error:

This statute will be considered according to its real purpose and effect rather than its mere language.

Rogers v. Alabama, 192 U. S. 226, 48 L. ed. 417, 24 Sup. Ct. Rep. 257; Henderson v. New York (Henderson v. Wickham) 92

U. S. 259, 23 L. ed. 543; Cummings v. Missouri, 4 Wall. 325, 18 L. ed. 363.

This statute denies to plaintiff in error his right to trial by jury because it arbitrarily overcomes the presumption of his innocence, and gives him no fair opportunity to rebut the prima facie evidence of his guilt.

Wilmering v. Corbin Bkg. Co. 126 Ala. 279, 28 So. 640; Wilburn v. McCalley, 63 Ala. 436; 24 Cyc. Law & Proc. p. 192.

A state may establish and alter rules of evidence as to what constitutes proof of an offense, provided the accused is given a fair opportunity to explain and contest the charge, and the rule is not arbitrary in character.

Com. v. Wallace, 7 Gray, 222; Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372.

Statutes have been held valid which make the possession of stolen goods, burglars' tools, gambling paraphernalia, policy slips, and intoxicating liquors in certain cases prima facie evidence of crime, because there is a logical connection between these things and the offense, and evidence is possible and admissible to rebut the prima facie case.

Adam v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372.

A statute creating an offense not existing at common law must be sufficiently certain to show what the legislature intended to prohibit and punish; otherwise it will be void for uncertainty.

12 Cyc. Law & Proc. p. 142; United States v. Reese, 92 U. S. 214, 23 L. ed. 563.

The statute denies to plaintiff in error the equal protection of the laws.

Toney v. State, 141 Ala. 120, 67 L.R.A. 286, 109 Am. St. Rep. 23, 37 So. 332, 3 A. & E. Ann. Cas. 319.

The statute plainly and flagrantly violates the 13th Amendment to the Federal Constitution.

Carr v. State, 106 Ala. 35, 34 L.R.A. 634, 54 Am. St. Rep. 17, 17 So. 350; Ex parte Drayton, 153 Fed. 986; State v. Murray, 116 La. 655, 40 So. 930, 7 A. & E. Ann. Cas. 957; Re Thompson, 117 Mo. 83, 20 L.R.A. 462, 38 Am. St. Rep. 639, 22 S. W. 863; Re Turner, 1 Abb. U. S. 84, Fed. Cas. No. 14,247; Clark's Case, 1 Blackf. 122, 12 Am. Dec. 213; Webb v. Webb, 140 Ala. 268, 103 Am. St. Rep. 30, 37 So. 96; United States v. Clement, 171 Fed. 974; Ex parte Hollman, 79 S. C. 9, 21 L.R.A. (N.S.) 242, 60 S. E. 19, 14 A. & E. Ann. Cas. 1105; Murray v. Murray, 84 Ala. 365, 4 So. 239.

"Involuntary servitude" includes all forms of compulsory service for the benefit or pleasure of others.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Civil Rights Case, 109 U. S. 3, 27 L. ed. 836, 3 Sup. Ct. Rep. 18; Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429; Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326.

If the statute here assailed be upheld, will not the practical effect be to legalize and establish a condition of involuntary servitude and virtual peonage?—a condition that world-wide civilization and enlightenment has condemned as utterly destructive of the best elements of manhood in both servant and master.

Clark's Case, 1 Blackf. 122, 12 Am. Dec. 213; Ex parte Hollman, 79 S. C. 9, 21 L.R.A.(N.S.) 242, 60 S. E. 19, 14 A. & E. Ann. Cas. 1105; Butts and Penry, 3 Keble, 785; Chamberlain v. Harvey, 1 Ld. Raym. 146; Smith v. Gould, 2 Ld. Raym. 1275, 2 Salk. 666; Sommersett's Case, 20 How. St. Tr. 82; Lives of Chief Justices of Eng. vol. 3, p. 156, vol. 4, p. 134.

Assistant Attorney General **Harr** argued the cause, and, with Attorney General Wickersham, filed a brief as *amicus curiæ:*

Peonage, however created, is compulsory service,—involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced.

Clyatt v. United States, 197 U. S. 207, 216, 49 L. ed. 726, 729, 25 Sup. Ct. Rep. 429.

The act is the result of a serious effort on the part of the state of Alabama to enforce the performance of labor contracts.

Bailey v. State, 158 Ala. 24, 48 So. 498.

It may be that the legislature can punish fraudulent practices in obtaining property by false pretenses under contract for the performance of an act or service. If such were the real object of the statute, it would be clearly distinguishable from one punishing a mere breach of contract.

Freeman v. United States, 217 U. S. 539, 54 L. ed. 874, 30 Sup. Ct. Rep. 592, 19 A. & E. Ann. Cas. 755.

But is the fact that "on its face the purpose is to punish fraudulent practices, not the mere failure to pay a debt," sufficient? Clearly not. As this court has said, "in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

Henderson v. New York (Henderson v. Wickham) 92 U. S. 268, 23 L. ed. 547.

Fortunately, the supreme court of Alabama has itself informed us as to at least one of the chief objects of the statute, and by a parity of reasoning the other may be easily inferred.

McIntosh v. State, 117 Ala. 128, 23 So. 668.

The judgment in this case, and the statute of Alabama upon which it is founded, are in violation of the 14th Amendment to the Constitution of the United States—

(1) As denying the defendant the equal protection of the laws.

Ex parte Drayton, 153 Fed. 986; Yick Wo v. Hopkins, 118 U. S. 356, 373, 30 L. ed. 220, 227, 6 Sup. Ct. Rep. 1064; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 151, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; Peonage Cases, 123 Fed. 691.

(2) As depriving the defendant of liberty and property without due process of law.

People v. Cannon, 139 N. Y. 43, 36 Am. St. Rep. 668, 34 N. E. 759; State v. Beswick, 13 R. I. 211, 43 Am. Rep. 26; Board of Excise v. Merchant, 103 N. Y. 148, 57 Am. Rep. 705, 8 N. E. 484; Com. v. Rubin, 165 Mass. 453, 43 N. E. 200; Kelly v. Jackson, 6 Pet. 622, 631, 8 L. ed. 523, 526; Vankirk v. Staats, 24 N. J. L. 123; Steinhardt v. Beir, 28 Jones & S. 489, 16 N. Y. Supp. 609; Mooney v. La Follette, 21 App. Div. 510, 48 N. Y. Supp. 460; Greenl. Ev. § 33.

The principal that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary; and its enforcement lies at the foundation of the administration of our criminal law.

Coffin v. United States, 156 U. S. 432, 453, 39 L. ed. 481, 491, 15 Sup. Ct. Rep. 394.

The statute would seem to be void for ambiguity.

United States v. Reese, 92 U. S. 214, 23 L. ed. 563; 12 Cyc. Law & Proc. p. 142.

Consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law, and protect the citizen in his private right, and guard him against the arbitrary action of government.

Twining v. New Jersey, 211 U. S. 78, 101, 53 L. ed. 97, 107, 29 Sup. Ct. Rep. 14.

Messrs. **Alexander M. Garber** and **Thomas W. Martin** argued the cause and filed a brief for defendant in error:

The offense is but a species of the common-law crime of cheating by false pretenses; and if in fact the statute does define and punish a crime, there can be no question here of its validity.

Ex parte Riley, 94 Ala. 82, 10 So. 528; Bailey v. State, 158 Ala. 18, 48 So. 498; Toney v. State, 141 Ala. 120, 67 L.R.A. 286, 109 Am. St. Rep. 23, 37 So. 332, 3 A. & E. Ann. Cas. 319; Peonage Cases, 123 Fed. 690; Ex parte Drayton, 153 Fed. 986; Lamar v. State, 120 Ga. 312, 47 S. E. 958; State v. Williams, 150 N. C. 802, 63 S. E. 949; Ex parte Hollman, 79 S. C. 9, 21 L.R.A.(N.S.) 242, 60 S. E. 19, 14 A. & E. Ann. Cas. 1105.

The statute we are now considering is wholly different from the law held to be obnoxious to the state Constitution.

Toney v. State, 141 Ala. 120, 67 L.R.A. 286, 109 Am. St. Rep. 23, 37 So. 332, 3 A. & E. Ann. Cas. 319; Peonage Cases, 123 Fed. 671; Bailey v. State, 158 Ala. 18, 48 So. 498; State v. Vann, 150 Ala. 66, 43 So. 357, 14 A. & E. Ann. Cas. 1058.

The statute was meant either to prevent employees from making fraudulent contracts, or to prevent them from obtaining money by promising service.

McIntosh v. State, 117 Ala. 127, 23 So. 668.

This court cannot hold the law to be violative either of the 13th Amendment or of the peonage statute, except on the theory that it imprisons for a debt.

Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429.

The statute cannot, by any canon of construction, be held to imprison for debt.

Freeman v. United States, 217 U. S. 539, 54 L. ed. 874, 30 Sup. Ct. Rep. 592, 19 A. & E. Ann. Cas. 755; Re Ebenhack, 17 Kan. 618; State v. Nicholson, 67 Md. 1, 8 Atl. 817; State v. Yardley, 95 Tenn. 546, 34 L.R.A. 656, 32 S. W. 481.

The statute does not deny the equal protection of the laws.

Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; Moore v. Missouri, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 A. & E. Ann. Cas. 1247; Halter v. Nebraska, 205 U. S. 34, 51 L. ed. 696, 27 Sup. Ct. Rep. 419, 10 A. & E. Ann. Cas. 525; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; State v. Chapman, 56 S. C. 420, 76 Am. St. Rep. 557, 34 S. E. 961; Dreyer v. Pease, 88 Fed. 978; Rogers v. Alabama, 192 U. S. 226, 48 L. ed. 417, 24 Sup. Ct. Rep. 257; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Tinsley v. Anderson, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805; American Steel & Wire Co.

v. Speed, 192 U. S. 500, 523, 48 L. ed. 538, 547, 24 Sup. Ct. Rep. 365; Ex parte King, 102 Ala. 182, 15 So. 524; Re Milecke, 52 Wash. 312, 21 L.R.A.(N.S.) 259, 132 Am. St. Rep. 968, 100 Pac. 743; State v. Yardley, 95 Tenn. 546, 34 L.R.A. 656, 32 S. W. 481; Hutchinson v. Davis, 58 Ill. App. 358; State v. Engle, 156 Ind. 339, 58 N. E. 698.

The statute does not deny due process of law.

Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14; Dent v. West Virginia, 129 U. S. 128, 32 L. ed. 628, 9 Sup. Ct. Rep. 231; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 579.

The right of the legislature to establish a prima facie rule of evidence in criminal cases has been recognized by every court, state and Federal, in which the question has been presented.

Li Sing v. United States, 180 U. S. 486, 45 L. ed. 634, 21 Sup. Ct. Rep. 449; Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; Ah How v. United States, 193 U. S. 65, 48 L. ed. 619, 24 Sup. Ct. Rep. 357; Fong Yue Ting v. United States, 149 U. S. 698, 719, 37 L. ed. 905, 915, 13 Sup. Ct. Rep. 1016; Com. v. Williams, 6 Gray, 1; State v. Beach, 147 Ind. 74, 36 L.R.A. 179, 43 N. E. 949; State v. Buck, 120 Mo. 479, 25 S. W. 573; State v. Kingsley, 108 Mo. 135, 18 S. W. 994; Meadowcroft v. People, 163 Ill. 56, 35 L.R.A. 176, 54 Am. St. Rep. 447, 45 N. E. 303; Baker v. State, 54 Wis. 368, 12 N. W. 12; Robertson v. People, 20 Colo. 279, 38 Pac. 326, 9 Am. Crim. Rep. 284; Voght v. State, 124 Ind. 358, 24 N. E. 680; People v. Cannon, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759; Board of Excise v. Merchant, 103 N. Y. 148, 57 Am. Rep. 705, 8 N. E. 484; Re Milecke, 52 Wash. 312, 21 L.R.A.(N.S.) 259, 132 Am. St. Rep. 968, 100 Pac. 743.

The validity of this provision of the statute has been considered and upheld in three different cases by the supreme court of Alabama.

Bailey v. State, 158 Ala. 18, 48 So. 498; State v. Vann, 150 Ala. 66, 43 So. 357, 14 A. & E. Ann. Cas. 1058; State v. Thomas, 144 Ala. 77, 2 L.R.A.(N.S.) 1011, 113 Am. Am. St. Rep. 17, 40 So. 271, 6 A. & E. Ann. Cas. 744; State v. Sattley, 131 Mo. 464, 33 S. W. 41.

A prima facie rule of evidence in a criminal case does not overcome the presumption of innocence, or change the burden of proof, or require the jury to convict, unless they are satisfied, from all the evidence, of the guilt of the accused beyond a reasonable doubt.

24 Cyc. Law & Proc. p. 192.

Nor does the presumption of innocence attend a defendant throughout the whole trial, but only "until sufficient evidence is introduced to overcome the proof which the law has created."

Coffin v. United States, 156 U. S. 453, 39 L. ed. 491, 15 Sup. Ct. Rep. 394.

Moreover, whether the facts are consistent with innocence is a conclusion for the jury to draw; and they may, notwithstanding the present rule of evidence, find the defendant not guilty. It is the duty of the jury to consider all the evidence in the case, and to find the defendant not guilty if a reasonable doubt arises out of any part of the evidence.

Hurd v. State, 94 Ala. 100, 10 So. 528.

Under an indictment for larceny, certain presumptions arise against the defendant from recent possession of stolen goods. As said by Judge Brickell, in Martin v. State, 104 Ala. 78, 16 So. 82: "It is the settled law of this state, that the recent possessions of stolen goods imposes on the possessor the onus of explaining the possession; and, if he fails to make a reasonable explanation, raises a presumption of guilt, which will support a verdict of guilty."

To the same effect, see Wilson v. United States, 162 U. S. 613, 40 L. ed. 1090, 16 Sup. Ct. Rep. 895; Considine v. United States, 50 C. C. A. 272, 112 Fed. 342.

At the same time, our court recognizes the doctrine of the presumption of innocence. See Newsom v. State, 107 Ala. 133, 18 So. 206.

The entire contention of a class discrimination calls on this court to disregard the interpretation given to a state statute by the court of last resort of the state, and, by an adverse construction, to decide that the state law is repugnant to the Constitution of the United States. But the elementary rule is that this court accepts the interpretation of a statute of a state, affixed to it by the court of last resort thereof.

Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 353, 44 L. ed. 192, 194, 20 Sup. Ct. Rep. 136; American Steel & Wire Co. v. Speed, 192 U. S. 523, 48 L. ed. 547, 24 Sup. Ct. Rep. 365.

While we are confident that the statute is valid in its entirety, and that the rule of evidence should be upheld, yet, if the court should be of opinion that the statute, as originally passed, was valid, and that the rule of evidence is an improper exercise of legislative power, then we insist that the original statute would remain in force.

Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Allen v. Louisiana. 103 U. S. 80, 83, 26

L. ed. 318, 319; Baldwin v. Franks, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763; Kimmish v. Ball, 129 U. S. 217, 32 L. ed. 695, 2 Inters. Com. Rep. 407, 9 Sup. Ct. Rep. 277; Noble v. Mitchell, 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. Rep. 110; Bailey v. Alabama, 211 U. S. 453, 53 L. ed. 278, 29 Sup. Ct. Rep. 141.

Mr. Justice **Hughes** delivered the opinion of the court:

This is a writ of error to review a judgment of the supreme court of the state of Alabama, affirming a judgment of conviction in the Montgomery city court. The statute upon which the conviction was based is assailed as in violation of the 14th Amendment of the Constitution of the United States upon the ground that it deprived the plaintiff in error of his liberty without due process of law and denied him the equal protection of the laws, and also of the 13th Amendment, and of the act of Congress providing for the enforcement of that Amendment, in that the effect of the statute is to enforce involuntary servitude by compelling personal service in liquidation of a debt.

The statute in question is § 4730 of the Code of Alabama of 1896, as amended in 1903 and 1907. The section of the Code as it stood before the amendments provided that any person who, with intent to injure or defraud his employer, entered into a written contract for service, and thereby obtained from his employer money or other personal property, and with like intent and without just cause, and without refunding the money or paying for the property, refused to perform the service, should be punished as if he had stolen it. In 1903 (Gen. Acts [Ala.]1903, p. 345) the section was amended so as to make the refusal or failure to perform the service, or to refund the money, or pay for the property, without just cause, prima facie evidence of the intent to injure or defraud. This amendment was enlarged by that of 1907. Gen. Acts. (Ala.) 1907, p. 636. The section, thus amended, reads as follows:

"Any person who, with intent to injure or 228]defraud his *employer, enters into a contract in writing for the performance of any act of service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must on conviction be punished by a fine in double the damage suffered by the injured party, but not more than $300, one half of said fine to go to the county and one half to the party injured; and any person who, with intent to injure or defraud his landlord, enters into any contract in writing for the rent of land, and thereby obtains any money or other personal property from such landlord, and with like intent, without just cause, and without refunding such money, or paying for such property, refuses or fails to cultivate such land, or to comply with his contract relative thereto, must on conviction be punished by fine in double the damage suffered by the injured party, but not more than $300, one half of said fine to go to the county and one half to the party injured. And the refusal or failure of any person, who enters into such contract, to perform such act or service, or to cultivate such land, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure his employer or landlord or defraud him. That all laws and parts of laws in conflict with the provisions hereof be and the same are hereby repealed."

There is also a rule of evidence enforced by the courts of Alabama which must be regarded as having the same effect as if read into the statute itself, that the accused, for the purpose of rebutting the statutory presumption, shall not be allowed to testify "as to his uncommunicated motives, purpose, or intention." 161 Ala. 77, 78, 49 So. 886.

Bailey, the plaintiff in error, was committed for detention on the charge of obtaining $15 under a *contract in writing with[229 intent to injure or defraud his employer. He sued out a writ of habeas corpus, challenging the validity of the statute. His discharge was refused, and the supreme court of the state affirmed the order, holding the statute to be constitutional. 158 Ala. 18, 48 So. 498. On writ of error from this court it was held that the case was brought here prematurely, and the questions now presented were expressly reserved. Bailey v. Alabama, 211 U. S. 452, 53 L. ed. 278, 29 Sup. Ct. Rep. 141.

Having failed to obtain his release on habeas corpus, Bailey was indicted on the following charge:

"The grand jury of said county charge that before the finding of this indictment Alonzo Bailey, with intent to injure or defraud his employer, the Riverside Company, a corporation, entered into a written contract to perform labor or services for the Riverside Company, a corporation, and obtained thereby the sum of $15 from the said the Riverside Company, and afterwards with like intent, and without just cause, failed or refused to perform such labor or services, or to refund such money, against the peace and dignity of the state of Alabama."

Motion to quash and a demurrer to the

indictment were overruled. Upon the trial the following facts appeared: On December 26, 1907, Bailey entered into a written contract with the Riverside Company, which provided:

"That I, Lonzo Bailey, for and in consideration of the sum of $15 in money, this day in hand paid to me by said the Riverside Company, the receipt whereof I do hereby acknowledge, I, the said Lonzo Bailey, do hereby consent, contract, and agree to work and labor for the said Riverside Company as a farm hand on their Scott's Bend place in Montgomery county, Alabama, from the 30 day of December, 1907, to the 30 day of December, 1908, at and for the sum of $12 per month.

230] *"And the said Lonzo Bailey agrees to render respectful and faithful service to the said the Riverside Company, and to perform diligently and actively all work pertaining to such employment, in accordance with the instructions of the said the Riverside Company or agent.

"And the said the Riverside Company, in consideration of the agreement above mentioned of the said Lonzo Bailey, hereby employs the said Lonzo Bailey as such farm hand for the time above set out, and agrees to pay the said Lonzo Bailey the sum of $10.75 per month."

The manager of the employing company testified that at the time of entering into this contract there were present only the witness and Bailey, and that the latter then obtained from the company the sum of $15; that Bailey worked under the contract throughout the month of January and for three or four days in February, 1908, and then, "without just cause, and without refunding the money, ceased to work for said Riverside Company, and has not since that time performed any service for said company in accordance with or under said contract, and has refused and failed to perform any further service thereunder, and has, without just cause, refused and failed to refund said $15." He also testified, in response to a question from the attorney for the defendant, and against the objection of the state, that Bailey was a negro. No other evidence was introduced.

The court, after defining the crime in the language of the statute, charged the jury, in accordance with its terms, as follows:

"And the refusal of any person who enters into such contract to perform such act or service, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure his employer, or to defraud him."

Bailey excepted to these instructions, and requested the court to instruct the jury that the statute and the *provision creat- [231 ing the presumption were invalid, and further that "the refusal or failure of the defendant to perform the service alleged in the indictment, or to refund the money obtained from the Riverside Company under the contract between it and the defendant, without cause, does not of itself make out a prima facie case of the defendant's intent to injure or defraud said Riverside Company."

The court refused these instructions and Bailey took exception.

The jury found the accused guilty, fixed the damages sustained by the injured party at $15, and assessed a fine of $30. Thereupon Bailey was sentenced by the court to pay the fine of $30 and the costs, and in default thereof to hard labor "for twenty days in lieu of said fine, and one hundred and sixteen days on account of said costs."

On appeal to the supreme court of the state, the constitutionality of the statute was again upheld and the judgment affirmed. 161 Ala. 75, 49 So. 886.

We at once dismiss from consideration the fact that the plaintiff in error is a black man. While the action of a state, through its officers charged with the administration of a law fair in appearance, may be of such a character as to constitute a denial of the equal protection of the laws (Yick Wo v. Hopkins, 118 U. S. 356, 373, 30 L. ed. 220, 227, 6 Sup. Ct. Rep. 1064), such a conclusion is here neither required nor justified. The statute, on its face, makes no racial discrimination, and the record fails to show its existence in fact. No question of a sectional character is presented, and we may view the legislation in the same manner as if it had been enacted in New York or in Idaho. Opportunities for coercion and oppression, in varying circumstances, exist in all parts of the Union, and the citizens of all the states are interested in the maintenance of the constitutional guaranties, the consideration of which is here involved.

*Prior to the amendment of the year [232 1903, enlarged in 1907, the statute did not make the mere breach of the contract, under which the employee had obtained from his employer money which was not refunded or property which was not paid for, a crime. The essential ingredient of the offense was the intent of the accused to injure or defraud. To justify conviction, it was necessary that this intent should be etasblished by competent evidence, aided only by such inferences as might logically be derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption.

This was the construction which the supreme court of Alabama placed upon the

statute, as it then stood, in Ex parte Riley, 94 Ala. 82, 10 So. 528. In that case the court said (id. 83, 84):

"The ingredients of this statutory offense are: (1) A contract in writing by the accused for the performance of any act or service; (2) an intent on the part of the accused, when he entered into the contract, to injure or defraud his employer; (3) the obtaining by the accused of money or other personal property from such employer by means of such contract entered into with such intent; and (4) the refusal by the accused, with like intent, and without just cause, and without refunding such money, or paying for such property, to perform such act or service. This statute by no means provides that a person who has entered into a written contract for the performance of services, under which he has obtained money or other personal property, is punishable as if he had stolen such money or other personal property, upon his refusal to perform the contract, without refunding the money or paying for the property. A mere breach of a contract is not by the statute made a crime. The criminal feature of the transaction is wanting unless the accused entered into the contract with intent to injure or defraud his employer, and unless his refusal to perform [233]*was with like intent and without just cause. That there was an intent to injure or defraud the employer, both when the contract was entered into and when the accused refused performance, are facts which must be shown by the evidence. As the intent is the design, purpose, resolve, or determination in the mind of the accused, it can rarely be proved by direct evidence, but must be ascertained by means of inferences from the facts and circumstances developed by the proof. Carlisle v. State, 76 Ala. 75; Mack v. State, 63 Ala. 138. In the absence, however, of evidence from which such inferences may be drawn, the jury are not justified in indulging in mere unsupported conjectures, speculations, or suspicions as to intentions which were not disclosed by any visible or tangible act, expression, or circumstance. Green v. State, 68 Ala. 539." See also Dorsey v. State, 111 Ala. 40, 20 So. 629; McIntosh v. State, 117 Ala. 128, 23 So. 668.

We pass, then, to the consideration of the amendment, through the operation of which under the charge of the trial court this conviction was obtained. No longer was it necessary for the prosecution to comply with the rule of the Riley Case (supra) in order to establish the intent to injure or defraud which, as the court said, constituted the gist of the offense. It was "the difficulty in proving the intent, made patent by that decision," which "suggested the amendment of 1903." Bailey v. State, 158 Ala. p. 25, 48 So. 498. By this amendment it was provided, in substance, that the refusal or failure to perfom the service contracted for, or to refund the money obtained, without just cause, should be prima facie evidence of the intent to injure or defraud.

But the refusal or failure to perform the service, without just cause, constitutes the breach of the contract. The justice of the grounds of refusal or failure must, of course, be determined by the contractual obligation assumed. *Whatever the rea-[234 son for leaving the service, if, judged by the terms of the contract, it is insufficient in law, it is not "just cause." The money received and repayable, nothing more being shown, constitutes a mere debt. The asserted difficulty of proving the intent to injure or defraud is thus made the occasion for dispensing with such proof, so far as the prima facie case is concerned. And the mere breach of a contract for personal service, coupled with the mere failure to pay a debt which was to be liquidated in the course of such service, is made sufficient to warrant a conviction.

It is no answer to say that the jury must find, and here found, that a fraudulent intent existed. The jury by their verdict cannot add to the facts before them. If nothing be shown but a mere breach of a contract of service and a mere failure to pay a debt, the jury have nothing else to go upon, and the evidence becomes nothing more because of their finding. Had it not been for this statutory presumption, supplied by the amendment, no one would be heard to say that Bailey could have been convicted.

Prima facie evidence is sufficient evidence to outweigh the presumption of innocence, and if not met by opposing evidence, to support a verdict of guilty. "It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose." Kelly v. Jackson, 6 Pet. 632, 8 L. ed. 526.

We are not impressed with the argument that the supreme court of Alabama has construed the amendment to mean that the jury is not controlled by the presumption, if unrebutted, and still may find the accused not guilty. That court, in its opinion, said: "Again, it must be borne in mind that the rule of evidence fixed by the statute does not make it the duty of the jury to convict on the evidence referred to in the enactment, if unrebutted, whether satisfied thereby of the guilt of the accused beyond a reasonable doubt or not. On the contrary, *with such evidence before them, the[235 jury are still left free to find the accused guilty or not guilty, according as they may

be satisfied of his guilt or not, by the whole evidence." 161 Ala. 78, 49 So. 886.

But the controlling construction of the statute is the affirmance of this judgment of conviction. It is not sufficient to declare that the statute does not make it the *duty* of the jury to convict, where there is no other evidence but the breach of the contract and the failure to pay the debt. The point is that, in such a case, the statute *authorizes* the jury to convict. It is not enough to say that the jury may not accept that evidence as alone sufficient; for the jury may accept it, and they have the express warrant of the statute to accept it as a basis for their verdict. And it is in this light that the validity of the statute must be determined.

It is urged that the time and circumstances of the departure from service may be such as to raise not only an inference, but a strong inference, of fraudulent intent. There was no need to create a statutory presumption, and it was not created for such a case. Where circumstances are shown permitting a fair inference of fraudulent purpose, the case falls within the rule of Ex parte Riley (supra), which governed prosecutions under the statute before the amendment was made. The "difficulty," which admittedly the amendment was intended to surmount, did not exist where natural inferences sufficed. Plainly, the object of the statute was to hit cases which were destitute of such inferences, and to provide that the mere breach of the contract and the mere failure to pay the debt might do duty in their absence.

While, in considering the natural operation and effect of the statute, as amended, we are not limited to the particular facts of the case at the bar, they present an illuminating illustration. We may briefly restate them. Bailey made a contract to work 236]for a year at $12 a month. He *received $15, and he was to work this out, being entitled monthly only to $10.75 of his wages. No one was present when he made the contract but himself and the manager of the employing company. There is not a particle of evidence of any circumstance indicating that he made the contract or received the money with any intent to injure or defraud his employer. On the contrary, he actually worked for upwards of a month. His motive in leaving does not appear, the only showing being that it was without legal excuse and that he did not repay the money received. For this he is sentenced to a fine of $30 and to imprisonment at hard labor, in default of the payment of the fine and costs, for 136 days. Was not the case the same in effect as if the statute had made it a criminal act to leave the service without just cause and without liquidating the debt? To say that he has been found guilty of an intent to injure or defraud his employer, and not merely for breaking his contract and not paying his debt, is a distinction without a difference to Bailey.

Consider the situation of the accused under this statutory presumption. If, at the outset, nothing took place but the making of the contract and the receipt of the money, he could show nothing else. If there was no legal justification for his leaving his employment, he could show none. If he had not paid the debt, there was nothing to be said as to that. The law of the state did not permit him to testify that he did not intend to injure or defraud. Unless he were fortunate enough to be able to command evidence of circumstances affirmatively showing good faith, he was helpless. He stood, stripped by the statute of the presumption of innocence, and exposed to conviction for fraud upon evidence only of breach of contract and failure to pay.

It is said that we may assume that a fair jury would convict only where the circumstances sufficiently indicated a fraudulent intent. Why should this be assumed *in[237 the face of the statute and upon this record? In the present case the jury did convict, although there is an absence of evidence sufficient to establish fraud under the familiar rule that fraud will not be presumed, and the obvious explanation of the verdict is that the trial court, in accordance with the statute, charged the jury that refusal to perform the service, or to repay the money, without just cause, constituted prima facie evidence of the commission of the offense which the statute defined. That is, the jury were told in effect that the evidence, under the statutory rule, was sufficient, and hence they treated it as such. There is no basis for an assumption that the jury would have acted differently if Bailey had worked for three months, or six months, or nine months, if in fact his debt had not been paid. The normal assumption is that the jury will follow the statute, and, acting in accordance with the authority it confers, will accept as sufficient what the statute expressly so describes.

It may further be observed that under the statute, there is no punishment for the alleged fraud if the service is performed or the money refunded. If the service is rendered in liquidation of the debt, there is no punishment; and if it is not rendered, and the money is not refunded, that fact alone is sufficient for conviction. By a statute passed by the legislature of Alabama in 1901, it was made a misdemeanor for any person who had made a written contract to

labor for or serve another for any given time, to leave the service before the expiration of the contract, and without the consent of the employer, and to make a second contract of similar nature with another person without giving the second employer notice of the existence of the first contract. This was held unconstitutional upon the ground that it interfered with freedom of contract. Toney v. State, 141 Ala. 120, 67 L.R.A. 286, 109 Am. St. Rep. 23, 37 So. 332, 3 A. & E. Ann. Cas. 319. But, judging it by its necessary operation and obvious effect, the fundamental purpose plainly was 238]to compel, under the sanction *of the criminal law, the enforcement of the contract for personal service, and the same purpose, tested by like criteria, breathes despite its different phraseology through the amendments of 1903 and 1907 of the statute here in question.

We cannot escape the conclusion that, althought the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt; and judging its purpose by its effect, that it seeks in this way to provide the means of compulsion through which performance of such service may be secured. The question is whether such a statute is constitutional.

This court has frequently recognized the general power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government. Fong Yue Ting v. United States, 149 U. S. 698, 749, 37 L. ed. 905, 925, 13 Sup. Ct. Rep. 1016. In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be prima facie evidence of the main fact in issue; and where the inference is not purely arbitrary, and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law, or a denial of the equal 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; Mobile, J. & K. C. R. Co. v. Turnipseed, decided by this court December 19, 1910 [219 U. S. 35, ante, 78, 31 Sup. Ct. Rep. 136].

The latest expression upon this point is found in the case last cited, where the court, by Mr. Justice Lurton, said: "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law, or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact *presumed, and that the infer-[239 ence of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

In this class of cases where the entire subject-matter of the legislation is otherwise within state control, the question has been whether the prescribed rule of evidence interferes with the guaranteed equality before the law, or violates those fundamental rights and immutable principles of justice which are embraced within the conception of due process of law. But where the conduct or fact, the existence of which is made the basis of the statutory presumption, itself falls within the scope of a provision of the Federal Constitution, a further question arises. It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions. And the state may not in this way interfere with matters withdrawn from its authority by the Federal Constitution, or subject an accused to conviction for conduct which it is powerless to proscribe.

In the present case it is urged that the statute as amended, through the operation of the presumption for which it provides, violates the 13th Amendment of the Constitution of the United States and the act of Congress passed for its enforcement.

*The 13th Amendment provides:[240

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

Pursuant to the authority thus conferred, Congress passed the act of March 2, 1867, chap. 187, 14 Stat. at L. 546, the provisions of which are now found in §§ 1990 and 5526 of the Revised Statutes (U. S.

Comp. Stat. 1901, pp. 1266, 3715), as follows:

"Sec. 1990. The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the territory of New Mexico, or in any other territory or state of the United States; and all acts, laws, resolutions, orders, regulations, or usages of the territory of New Mexico, or of any other territory or state, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void."

"Sec. 5526. Every person who holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return, of any person to a condition of peonage, shall be punished by a fine of not less than one thousand nor more than five thousand dollars, or by imprisonment not less than one year nor more than five years, or by both."

The language of the 13th Amendment was not new. It reproduced the historic words of the ordinance of 1787 for the government of the Northwest territory, and gave them unrestricted application within the United States and all places subject to their jurisdiction. While the immediate concern was with African slavery, the 241]*Amendment was not limited to that. It was a charter of universal civil freedom for all persons, of whatever race, color, or estate, under the flag.

The words involuntary servitude have a "larger meaning than slavery."

"It was very well understood that, in the form of apprenticeship for long terms, as it had been practised in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word 'slavery' had been used." Slaughter-House Cases, 16 Wall. p. 69, 21 L. ed. 406. The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude.

While the Amendment was self-executing, so far as its terms were applicable to any existing condition, Congress was authorized to secure its complete enforcement by appropriate legislation. As was said in the Civil Rights Cases: "By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the Amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." 109 U. S. 20, 27 L. ed. 842, 3 Sup. Ct. Rep. 18.

The act of March 2, 1867 (Rev. Stat. §§ 1990 and 5526, supra), was a valid exercise of this express authority. Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429. It declared that all laws of any state, by virtue of which any attempt should be made "to establish, maintain, or enforce, directly or *indirect-[242 ly, the voluntary or involuntary service or labor of any person as peons, in liquidation of any debt or obligation, or otherwise," should be null and void.

Peonage is a term descriptive of a condition which has existed in Spanish America, and especially in Mexico. The essence of the thing is compulsory service in payment of a debt. A peon is one who is compelled to work for his creditor until his debt is paid. And in this explicit and comprehensive enactment, Congress was not concerned with mere names or manner of description, or with a particular place or section of the country. It was concerned with a fact, wherever it might exist; with a condition, however named and wherever it might be established, maintained, or enforced.

The fact that the debtor contracted to perform the labor which is sought to be compelled does not withdraw the attempted enforcement from the condemnation of the statute. The full intent of the constitutional provision could be defeated with obvious facility if, through the guise of contracts under which advances had been made, debtors could be held to compulsory service. It is the compulsion of the service that the statute inhibits, for when that occurs, the condition of servitude is created, which would be not less involuntary because of the original agreement to work out the indebtedness. The contract exposes the debtor to liability for the loss due to the breach, but not to enforced labor. This has been so clearly stated by this court in the case of Clyatt, supra, that discussion is unnecessary. The court there said:

"The constitutionality and scope of §§ 1990 and 5526 present the first questions for our consideration. They prohibit peonage. What is peonage? It may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. As said by Judge Benedict, delivering the opinion in Jaremillo v. Romero, 243]1 N. M. 190, 194: *'One fact existed universally; all were indebted to their masters. This was the cord by which they seemed bound to their masters' service.' Upon this is based a condition of compulsory service. Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however created, is compulsory service, involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service. We need not stop to consider any possible limits or exceptional cases, such as the service of a sailor (Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326), or the obligations of a child to its parents, or of an apprentice to his master, or the power of the legislature to make unlawful and punish criminally an abandonment by an employee of his post of labor in any extreme cases. That which is contemplated by the statute is compulsory service to secure the payment of a debt." 197 U. S. pp. 215, 216.

The act of Congress, nullifying all state laws by which it should be attempted to enforce the "service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise," necessarily embraces all legislation which seeks to compel the service or labor by making it a crime to refuse or fail to perform it. Such laws would furnish the readiest means of compulsion. 244]The 13th *Amendment prohibits involuntary servitude except as punishment for crime. But the exception, allowing full latitude for the enforcement of penal laws, does not destroy the prohibition. It does not permit slavery or involuntary servitude to be established or maintained through the operation of the criminal law by making it a crime to refuse to submit to the one or to render the service which would constitute the other. The state may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt.

If the statute in this case had authorized the employing company to seize the debtor, and hold him to the service until he paid the $15, or had furnished the equivalent in labor, its invalidity would not be questioned. It would be equally clear that the state could not authorize its constabulary to prevent the servant from escaping, and to force him to work out his debt. But the state could not avail itself of the sanction of the criminal law to supply the compulsion any more than it could use or authorize the use of physical force. "In contemplation of the law, the compulsion to such service by the fear of punishment under a criminal statute is more powerful than any guard which the employer could station." Ex parte Hollman, 79 S. C. 22, 21 L.R.A.(N.S.) 249, 60 S. E. p. 24, 14 A. & E. Ann. Cas. 1109.

What the state may not do directly it may not do indirectly. If it cannot punish the servant as a criminal for the mere failure or refusal to serve without paying his debt, it is not permitted to accomplish the same result by creating a statutory presumption which, upon proof of no other fact, exposes him to conviction and punishment. Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question (Henderson v. New York [Henderson v. Wickham] 92 U. S. p. 268, 23 L. ed. 547), and it is apparent that it furnishes a convenient instrument for the coercion *which[245 the Constitution and the act of Congress forbid; an instrument of compulsion peculiarly effective as against the poor and the ignorant, its most likely victims. There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based. The provision designed to secure it would soon become a barren form if it were possible to establish a statutory presumption of this sort, and to hold over the heads of laborers the threat of punishment for crime, under the name of fraud, but merely upon evidence of failure to work out their debts. The act of Congress deprives of effect all legislative measures of any state through which, directly or indirectly, the prohibited thing, to wit, compulsory service to secure the payment of a debt, may be established

or maintained; and we conclude that § 4730, as amended, of the Code of Alabama, in so far as it makes the refusal or failure to perform the act or service, without refunding the money or paying for the property prima facie evidence of the commission received of the crime which the section defines, is in conflict with the 13th Amendment, and the legislation authorized by that Amendment, and is therefore invalid.

In this view it is unnecessary to consider the contentions which have been made under the 14th Amendment. As the case was given to the jury under instructions which authorized a verdict in accordance with the statutory presumption, and the opposing instructions requested by the accused were refused, the judgment must be reversed.

Reversed and cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice **Holmes**, dissenting:

We all agree that this case is to be considered and decided in the same way as if it [246]arose in Idaho or New York. *Neither public document nor evidence discloses a law which, by its administration, is made something different from what it appears on its face, and therefore the fact that in Alabama it mainly concerns the blacks does not matter. Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, does not apply. I shall begin, then, by assuming for the moment what I think is not true, and shall try to show not to be true, that this statute punishes the mere refusal to labor according to contract as a crime, and shall inquire whether there would be anything contrary to the 13th Amendment or the statute if it did, supposing it to have been enacted in the state of New York. I cannot believe it. The 13th Amendment does not outlaw contracts for labor. That would be at least as great a misfortune for the laborer as for the man that employed him. For it certainly would affect the terms of the bargain unfavorably for the laboring man if it were understood that the employer could do nothing in case the laborer saw fit to break his word. But any legal liability for breach of a contract is a disagreeable consequence which tends to make the contractor do as he said he would. Liability to an action for damages has that tendency as well a fine. If the mere imposition of such consequences as tend to make a man keep to his promise is the creation of peonage when the contract happens to be for labor, I do not see why the allowance of a civil action is not, as well as an indictment ending in fine. Peonage is service to a private master at which a man is kept by bodily compulsion against his will. But the creation of the ordinary legal motives for right conduct does not produce it. Breach of a legal contract without excuse is wrong conduct, even if the contract is for labor; and if a state adds to civil liability a criminal liability to fine, it simply intensifies the legal motive for doing right; it does not make the laborer a slave.

But if a fine may be imposed, imprisonment may be *imposed in case of a[247 failure to pay it. Nor does it matter if labor is added to the imprisonment. Imprisonment with hard labor is not stricken from the statute books. On the contrary, involuntary servitude as a punishment for crime is excepted from the prohibition of the 13th Amendment in so many words. Also the power of the states to make breach of contract a crime is not done away with by the abolition of slavery. But if breach of contract may be made a crime at all, it may be made a crime with all the consequences usually attached to crime. There is produced a sort of illusion if a contract to labor ends in compulsory labor in a prison. But compulsory work for no private master in a jail is not peonage. If work in a jail is not condemned in itself, without regard to what the conduct is it punishes, it may be made a consequence of any conduct that the state has power to punish at all. I do not blink the fact that the liability to imprisonment may work as a motive when a fine without it would not, and that it may induce the laborer to keep on when he would like to leave. But it does not strike me as an objection to a law that it is effective. If the contract is one that ought not to be made, prohibit it. But if it is a perfectly fair and proper contract, I can see no reason why the state should not throw its weight on the side of performance. There is no relation between its doing so in the manner supposed, and allowing a private master to use private force upon a laborer who wishes to leave.

But all that I have said so far goes beyond the needs of the case as I understand it. I think it a mistake to say that this statute attaches its punishment to the mere breach of a contract to labor. It does not purport to do so; what it purports to punish is fraudulently obtaining money by a false pretense of an intent to keep the written contract in consideration of which the money is advanced. (It is not necessary to cite cases to show that such an intent *may be the subject of a material[248 false representation.) But the import of the statute is supposed to be changed by the provision, that a re-

fusal to perform, coupled with a failure to return the money advanced, shall be prima facie evidence of fraudulent intent. I agree that if the statute created a conclusive presumption, it might be held to make a disguised change in the substantive law. Keller v. United States, 213 U. S. 138, 150, 53 L. ed. 737, 741, 29 Sup. Ct. Rep. 470, 16 A. & E. Ann. Cas. 1066. But it only makes the conduct prima facie evidence,—a very different matter. Is it not evidence that a man had a fraudulent intent if he receives an advance upon a contract over night and leaves in the morning? I should have thought that it very plainly was. Of course, the statute is in general terms, and applies to a departure at any time without excuse or repayment, but that does no harm except on a tacit assumption that this law is not administered as it would be in New York, and that juries will act with prejudice against the laboring man. For prima facie evidence is only evidence, and as such may be held by the jury insufficient to make out guilt. 161 Ala. 78, 49 So. 886. This was decided by the supreme court of Alabama in this case, and we should be bound by their construction of the statute, even if we thought it wrong. But I venture to add that I think it entirely right. State v. Intoxicating Liquors, 80 Me. 57, 12 Atl. 794, 7 Am. Crim. Rep. 291. This being so, I take it that a fair jury would acquit, if the only evidence were a departure after eleven months' work, and if it received no color from some special well-known course of events. But the matter well may be left to a jury, because their experience as men of the world may teach them that in certain conditions it is so common for laborers to remain during a part of the season, receiving advances, and then to depart at the period of need, in the hope of greater wages at a neighboring plantation, that when a laborer follows that course there is a fair inference of fact that he intended it from the beginning. The Alabama 249]statute, *as construed by the state court and as we must take it, merely says, as a court might say, that the prosecution may go to the jury. This means, and means only, that the court cannot say, from its knowledge of the ordinary course of events, that the jury could not be justified by its knowledge in drawing the inference from the facts proved. In my opinion, the statute embodies little if anything more than what I should have told the jury was the law without it. The right of the state to regulate laws of evidence is admitted, and the statute does not go much beyond the common law. Com. v. Rubin, 165 Mass. 453, 43 N. E. 200.

I do not see how the result that I have reached thus far is affected by the rule laid down by the court, but not contained in the statute, that the prisoner cannot testify to his uncommunicated intentions, and therefore, it is assumed, would not be permitted to offer a naked denial of an intent to defraud. If there is an excuse for breaking the contract, it will be found in external circumstances, and can be proved. So the sum of the wrong supposed to be inflicted is that the intent to go off without repaying may be put further back than it would be otherwise. But if there is a wrong it lies in leaving the evidence to the jury,—a wrong that is not affected by the letting in or keeping out an item of evidence on the other side. I have stated why I think it was not a wrong.

To sum up, I think that obtaining money by fraud may be made a crime as well as murder or theft; that a false representation, expressed or implied, at the time of making a contract of labor, that one intends to perform it, and thereby obtaining an advance, may be declared a case of fraudulently obtaining money as well as any other; that if made a crime it may be punished like any other crime; and that an unjustified departure from the promised service without repayment may be declared a sufficient case to go to the jury for their judgment; all without in any *way[250 infringing the 13th Amendment or the statutes of the United States.

Mr. Justice Lurton concurs in this dissent.

UNITED STATES, Plff. in Err.,
v.
CARL S. CHAMBERLIN, D. H. Rice, and Tyson S. Dines, as Executors of the Last Will and Testament of Winfield Scott Stratton, Deceased, Defendants in Error.

(See S. C. Reporter's ed. 250-270.)

Debt — for stamp tax — other remedies not exclusive.

1. The stamp tax which, under the war revenue act of June 13, 1898 (30 Stat. at L. 448, chap. 448, U. S. Comp Stat. 1901, p. 2286), § 6, is to be "levied, collected, and paid" upon the execution of a conveyance, may be recovered by the United States in an action of debt, notwithstanding the further provisions of the statute imposing fine or imprisonment for issuing an unstamped conveyance, and making such unstamped instrument inadmissible in evidence, incapable of record, and invalid and of no ef-

NOTE.—On retrospective legislation—see notes to Otoe County v. Baldwin, 28 L. ed. U. S. 331, and Barnitz v. Beverly, 41 L. ed. U. S. 94.

fect, which must be deemed made in order to induce the payment of the tax, and not as substitutes for payment.

[For other cases, see Debt, II., in Digest Sup. Ct. 1908.]

Statutes — retrospective operation — validating unstamped conveyance.

2. Conveyances of land previously made, as well as those subsequently executed, were comprehended by the amendment of March 2, 1901 (31 Stat. at L. 941, chap. 806, U. S. Comp. Stat. 1901, p. 2296), by which the language of the original proviso in the war revenue act of June 13, 1908, § 13, for validating unstamped bonds, debentures, or certificates of stock or indebtedness, on making the prescribed payment, was broadened to as to embrace any instrument, document, or paper of any kind or description whatsoever mentioned in schedule A of the act, which specifically mentioned conveyances of land.

[For other cases, see Statutes, II., in Digest Sup. Ct. 1908.]

Internal revenue — stamp tax — validating unstamped conveyance.

3. The satisfaction of a judgment for the recovery of the stamp tax which, under the war revenue act of June 13, 1898, is to be levied, collected, and paid upon the execution of a conveyance, must be deemed the equivalent of the payment of the price of the stamps under § 13 of that act, as amended by the act of March 2, 1901, validating unstamped instruments on making the prescribed payment, in view of U. S. Rev. Stat. § 3216, U. S. Comp. Stat. 1901, p. 2084, providing that all judgments and moneys recovered or received for taxes, costs, forfeitures, and penalties shall be paid to collectors as internal taxes are required to be paid.

[For other cases, see Internal Revenue, III. 1, in Digest Sup. Ct. 1908.]

Debt — to recover stamp tax.

4. Express statutory authority for an action by the United States to recover the stamp tax which, under the war revenue act of June 13, 1898, § 6, is to be levied, collected, and paid upon the execution of a conveyance, is given by § 31 of that act, making applicable all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes not heretofore specifically repealed, which must comprehend the authority conferred by U. S. Rev. Stat. § 3213, U. S. Comp. Stat. 1901, p. 2083, to sue for and recover taxes in the name of the United States in any proper form of action, before any Federal circuit or district court for the district within which the liability is incurred, or where the party from whom such tax is due resides.

[For other cases, see Debt, II., in Digest Sup. Ct. 1908.]

[No. 77.]

Argued December 16, 1910. Decided January 3, 1911.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the District Court of the District of Colorado, sustaining a demurrer to the complaint in an action by the United States to recover the stamp tax payable under the war revenue act upon the execution of a conveyance. Reversed.

See same case below, 84 C. C. A. 461, 156 Fed. 881, 13 A. & E. Ann. Cas. 720.

Statement by Mr. Justice **Hughes**:

This case comes here on certiorari. The action was brought by the United States, in the district court of *the United[251 States for the district of Colorado, against the executors of the estate of Winfield Scott Stratton, deceased, to recover the amount of stamp taxes claimed to be payable under the war revenue act of June 13, 1898. [30 Stat. at L. 448, chap. 448, U. S. Comp. Stat. 1901, p. 2286.]

The plaintiff alleged that in May, 1899, Stratton had conveyed to a corporation known as Stratton's Independence, Limited, certain lands in the state of Colorado by deed reciting a consideration of $4,850,000; that internal revenue stamps of the value of $4,850 were affixed to the deed, whereas the actual consideration of the conveyance and the value of the lands was $9,733,000, and by reason thereof there became due and payable to the United States from Stratton a revenue tax amounting to $9,733, of which the sum of $4,833 remained unpaid, internal revenue stamps therefor not having been attached to the deed or canceled; that the Collector of Internal Revenue of the United States for the district of Colorado had reported the facts to the Commissioner of Internal Revenue, who had determined that the sum of $9,733 should have been paid, and demand for payment having been made and refused, the said Commissioner had directed suit be instituted.

The district court sustained a general demurrer to the complaint, and its judgment was affirmed by the circuit court of appeals.

The applicable provisions of the war revenue act of June 13, 1898, chapter 448 (30 Stat. at L. pp. 448–470; 2 U. S. Rev. Stat. Supp. pp. 779–804, U. S. Comp. Stat. 1901, pp. 2286–2311), are set forth in the margin, together with the amendment to § 13, made by the act of March 2, 1901, chapter 806 (31 Stat. at L. 941, U. S. Comp. Stat. 1901, p. 2296).†

†"Sec. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and

Assistant Attorney General **Denison** argued the cause, and, with Mr. Barton Corneau, filed a brief for plaintiff in error:

The obligation here was a personal one to pay, and not merely an obligation of the things taxed, or of the owner to affix stamps.

3 Bl. Com. 160; Meredith v. United States, 13 Pet. 486, 493, 10 L. ed. 258, 262; United States v. Lyman, 1 Mason, 482, Fed. Cas. No. 15,647.

This personal obligation to pay created by the act imposing the tax, whether the tax be of one or another sort, is enforceable by any appropriate civil action, even though the taxing statute does not contain a specific grant of authority to proceed in that way.

Meredith v. United States, 13 Pet. 486, 493, 10 L. ed. 258, 262; United States v. Lyman, 1 Mason, 482, Fed. Cas. No. 15,647; United States v. Hathaway, 3 Mason, 326, Fed. Cas. No. 15,326; Dollar Sav. Bank v. United States, 19 Wall. 227, 22 L. ed. 80; Stockwell v. United States, 13 Wall. 531, 20 L. ed. 491; Chaffee v. United States, 18 Wall. 516, 21 L. ed. 908; King v. United States, 99 U. S. 229, 25 L. ed. 373; United States v. Erie R. Co. 106 U. S. 327, 27 L. ed. 151, 1 Sup. Ct. Rep. 223; United States v. Philadelphia & R. R. Co. 123 U. S. 113, 31 L. ed. 138, 8 Sup. Ct. Rep. 77; United States v. Snyder, 149 U. S. 210, 37 L. ed. 705, 13 Sup. Ct. Rep. 846; United States v. George, 6 Blatchf. 416, Fed. Cas. No. 15,198; United

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paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule. . . .

"Sec. 7. That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document, or paper, as aforesaid, shall not be competent evidence in any court.

. . . . . .

"Sec. 13. That any person or persons who shall register, issue, sell, or transfer, or who shall cause to be issued, registered, sold, or transferred, any instrument, document, or paper of any kind or description whatsoever mentioned in schedule A of this act, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the tax chargeable thereon, and canceled in the manner required by law, with intent to evade the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding fifty dollars, or by imprisonment not exceeding six months, or both, in the discretion of the court; and such instrument, document, or paper, not being stamped according to law, shall be deemed invalid and of no effect: Provided, That hereafter, in all cases where the party has not affixed to any instrument the stamp required by law thereon at the time of issuing, selling, or transferring the said bonds, debentures, or certificates of stock or of indebtedness, and he or they, or any party having an interest therein, shall be subsequently desirous of affixing such stamp to said instrument, or, if said instrument be lost, to a copy thereof, he or they shall appear before the collector of internal revenue of the proper district, who shall, upon the payment of the price of the proper stamp required by law, and of a penalty of ten dollars, and where the whole amount of the tax denoted by the stamp required shall exceed the sum of fifty dollars, on payment also of interest, at the rate of six per centum on said tax from the day on which such stamp ought to have been affixed, affix the proper stamp to such bond, debenture, certificate of stock or of indebtedness, or copy, and note upon the margin thereof the date of his so doing, and the fact that such penalty has been paid; and the same shall thereupon be deemed and held to be as valid, to all intents and purposes, as if stamped when made or issued: And provided further, That where it shall appear to said collector, upon oath or otherwise, to his satisfaction, that any such instrument has not been duly stamped, at the time of making or issuing the same, by reason of accident, mistake, inadvertence, or urgent necessity, and without any wilful design to defraud the United States of the stamp, or to evade or delay the payment thereof, then and in such case, if such instrument, or, if the original be lost, a copy thereof, duly certified by the officer having charge of any records in which such original is required to be recorded, or otherwise duly proven to the satisfaction of the collector, shall, within twelve calendar months after the making or issuing thereof, be brought to the said collector of internal revenue to be stamped, and the stamp tax chargeable thereon shall be paid, it shall be lawful for the said collector to remit the penalty aforesaid, and to cause such

States v. Phelps, 17 Blatchf. 312, Fed. Cas. No. 16,039; United States v. Pacific R. Co. 4 Dill. 6, Fed. Cas. No. 15,983; United States v. Cobb. 11 Fed. 76; United States v. Boyd, 24 Fed. 690; United States v. National Fibre Board Co. 133 Fed. 597; United States v. Hazard, Fed Cas No. 15,337; United States v. Dodge, Deady, 124, Fed. Cas. No. 14,973; United States v. Tilden, 9 Ben. 368, Fed. Cas. No. 16,519; United States v. Washington Mills, 2 Cliff, 601, Fed. Cas. No. 16,647; Atty. Gen. v. Jewers, Bunbury, 225; Atty. Gen. v. Hatton, Bunbury, 262; Atty. Gen. v. Weeks, Bunbury, 224; Atty. Gen. v. Tooke, Hardres, 334; Atty. Gen. v. ———, 2 Anstr. 558; Atty. Gen. v. Stranyforth, Bunbury, 97; 2 Dill. Mun. Corp. § 815; Waller v. Travers, Hardres, 301; Atty. Gen. v. Chitty, Parker, 37; Rex v. Malland, 2 Strange, 828; United States v. Mexican International R. Co. 154 Fed. 519.

The argument adopted by the court below, that a tax is not a "debt," and consequently is not recoverable by suit, is wholly beside the point. The name by which the obligation created by the levy of the tax is called cannot be important. United States v. Pacific R. Co. 4 Dill. 66, Fed. Cas. No. 15,983.

But although the irrelevancy of the question whether or not a tax is, technically speaking, a debt, seems too clear for argument, it is not improper to call attention to the fact that the cases relied on by ap-

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instrument to be duly stamped. And when the original instrument, or a certified or duly proven copy thereof, as aforesaid, duly stamped so as to entitle the same to be recorded, shall be presented to the clerk, register, recorder, or other officer having charge of the original record, it shall be lawful for such officer, upon the payment of the fee legally chargeable for the recording thereof, to make a new record thereof, or to note upon the original record the fact that the error or omission in the stamping of said original instrument has been corrected pursuant to law; and the original instrument or such certified copy, or the record thereof, may be used in all courts and places in the same manner and with like effect as if the instrument had been originally stamped: And provided further, That in all cases where the party has not affixed the stamp required by law upon any such instrument issued, registered, sold, or transferred at a time when and at a place where no collection district was established, it shall be lawful for him or them, or any party having an interst therein, to affix the proper stamp thereto, or, if the original be lost, to a copy thereof. But no right acquired in good faith before the stamping of such instrument, or copy thereof, as herein provided, if such record be required by law, shall in any manner be affected by such stamping as aforesaid."

The foregoing section (§ 13) was amended by the act of March 2, 1901, chapter 806 (31 Stat. at L. 941, U. S. Comp. Stat. 1901, p. 2296), by striking out the words "schedule A of" in the fourth line of the section as above quoted, and also by inserting in the first proviso after the words "bonds, debentures, or certificates of stock or of indebtedness," the words "or any instrument, document, or paper of any kind or description whatsoever, mentioned in schedule A of this act."

"Sec. 14. That hereafter no instrument, paper, or document required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded or admitted, or used as evidence in any court until a legal stamp or stamps, denoting the amount of tax, shall have been affixed thereto, or prescribed by law. . . .

"Sec. 15. That it shall not be lawful to record or register any instrument, paper, or document required by law to be stamped unless a stamp or stamps of the proper amount shall have been affixed and canceled in the manner prescribed by law; and the record, registry, or transfer of any such instruments upon which the proper stamp or stamps aforesaid shall not have been affixed and canceled as aforesaid shall not be used in evidence.

. . . . . .

"Sec. 25. That the Commissioner of Internal Revenue shall cause to be prepared for the payment of the taxes prescribed in this act suitable stamps denoting the tax on the document, article, or thing to which the same may be affixed, and he is authorized to prescribe such method for the cancelation of said stamps, as substitute for or in addition to the method provided in this act, as he may deem expedient. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is authorized to procure any of the stamps provided for in this act by contract whenever such stamps cannot be speedily prepared by the Bureau of Engraving and Printing; but this authority shall expire on the first day of July, eighteen hundred and ninety-nine. That the adhesive stamps used in the payment of the tax levied in schedules A and B of this act shall be furnished for sale by the several collectors of internal revenue, who shall sell and deliver them at their face value to all persons applying for the same, except officers or employees of the internal-revenue service: Provided, That such collectors may sell and deliver such stamps in quantities of not less than one hundred dollars of face value, with a discount of one per centum, except as otherwise provided in this act. And he may, with the approval of the Secretary of the Treasury, make all

pellee do not establish what is claimed for them.

Lane County v. Oregon, 7 Wall. 71, 19 L. ed. 101; Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197; Crabtree v. Madden, 4 C. C. A. 408, 12 U. S. App. 159, 54 Fed. 426.

The English copyright act did not, by giving a cause of action to a common informer, in case of a copyright infringement, deprive the holder of the copyright of his action for damages arising from such infringement.

Beckford v. Hood, 7 T. R. 620, 4 Revised Rep. 527.

This court has never yet held the government to be limited to one remedy merely because it was the only one given by the statute creating a right. On the contrary, the decisions have always been the other way.

Meredith v. United States, 13 Pet. 486, 493, 10 L. ed. 258, 262; Dollar Sav. Bank v. United States, 19 Wall. 227, 22 L. ed. 80; Blacklock v. United States, 208 U. S. 75, 52 L. ed. 396, 28 Sup. Ct. Rep. 228; United States v. Stevenson, 215 U. S. 190, 54 L. ed. 153, 30 Sup. Ct. Rep. 35.

Mr. **D. P. Strickler** argued the cause, and, with Mr. P. H. Holme, filed a brief for defendants in error:

That part of the act of June 13, 1898, requiring stamps on deeds, does not create a liability authorizing an action of debt against one failing to comply with its requirements.

Lane County v. Oregon, 7 Wall. 71, 19 L. ed. 101; Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197; Crabtree v. Madden, 4 C. C. A. 408, 12 U. S. App. 159, 54 Fed. 426; Fleshman v. McClain, 105 Fed. 610, 46 C. C. A. 15, 106 Fed. 880; United States v. Chamberlin, 84 C. C. A. 461, 156 Fed. 881, 13 A. & E. Ann. Cas. 720.

The remedies and penalties prescribed by said act for a violation thereof are exclusive.

Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197; United States v. Trucks, 27 Fed. 541, 28 Fed. 846; McClain v. Fleshman, 46 C. C. A. 15, 106 Fed. 880; Craft v. Schafer, 82 C. C. A. 349, 153 Fed. 175; United States v. Chamberlin, 84 C. C. A. 461, 156 Fed. 881, 13 A. & E. Ann. Cas. 720; Thompson v. Allen County, 115 U. S. 550, 29 L. ed. 472, 6 Sup. Ct. Rep. 140; Barkley v. Levee Comrs. 93 U. S. 258, 23 L. ed. 893; Heine v. Levee Comrs. 19 Wall. 655, 22 L. ed. 223.

Mr. Justice **Hughes**, after making the foregoing statement, delivered the opinion of the court:

The question presented is whether an action lies by the United States to recover the amount of a stamp tax payable under the war revenue act of 1898 upon the execution of a conveyance.

If the statute creates an obligation to pay the tax, and does not provide an exclusive remedy, the action must be regarded as well brought.

At common law, customs duties were recoverable by the Crown by an information in debt or an exchequer information in the nature of a bill in equity for discovery and account. These informations rested upon the general principle "that in the given case the common law or the statute creates a debt, charge, or duty in the party personally to pay the duties immediately upon the importation; and that therefore the ordinary remedies lie for this, as for any other acknowledged debt due to the Crown." United States v. Lyman, 1 Mason, p. 499, Fed. Cas. No. 15,647. See also Comyn's Dig. (title "Debt" A, 9); Atty. Gen. v. Stranyforth, Bunbury, 97; Atty. Gen. v. Weeks, Bunbury, 223; Atty. Gen. v. Jewers, Bunbury, 225; Atty. Gen. v. Hatton, Bunbury, 262.

Applying this principle, it was held in the Lyman Case, supra, and in Meredith v. United States, 13 Pet. 486, 10 L. ed. 258, that the government was entitled to maintain an action to recover duties upon imports as a personal indebtedness of the importers. The duty to pay was there derived from the language of the act of April 27, 1816, chap. 107 (3 Stat. at L. p. 310), that "there shall be levied, collected, and paid" the several duties mentioned, and in ac-

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needful rules and regulations for the proper enforcement of this act.

Schedule A.

Stamp Taxes.

. . . . . .

"Conveyance: Deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value exceeds one hundred dollars and does not exceed five hundred dollars, fifty cents; and for each additional five hundred dollars or fractional part thereof in excess of five hundred dollars, fifty cents.

. . . . . .

"Sec. 31. That all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed, are hereby made applicable to this act."

259] cordance with an *established rule of interpretation the charge of the duty on the goods was taken to mean a personal charge against the owner. In the case last cited the court, by Mr. Justice Story, said (p. 493):

"The first question is whether Smith and Buchanan were every personally indebted for these duties; or, in other words, whether the importers of goods do, in virtue of the importation thereof, become personally indebted to the United States for the duties due thereon; or the remedy of the United States is exclusively confined to the lien on the goods, and the security of the bond given for the duties. It appears to us clear upon principle, as well as upon the obvious import of the provisions of the various acts of Congress on this subject, that the duties due upon all goods imported constitute a personal debt due to the United States from the importer (and the consignee for this purpose is treated as the owner and importer), independently of any lien on the goods, and in any bond given for the duties. The language of the duty act of the 27th of April, 1816, chap. 107, 3 Stat. at L. 310, under which the present importations were made, declares that 'there shall be levied, collected, and paid' the several duties prescribed by tha act on goods imported into the United States. And this is a common formulary in other acts laying duties. Now, in the exposition of statutes laying duties, it has been a common rule of interpretation, derived from the principles of the common law, that where the duty is charged on the goods, the meaning is that it is a personal charge on the owner by reason of the goods. So it was held in Atty. Gen. v. ———, 2 Anstr. 558, where a duty was laid on wash in a still; and it was said by the court that where duties are charged on any articles in a revenue act, the word 'charged' means that the owner shall be debited with the sum; and that this rule prevailed even when the article was actually lost or destroyed before it became available to the 260] owner. Nor is there anything *new in this doctrine; for it has long been held that in all such cases an action of debt lies in favor of the government against the importer, for the duties, whenever by accident, mistake, or fraud, no duties, or short duties, have been paid."

A similar rule has been applied in the case of internal revenue taxes. United States v. Washington Mills, by Clifford, J., 2 Cliff. 601, 607, Fed. Cas. No. 16,647; Dollar Sav. Bank v. United States, 19 Wall. 227, 22 L. ed. 80; United States v. Pacific R. Co. by Miller and Dillon, JJ., 4 Dill. 66, Fed. Cas. No. 15,983; United States v. Tilden, by Blatchford, J., 9 Ben. 368, Fed. Cas. No. 16,519.

In Dollar Sav. Bank v. United States, supra, an action of debt was sustained to recover the amount of the internal revenue tax imposed by the act of July 13, 1866 (14 Stat. at L. 138, chap. 184), on the undistributed gains carried to the surplus funds of the bank. It was objected that the act provided a special remedy for the assessment and collection of the tax, and that no other could be used. But the court, finding no prohibition of the remedy by action, held the argument untenable, saying (pp. 238-240):

"It must also be conceded to be a rule of the common law in England, as it is in Pennsylvania and many of the other states, that where a statute creates a right and provides a particular remedy for its enforcement, the remedy is generally exclusive of all common-law remedies.

"But it is important to notice upon what the rule is founded. The reason of the rule is that the statute, by providing a particular remedy, manifests an intention to prohibit other remedies, and the rule, therefore, rests upon a presumed statutory prohibition. It applies and it is enforced whan anyone to whom the statute is a rule of conduct seeks redress for a civil wrong. He is confined to the remedy pointed out in the statute, for he is forbidden to make use of any other. But by the internal revenue law, the United States are not prohibited from adopting any remedies for the recovery of a debt due *to them which are[261 known to the laws of Pennsylvania. The prohibitions, if any, either express or implied, contained in the enactment of 1866, are for others, not for the government. They may be obligatory upon tax collectors. They may prevent any suit at law by such officers or agents. But they are not rules for the conduct of the state. It is a familiar principle that the King is not bound by any act of parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. He may even take the benefit of any particular act, though not named. The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently in the different states, and practically in the Federal courts. It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriæ*, or universal trustee, enters as much

into our political state as it does into the principles of the British Constitution.

"It must, then, be concluded that the government is not prohibited by anything contained in the act of 1866 from employing any common-law remedy for the collection of its dues. The reason of the rule which denies to others the use of any other than the statutory remedy is wanting, therefore, in applicability to the government, and the rule itself must not be extended beyond its reason." See also United States v. Stevenson, 215 U. S. p. 197, 54 L. ed. 156, 30 Sup. Ct. Rep. 35.

The statute in the Savings Bank Case contained a provision (now in § 3213, Rev. Stat., U. S. Comp. Stat. 1901, p. 2083) which expressly authorized the bringing of an action. But the court also found a sufficient basis for its judgment in the general power of the government to collect by suit taxes that are due, where the statute imposing the tax does not deny that reme-[262] dy. *This point was presented, considered, and decided in the determination of the cause, and the decision is none the less authoritative because there was another ground for the ultimate conclusion. Florida C. R. Co. v. Schutte, 103 U. S. p. 143, 26 L. ed. 336; Union P. R. Co. v. Mason City & Ft. D. R. Co. 199 U. S. p. 166, 50 L. ed. 137, 26 Sup. Ct. Rep. 19.

Neither Lane County v. Oregon, 7 Wall. 71, 19 L. ed. 101, nor Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197, relied upon by the defendants, involved the question. In the former case it was held that the acts of Congress of 1862 and 1863 [12 Stat. at L. 345, 532, 709, chaps. 33, 142, 73], making United States notes a legal tender for debts, had no reference to taxes imposed by state authority. The legal tender acts expressly provided that the notes should be receivable for national taxes, and the context forbade the conclusion that Congress intended to include state taxes under the term "debts," and there was hence no conflict with the statute of Oregon which required the taxes due the state to be collected in coin.

In Meriwether v. Garrett, supra, it was held that taxes levied before the repeal of the charter of a municipality, other than such as were levied in obedience to the special requiremant of contracts entered into under the authority of law, and such as were levied under judicial direction for the payments of judgments recovered against the city, could not be collected through the instrumentality of a court of chancery at the instance of the city's creditors. Such taxes could be collected only under authority from the legislature.

A tax may or may not be a "debt" under a particular statute, according to the sense in which the word is found to be used. But whether the government may recover a personal judgment for a tax depends upon the existence of the duty to pay, for the enforcement of which another remedy has not been made exclusive. Whether an action of debt is maintainable depends not upon the question who is the plaintiff or in what manner the obligation was *in-[263] curred, but it lies whenever there is due a sum either certain or readily reduced to certainty. Stockwell v. United States, 13 Wall. p. 542, 20 L. ed. 493.

Here the tax was a stamp tax, but the language as clearly imports the obligation to pay as did that of the statute before the court in the Meredith Case, supra. Section 6 of the war revenue act of 1898 provided that there should be "levied, collected, and paid" in respect of the instruments mentioned, "by any person or persons or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money" set forth in the schedule which followed. There is nothing in the nature of a stamp tax which *per se* negatives either the personal obligation, otherwise to be derived from the words imposing the tax, or its collection by action. The stamp is to be affixed to the instrument "to denote said tax." Secs. 7, 13, 14. Section 25 provided that the Commissioner of Internal Revenue should cause to be prepared "for the payment of the taxes prescribed in this act suitable stamps denoting the tax on the document, article, or thing to which the same may be affixed." The stamp is the evidence, and its purchase the convenient means, of payment. When a statute says that a person shall *pay* a given tax, it obviously imposes upon that person the duty to pay, and this may be enforced through the ordinary means adapted to the recovery of a definite sum due, unless that course is clearly prohibited.

The objection was made in the Savings Bank Case, supra, that the tax had not been assessed. The court held, however, that no other assessment than that made by the statute was necessary in order to determine the extent of the bank's liability. Following this rule, Judge Blatchford said in United States v. Tilden, 9 Ben. p. 386, Fed. Cas. No. 16,519, where the action was brought to recover unpaid taxes on income: "The extent of the liability of the individual for *income tax is defined by the stat-[264] ute, equally with the extent of the liability of the bank for the tax on undistributed earnings. In each case it is necessary, in an action of debt for the tax, to resort to

sources of information outside of the statute, to ascertain the amount on which the per centum of tax fixed by the statute is to be calculated. . . . The difference between the two cases, in that respect, if there be any, will be, in every case, one of degree merely, not of principle. The statute, in imposing the per centum of tax on the income of the individual, makes a charge on him of a sum which is certain for the purposes of an action of debt, because it can be made certain through the action of a judicial tribunal, by following the rules laid down in the statute. That is the principle of the decision in the case of the bank, and it controls the present case." See also King v. United States, 99 U. S. p. 233, 25 L. ed. 374; United States v. Erie R. Co. 107 U. S. p. 2, 27 L. ed. 385, 2 Sup. Ct. Rep. 83; United States v. Philadelphia & R. R. Co. 123 U. S. p. 114, 31 L. ed. 139, 8 Sup. Ct. Rep. 77; and United States v. Snyder, 149 U. S. 215, 37 L. ed. 707, 13 Sup. Ct. Rep. 846. The statute now before us fixes a tax of a specified amount, according to the consideration or value of the lands conveyed.

It is insisted, however, that the provision for penalties excludes the idea of a personal liability. Thus it is made a misdemeanor to sign or issue one of the described instruments to which a stamp has not been affixed, punishable under § 7 by a fine of not more than $100, and not exceeding $200 under § 10, in the case of a bill or note. And under § 13, where there is intent to evade the law, the offense is punished "by a fine not exceeding $50, or by imprisonment not exceeding six months, or both, in the discretion of the court." The unstamped instrument is made inadmissible in evidence (§§ 7, 14), is not allowed to be recorded (§ 15,) and by the provision of § 13 is to "be deemed invalid and of no effect."

265] *But these penalties were provided in order to induce the payment of the tax, and not as a substitute for payment. It cannot be supposed that Congress intended, by penalizing delinquency, to deprive the government of any suitable means of enforcing the collection of revenue. In large transactions, as in the case at bar, the fine which could be imposed would be much less than the tax, and no reason is suggested why the government should forego the collection of that which, under the statute, is its due. Punishment by imprisonment, under § 13, is imposed only where it can be shown that there was an "intent to evade the provisions" of the act; and while this remedy is appropriate in such a case, and is for the obvious purpose of discouraging evasion, it is without application where, for any other reason, the tax has not been paid, and thereby the government has lost its revenue. The provision invalidating the instrument is likewise punitive. The object was not primarily to deprive instruments of effect, but to insure the discharge of the obligation to pay; and that obligation would still be undischarged, even though, by reason of the nonpayment, the instrument was deemed invalid.

It is insisted, however, that there is no provision for the removal of the ban from the instrument in case the tax were collected by suit, and that this shows the intention to bar the latter remedy; for it is said that the purpose could not be to destroy the effect of the instrument and at the same time to compel the payment of the tax.

This argument proceeds upon a misconception of the statute. The provision under which unstamped instruments are made invalid is found in § 13, which also provides a method of validation on making the prescribed payment. The portion of this section which imposes the penalty is of comprehensive scope, and must be deemed to include a conveyance of land, as well as the other instruments within the purview of the statute. While the *language[266 of the first proviso, in its original form, specifically referred to "bonds, debentures, or certificates of stock or of indebtedness," this was broadened by the amendment made by the act of March 2, 1901, chapter 806 (31 Stat. at L. 941, U. S. Comp. Stat. 1901, p. 2296), so as to embrace "any instrument, document, or paper of any kind or description whatsoever mentioned in schedule A of this act." This amendment, in extending an existing opportunity so as expressly to include all instruments mentioned in the schedule, must be construed to refer not only to instruments subsequently executed, but to those as well which had been previously made or issued. No different construction is required by the language of the statute, the obvious policy of which was both to supply a measure of relief from the punitive provision and at the same time to encourage the payment of the tax. The provisions of the section as amended are as follows:

"Provided, That hereafter, in all cases where the party has not affixed to any instrument the stamp required by law thereon at the time of issuing, selling, or transferring the said bonds, debentures, or certificates of stock or of indebtedness, or any instrument, document, or paper of any kind or description whatsoever mentioned in schedule A of this act, and he or they, or any party having an interest therein, shall be subsequently desirous of affixing such stamp to said instrument, or, if said instru-

ment be lost, to a copy thereof, he or they shall appear before the collector of internal revenue of the proper district, who shall, upon the payment of the price of the proper stamp required by law, and of a penalty of ten dollars, and, where the whole amount of the tax denoted by the stamp required shall exceed the sum of fifty dollars, on payment also of interest, at the rate of six per centum, on said tax from the day on which such stamp ought to have been affixed, affix the proper stamp to such bond, debenture, certificate of stock or of indebted-
267] ness, or copy, or instrument, *document, or paper of any kind or description whatsoever mentioned in schedule A of this act, and note upon the margin thereof the date of his so doing, and the fact that such penalty has been paid; and the same shall thereupon be deemed and held to be as valid, to all intents and purposes, as if stamped when made or issued: And provided further, That where it shall appear to said collector, upon oath or otherwise, to his satisfaction, that any such instrument has not been duly stamped at the time of making or issuing the same, by reason of accident, mistake, inadvertence, or urgent necessity, and without any willful design to defraud the United States of the stamp, or to evade or delay the payment thereof, then and in such case, if such instrument, or, if the original be lost, a copy thereof, duly certified by the officer having charge of any records in which such original is required to be recorded, or otherwise duly proven to the satisfaction of the collector, shall, within twelve calendar months after the making or issuing thereof, be brought to the said collector of internal revenue to be stamped, and the stamp tax chargeable thereon shall be paid, it shall be lawful for the said collector to remit the penalty aforesaid and to cause such instrument to be duly stamped. And when the original instrument, or a certified or duly proven copy thereof, as aforesaid, duly stamped so as to entitle the same to be recorded, shall be presented to the clerk, register, recorder, or other officer having charge of the original record, it shall be lawful for such officer, upon the payment of the fee legally chargeable for the recording thereof, to make a new record thereof, or to note upon the original record the fact that the error or omission in the stamping of said original instrument has been corrected pursuant to law; and the original instrument or such certified copy, or the record thereof, may be used in all courts and places in the same manner and with like effect as if the instrument had
268] been originally *stamped: And provided further, That in all cases where the party has not affixed the stamp required by law upon any such instrument issued, registered, sold, or transferred at a time when and at a place where no collection district was established, it shall be lawful for him or them, or any party having an interest therein, to affix the proper stamp thereto, or, if the original be lost, to a copy thereof. But no right acquired in good faith before the stamping of such instrument, or copy thereof, as herein provided, if such record be required by law, shall in any manner be affected by such stamping as aforesaid."

Neither the punitive provision, nor the means thus afforded to escape it through a voluntary payment, indicate an intention to deprive the government of the right to compel payment by action. The party may pay the tax in the first instance, or he may subsequently make payment as the statute provides, and thus render the instrument effective. If he is unwilling or fails to avail himself of this opportunity, why should he be heard to insist that because the instrument is made invalid he should escape payment of what is due the government? In the face of the express requirement of the statute that he shall pay the tax, there is no basis for the contention that from the provisions affecting the validity of the instrument should be implied an intent to prohibit the enforcement or the tax by suit.

Further, as the obvious purpose is to validate the instrument in case the prescribed payment is made, the satisfaction of a judgment for the recovery of the tax must be deemed the equivalent of the payment of the price of the stamps under the provisos above quoted. Section 3216 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2084) provides: "All judgments and moneys recovered or received for taxes, costs, forfeitures, and penalties shall be paid to collectors as internal taxes are required to be paid." If the case is not one within the second proviso permitting the remission *of the penalty, the additional pay-[269
ment of $10 will be required to meet the conditions of the first proviso. But so far as the tax is concerned, the person liable therefor, on satisfying the judgment, will have the same right to have the instrument stamped by the collector as though he had paid the taxes to the officer without suit. Such a case would present no administrative difficulty in accomplishing the intent of the statute.

We have examined the other statutory provisions to which our attention has been called in support of the defense, and we find none of controlling significance, or which, taken separately or together, detract from the force of the provision imposing the obli-

gation to pay the tax, and deprive the government of the remedy here sought.

We are also of opinion that the statute itself provides that payment may be enforced by action. Section 31 makes "all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes not heretofore specifically repealed," applicable to the act. Within "administrative" provisions must be included those which relate to the collection of the taxes imposed. For the administration of the statute may well be taken to embrace all appropriate measures for its enforcement, and there is no substantial reason for assigning to the phrase which is used in the section quoted a narrower interpretation. It therefore comprehends the authority conferred by § 3213 of the Revised Statutes in the following words:

" . . . And taxes may be sued for and recovered in the name of the United States, in any proper form of action, before any circuit or district court of the United States for the district within which the liability to such tax is incurred, or where the party from whom such tax is due resides at the time of the commencement of the said action."

This provision authorizing suit, with the sanction of the Commissioner of Internal 270] Revenue (Rev. Stat. § 3214), *was originally enacted in 1866 (act of July 13, 1866, chap. 184, 14 Stat. at L. p. 111, U. S. Comp. Stat. 1901, p. 2084), as an amendment of the internal revenue act of June 30, 1864, chap. 173 (13 Stat. at L. 239), and included within its scope the stamp taxes then in force. It must be deemed applicable also to the taxes imposed by the act of 1898.

Upon these grounds we conclude that the United States was entitled to maintain this action, and that the demurrer should have been overruled. The judgment is therefore reversed.

R. J. HOUSE, Plff. in Err.,
v.
JOEL B. MAYES, Marshal of Jackson County, Missouri, and Elliott W. Major, Attorney General.

(See S. C. Reporter's ed. 270–285.)

Constitutional law — regulating sales — deduction from actual weight — due process of law — police power.

1. Making criminal any deduction by the purchaser from the actual weight of grain, seed, hay, or coal, under a claim of right by reason of any custom or rule of a board of trade, as is done by Mo. act of June 8, 1909, is a valid exercise of the police power of the state, and does not take property without due process of law, nor unconstitutionally interfere with the liberty to contract.

[For other cases, see Constitutional Law, IV. b, 7; IV. c, in Digest Sup. Ct. 1908.]

Constitutional law — police power — freedom to contract — regulating boards of trade.

2. The conduct of its business by a board of trade formed to enforce, as between its members, a high standard of business dealings, may be regulated by such means, not arbitrary or unreasonable in their nature, as may be found by the state necessary or needful to protect the people against unfair practices that are likely to occur, without unconstitutionally interfering with the liberty of contract to which its individual members are entitled.

[For other cases, see Constitutional Law, IV. b, 7, in Digest Sup. Ct. 1908.]

[No. 597.]

Argued December 13, 14, 1910. Decided January 9, 1911.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment denying relief by habeas corpus to a person convicted of making a deduction from the actual weight of a car load of wheat, under claim of right by reason of a rule of the board of trade. Affirmed.

See same case below, 227 Mo. 617, 127 S. W. 305.

The facts are stated in the opinion.

Mr. **Frank Hagerman** argued the cause, and, with Mr. Kimbrough Stone, filed a brief for plaintiff in error:

Under the 14th Amendment freedom of contract is guaranteed.

Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427; Holden v. Hardy, 169 U. S. 366, 390, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; Lochner v. New York, 198 U. S. 45, 53, 49 L. ed. 937, 940, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Adair v. United

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NOTE.—As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

For a discussion of police power generally, see notes to State v. Marshall, 1 L.R.A. 51; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; State v. Schlemmer, 10 L.R.A. 135; and Barbier v. Connolly, 28 L. ed. U. S. 923.

On the constitutionality of statutes restricting contracts and business—see note to State v. Loomis, 21 L.R.A. 789.

States, 208 U. S. 161, 172, 173, 52 L. ed 436, 441, 28 Sup. Ct. Rep. 277; 13 A. & E. Ann. Cas. 764.

The act in question clearly comes within the principles laid down in the foregoing cases. Freedom of contract must, of course, yield to the police power of the state. But there is a limit to the exercise of that power. In the end the court must decide the question.

Mugler v. Kansas City, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Lochner v. New York, 198 U. S. 45, 56, 57, 61, 49 L. ed. 937, 940, 941, 943, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Adair v. United States, 208 U. S. 161, 173, 52 L. ed. 436, 442, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764; State v. Julow, 129 Mo. 163, 175, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; State v. Missouri Tie & Timber Co. 181 Mo. 536, 559, 65 L.R.A. 588, 103 Am. St. Rep. 614, 80 S. W. 933, 2 A. & E. Ann. Cas. 119; State v. Cantwell, 179 Mo. 263, 78 S. W. 569; State v. Loomis, 115 Mo. 316, 21 L.R.A. 789, 22 S. W. 350.

There must be some reasonable grounds for the legislative interference, or it cannot be justified.

Bonnett v. Vallier, 136 Wis. 203, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 888; State v. Redmon, 134 Wis. 110, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 A. & E. Ann. Cas. 408.

The act in question clearly comes within the principles announced in Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133, and Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764.

The case is much like Harding v. People, 160 Ill. 459, 32 L.R.A. 445, 52 Am. St. Rep. 344, 43 N. E. 624, where there was a custom among mine owners and miners not to weigh the last car of coal mined each day, because that coal was used in the locomotive, the weight being fixed at the average carload weight for the day. The court declared invalid a statute requiring all mine owners, where miners were paid by weight, to weigh all cars at the mine.

Laws similar in principle have been before the courts, and have been almost unanimously condemned in opinions each of which is a forceful argument in favor of the contention here made.

Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; People v. Marcus, 185 N. Y. 257, 7 L.R.A.(N.S.) 282, 113 Am. St. Rep. 902, 77 N. E. 1073, 7 A. & E. Ann. Cas. 118; Gillespie v. People, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1007; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 66 L.R.A. 185, 76 Pac. 848, 1 A. & E. Ann. Cas. 936; State v. Bateman, 7 Ohio N. P. 487, 10 Ohio S. & C. P. Dec. 68; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098; Goldfield Mines Co. v. Goldfield Miners' Union Co. 159 Fed. 500; Atlanta v. Stein, 111 Ga. 789, 51 L.R.A. 335, 36 S. E. 932; Marshall & B. Co. v. Nashville, 109 Tenn. 495, 71 S. W. 815; Adams v. Brenan, 177 Ill. 194, 42 L.R.A. 718, 69 Am. St. Rep. 222, 52 N. E. 314; Holden v. Alton, 179 Ill. 318, 53 N. E. 556; Fiske v. People, 188 Ill. 206, 52 L.R.A. 291, 58 N. E. 985; State ex rel. Robert Mitchell Furniture Co. v. Toole, 26 Mont. 22, 55 L.R.A. 644, 91 Am. St. Rep. 386, 66 Pac. 496; Lewis v. Board of Education, 139 Mich. 306, 102 N. W. 756; People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764; Street v. Varney Electrical Supply Co. 160 Ind. 338, 61 L.R.A. 154, 98 Am. St. Rep. 325, 66 N. E. 895; State ex rel. Bramley v. Norton, 5 Ohio N. P. 183, 7 Ohio S. & C. P. Dec. 354; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 427, 23 L.R.A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; Braceville Coal Co. v. People, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; San Antonio & A. P. R. Co. v. Wilson, 4 Tex. App. Civ. Cas. (Willson) 565, 19 S. W. 910; Republic Iron & Steel Co. v. State, 160 Ind. 379, 62 L.R.A. 136, 66 N. E. 1005; Com. v. Isenberg, 4 Pa. Dist. R. 579; Bauer v. Reynolds, 3 Pa. Dist. R. 502; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; Godcharles v. Wigeman, 113 Pa. 431, 6 Atl. 354; State v. Haun, 61 Kan. 146, 47 L.R.A. 369, 59 Pac. 340; Jordon v. State, 51 Tex. Crim. Rep. 531, 11 L.R.A.(N.S.) 603, 103 S. W. 633, 14 A. & E. Ann. Cas. 616; Avent Beattyville Coal Co. v. Com. 96 Ky. 218, 28 L.R.A. 273, 28 S. W. 502; Frorer v. People, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; State v. Fire Creek Coal & Coke Co. 33 W. Va. 188, 6 L.R.A. 359, 25 Am. St. Rep. 891, 10 S. E. 288; Com. v. Perry, 155 Mass. 117, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; Kellyville Coal Co. v. Harrier, 207 Ill. 624, 99 Am. St. Rep. 240, 69 N. E. 927; Wallace v. Georgia C. & N. R. Co. 94 Ga. 732, 22 S. E. 579; New York, C. & St. L. R. Co.

v. Schaffer, 65 Ohio St. 414, 62 L.R.A. 931, 87 Am. St. Rep. 628, 62 N. E. 1036; Low v. Recs Printing Co. 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; State v. Redmon, 134 Wis. 110, 14 L.R.A. (N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 A. & E. Ann. Cas. 408; Montague v. Furness, 145 Cal. 205, 78 Pac. 640; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Buffalo v. Collins Baking Co. 39 App. Div. 432, 57 N. Y. Supp. 347; Ex parte Hawley, 22 S. D. 23, 15 L.R.A.(N.S.) 138, 115 N. W. 93; State ex rel. McKell v. Robins, 71 Ohio St. 273, 69 L.R.A. 427, 73 N. E. 470, 2 A. & E. Ann. Cas. 485; Ex parte Sing Lee, 96 Cal. 354, 24 L.R.A. 195, 31 Am. St. Rep. 218, 31 Pac. 245; Laundry Ordinance Case, 7 Sawy. 526, 13 Fed. 229; Yick Wo v. Hopkins, 118 U. S. 373, 30 L. ed. 227, 6 Sup. Ct. Rep. 1064; State ex rel. Baldwin v. Moore, 7 Wash. 173, 34 Pac. 461; Chicago v. Netcher, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497; People v. Gillson, 109 N. Y. 397, 4 Am. St. Rep. 465, 17 N. E. 343; Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; Re House Bill No. 203, 21 Colo. 27, 39 Pac. 431; Ramsey v. People, 142 Ill. 380, 17 L.R.A. 853, 32 N. E. 364; Re Preston, 63 Ohio St. 428, 52 L.R.A. 523, 81 Am. St. Rep. 642, 59 N. E. 101; Whitebreast Fuel Co. v. People, 175 Ill. 51, 51 N. E. 853; Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 12 L.R.A.(N.S.) 707, 79 N. E. 836; Ex parte Whitwell, 98 Cal. 73, 19 L.R.A. 727, 35 Am. St. Rep. 152, 32 Pac. 870; People ex rel. Madden v. Dycker, 72 App. Div. 308, 76 N. Y. Supp. 111.

A board of trade is organized by the voluntary action of brokers, for the purpose of making an arrangement, enforceable as between themselves, of an honorable character, to create a high standard of business dealings.

Tomkins v. Saffery, L. R. 3 App. Cas. 228, 47 L. J. Bankr. N. S. 11, 37 L. T. N. S. 758, 26 Week. Rep. 62, 4 Eng. Rul. Cas. 86; Moffatt v. Board of Trade, — Mo. App. —, 111 S. W. 900; Hopkins v. United States, 171 U. S. 578; 594, 43 L. ed. 290, 297, 19 Sup. Ct. Rep. 40; Nicol v. Ames, 173 U. S. 509, 517, 43 L. ed. 786, 792, 19 Sup. Ct. Rep. 522; Greer, M. & Co. v. Stoller, 77 Fed. 1; Melsheimer & G. Law & Customs of Stock Exchange, 3d ed. London, 1891, 98; Clarke v. Foss, 7 Biss. 547, Fed. Cas. No. 2,852; Bisbee & S. Board of Trade & Produce Exchange preface VI.; White v. Brownell, 2 Daly, 336; Leech v. Harris, 2 Brewst. (Pa.) 575; Haebler v. New York Produee Exch. 149 N. Y. 428, 44 N. E. 87; American Live Stock Commission Co. v. Chicago Live Stock Exch. 143 Ill. 226, 18 L.R.A. 190, 36 Am. St. Rep. 385, 32 N. E. 274; Dos Passos, Stock Exchange, 15; 23 Am. & Eng Enc. Law, pp. 749–751; Seymour v. Bridge, L. R. 14 Q. B. Div. 465, 54 L. J. Q. B. N. S. 347; Belton v. Hatch, 109 N. Y. 596, 4 Am. St. Rep. 495, 17 N. E. 225; Commercial Telegram Co. v. Smith, 47 Hun, 505; Board of Trade v. Nelson, 162 Ill. 438, 53 Am. St. Rep. 312, 44 N. E. 743; People ex rel. Thacher v. New York Commercial Asso. 18 Abb. Pr. 279; Vaughn v. Herndon, 91 Tenn. 64, 17 S. W. 793; People ex rel. Rice v. Chicago Bd. of Trade, 80 Ill. 136; Metropolitan Grain & Stock Exch. v. Chicago Bd. of Trade, 15 Fed. 847; Evans v. Chamber of Commerce, 86 Minn. 448, 91 N. W. 8.

There is a vast difference between the rights of a member of a voluntary, unincorporated institution, and those of a shareholder of a corporation.

1 Thomp. Corp. § 846; Bacon, Ben. Soc. § 89; Niblack, Ben. Soc. §§ 22, 23, 30, 73; Kehlenbeck v. Logeman, 10 Daly, 447.

Mr. Elliott W. Major, Attorney General of Missouri, argued the cause, and, with Mr. John M. Atkinson, filed a brief for defendants in error:

The legislature has the right to enact laws preventing and abolishing self-imposed rules of boards of trade which have been adopted as to weights and measures. Such legislation is within the police power of the state. The state can abolish any custom or usage among merchants or others as to what shall constitute the unit of weight.

Pittsburg & S. Coal Co. v. Louisiana, 156 U. S. 590, 39 L. ed. 544, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459; McLean v. Arkansas, 211 U. S. 550, 53 L. ed. 321, 29 Sup. Ct. Rep. 206; Tiedeman, Pol. Power, § 89, p. 208.

Making the deduction of any amount from the actual weight of certain commodities by reason of any custom or rule of a board of trade a misdemeanor, as provided in the Missouri statute, is a valid exercise of the police power of the state.

House v. Mayes, 227 Mo. 636, 127 S. W. 305; 30 Am. & Eng. Enc. Law, 2d ed. p. 451; People v. Wagner, 86 Mich. 599, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609; State v. Wilson, 61 Kan. 32, 47 L.R.A. 71, 58 Pac. 981; Pittsburg & S. Coal Co. v. Louisiana, 156 U. S. 590, 39 L. ed. 544, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Brass v. North Dakota, 153 U. S. 391, 38 L. ed.

757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; Cooley, Const. Lim. 6th ed. 744; Green v. Moffett, 22 Mo. 529; Evans v. Myers, 25 Pa. 114, 15 Mor. Min. Rep 243; Noble v. Durell, 3 T. R. 271; St. Cross Hospital v. Howard de Walden, 6 T. R. 338; Mays v. Jennings, 4 Humph. 102; Harris v. Rutledge, 19 Iowa, 388, 87 Am. Dec. 441; Tiedeman, Pol. Pow. § 89, pp. 208, 260–263; Freund, Pol. Power, 1 Bishop, New Crim. Law, § 234; McLean v. Arkansas, 211 U. S. 550, 546, 53 L. ed. 321, 29 Sup. Ct. Rep. 206; Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 A. & E. Ann. Cas. 865; New York v. Miln, 11 Pet. 105, 9 L. ed. 649; Thurlow v. Massachusetts, 5 How. 528, 12 L. ed. 266; Holden v. Hardy, 169 U. S. 380, 42 L. ed. 787, 18 Sup. Ct. Rep. 383; Bacon v. Walker, 204 U. S. 317, 51 L. ed. 502, 27 Sup. Ct. Rep. 289; Welch v. Swasey, 214 U. S. 105, 53 L. ed. 929, 29 Sup. Ct. Rep. 567; Chicago B. & Q. R. Co. v. Illinois, 200 U. S. 592, 50 L. ed. 609, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175.

The police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as those to promote public health, morals, or safety; it is not confined to the expression of what is offensive, disorderly, or unsanitary, but extends to what is for the greatest welfare of the state.

Bacon v. Walker, 204 U. S. 317, 51 L. ed. 502, 27 Sup. Ct. Rep. 289; McLean v. Arkansas, 211 U. S. 546, 53 L. ed. 319, 29 Sup. Ct. Rep. 206; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765; Welch v. Swasey, 214 U. S. 105, 53 L. ed. 929, 29 Sup. Ct. Rep. 567; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 592, 50 L. ed. 609, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; People v. Wagner, 86 Mich. 599, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609.

Mr. Justice **Harlan** delivered the opinion of the court:

The plaintiff in error was proceeded against by information filed in the criminal court of Jackson county, Missouri, under a statute of Missouri, which was passed June 8th, 1909, and is entitled, "An Act to Prevent Fraud in the Purchase and Sale of Grain and Other Commodities." The statute reads: "§ 1. Every sale of grain, seed, hay, or coal shall be made on the basis of *the actual weight thereof*, and any purchaser of grain, seed, hay, or coal, who shall deduct any amount from the actual weight or measure thereof under claim of right to do so *by reason of any custom or rule of a board of trade, or any pretense whatsoever*, shall be deemed guilty of a misdemeanor, and shall be subject to a fine of not less than $10 nor more than $100 for each and every offense. § 2. No agent or broker selling any grain, seed, hay, or coal shall have authority, under claim or right to do so *by reason of any custom or rule of board of trade*, to sell any grain, seed, hay, or coal only on the basis of the actual weight thereof, and any contract of sale of any grain, seed, hay, or coal, made in violation of this act, shall be null and void." Mo. Sess. Acts 1909, p. 519; Mo. Rev. Stat. §§ 11,969, 11,970.

The information charged that the accused, on the 1st day of September, 1909, at the county of Jackson, state of Missouri, purchased from one James Anderson a car load of wheat, by weight, and unlawfully took and deducted *from the[278 actual weight 100 pounds, pretending and claiming the right to make such deduction, and to have and keep the said 100 pounds so deducted free of charge and cost to him, under and by virtue of a rule and custom of the board of trade of Kansas City, Missouri.

Having been arrested on a capias, and being held in custody by the defendant as marshal, the accused presented to the criminal court an application for a writ of habeas corpus, claiming that he was deprived of his liberty in violation of the 14th Amendment of the Constitution of the United States. The application was denied, but it was subsequently granted by the supreme court of the state. The latter court, upon final hearing, also denied the application, and ordered that the petitioner be remanded to the custody of the marshal. The case is now here for review, upon assignments of error which question the constitutional validity of the statute under the 14th Amendment.

The case was heard upon an agreed statement of facts, the parties reserving all questions as to the relevancy of any particular fact therein stated. As the case is of some importance, it will be appropriate to set forth the above statement in full, as follows: "Without admission of either party as to the relevancy of any particular fact herein set forth, the following facts are agreed between the parties: There are competitive grain markets at Galveston, Texas; Chicago, Illinois; Omaha, Nebraska; Atchison and Wichita, Kansas; and St. Louis, St. Joseph, and Kansas City, Missouri. That Kansas City is a primary grain market. That a very slight difference in price or condition will influence the market

course of grain. That the board of trade of Kansas City, Missouri, is a voluntary organization of buyers and sellers of grain and provisions, supported by dues and assessments, and maintained for the purpose of 279] furnishing a marketing place *where such persons can meet, and, under rules of safety and convenience, transact such business. Its objects are: 'To maintain a board of trade to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in business; to facilitate the speedy adjustment of business disputes; to inspire confidence in the business methods and integrity of the parties hereto; to collect and disseminate valuable commercial and economic information, and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits, and to promote the general welfare of Kansas City.' Its members are governed by rules and regulations enacted by the members, and which form part of the written contract of association between them. This organization provides for the exclusive use of its members a trading floor, where grain is bought and sold only under and according to said rules. Three of said rules are: '§ 16. The weight supervising committee shall have supervision, through the weight department, of the unloading of all cars unloaded at all elevators, mills, warehouses, transfer and team tracks, within the jurisdiction of this board, and shall cause the same to be thoroughly swept and cleaned when unloaded. Sweeping or cleaning of cars subsequently by any operator or employee of any elevator, mill, warehouse, transfer or team tracks, or by any person or persons under agreement with the same, or the buying or receiving of any such sweepings or cleanings by any member of this association, is prohibited. § 17. Violations of any of the provisions of § 16 of this article shall subject the members so violating to a fine of $50 for the first offense, to a fine of $100 for the second offense, to expulsion and forfeiture of membership for the third offense. § 18. On all grain bought by members of the Kansas City board of trade, and on which Kansas City unloading weights are given, an allowance of 100 lbs. per car shall be 280] *made to the buyer, to cover loss on account of dirt and other foreign matter.' That said board of trade maintains a bureau of weights, which strictly enforces rule 16. That rules 16 and 17 were enacted to secure to the seller full weight of the entire contents of the car, and rule 18 to secure the buyer from loss through dirt and foreign matter in or swept out with the grain, which was unloaded at Kansas City. Before grain is sold, it is graded. One of the considerations in grading is the dirt and foreign matter in the grain. Experience had shown that there is a loss from dirt and foreign matter, varying with different cars, which is not fully taken care of in the grade. That there is no method in use of accurately determining the percentage of such foreign matter and dirt, and the 100-pound quantity was taken as a fair average. The members of said board of trade buy and sell sometimes as commission men for outsiders and sometimes for their own account, and it is impossible to tell without inquiry whether a buyer or seller is acting for himself or for someone else. The buying and selling of grain on the floor of said board of trade is, as in all other markets, based upon the constantly and rapidly fluctuating market prices in that and the other principal grain markets. There is no time nor opportunity to ascertain the capacity (principal or agent) in which a member is acting when he buys or sells, and, if he be in reality acting as agent, no opportunity to investigate the financial standing of the real principal. Because of this condition, and also to secure the prompt and faithful performance of all such contracts of sale, there is a rule of said board of trade forbidding the disclosure of outside principals, and holding the member in all cases as the principal. There are also rules making a member responsible for the faithful performance of such contracts. That the state railroad and warehouse commission has in force a rule requiring cars unloaded at Kansas City to be cleanly swept. That *the method of making the re-[281 duction is to weigh the loaded car; then, after emptying and cleanly sweeping the car, to weigh the car; the difference in these two weights is entered on the account sales as the weight of the car load of grain, the deduction of 100 pounds being also noted on that slip, and settlement made for this balance. That is, the weight of the entire contents of the car is shown, and also the 100 pounds' deduction on the face of the account sales given the seller. That upon the 1st day of September, 1909, your petitioner [House] bought upon the trading floor of said board of trade, and from a member thereof, a car load of wheat on Kansas City unloading weights. In accordance with the above method, and under said rule 18, he deducted 100 pounds and made settlement for the balance. The member selling this grain did not own it, but was acting as a commission man. He, however, dealt with your petitioner as in his own right, and your petitioner had no notice or knowledge that such seller was not the real owner of the grain. Nothing had been said between the

member selling and his principal as to the allowance of the 100 pounds. Both your petitioner and the seller understood at the time of sale that it was made subject to this rule."

An extended discussion of the general question of constitutional law raised by the assignments of error is rendered unnecessary by former decisions of this court. There are certain fundamental principles which those cases recognize and which are not open to dispute. In our opinion, they sustain the power of the state to enact the statute in question. Briefly stated, those principles are: That the government created by the Federal Constitution is one of enumerated powers, and cannot, by any of its agencies, exercise an authority not granted by that instrument, either in express words or by necessary implication; that a power may be implied when necessary 282] *to give effect to a power expressly granted; that while the Constitution of the United States and the laws enacted in pursuance thereof, together with any treaties made under the authority of the United States, constitute the supreme law of the land, a state of the Union may exercise all such governmental authority as is consistent with its own Constitution, and not in conflict with the Federal Constitution; that such a power in the state, generally referred to as its police power, is not granted by or derived from the Federal Constitution, but exists independently of it, by reason of its never having been surrendered by the state to the general government; that among the powers of the state, not surrendered,—which power therefore remains with the state,—is the power to so regulate the relative rights and duties of all within its jurisdiction as to guard the public morals, the public safety, and the public health, as well as to promote the public convenience and the common good; and that it is with the state to devise the means to be employed to such ends, taking care always that the means devised do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished, and are not inconsistent with its own Constitution or the Constitution of the United States. The cases which sanction these principles are numerous, are well known to the profession, and need not be here cited.

Applying these principles to the present case, we cannot say that the statute in question is in conflict with the Constitution of the United States. The supreme court of Missouri well observed that the object of the statute was to prevent the enforcement of a rule of a board of trade, under the ordinary operation of which unfair and fraudulent practices occur, or would most probably occur, in the sale of grain and the other commodities named. That court said:

"The provision of the act which petitioner is charged *with having violated is[283 that part thereof which prohibits any purchaser of grain from deducting any amount from the actual weight under any claim of right to do so by reason of any custom or rule of the board of trade; and it is the rule of the Kansas City board of trade at which this act is really aimed. The petitioner claims that this act is unconstitutional because it prohibits him from deducting an arbitrary amount, to wit, 100 pounds, from each and every car of grain, irrespective of the fact whether or not it actually contains any dirt or other foreign substance. While conceding in the agreed statement of facts that there is no method of accurately determining the percentage of such foreign matter and dirt, he assumes that there will be an average of 100 pounds to each car. He admits that in grading wheat, dirt and foreign matter are taken into account in determining the value of the grain, but the Kansas City board of trade has arbitrarily added to this, and deducted 100 pounds from every car; so that if A shipped a car of grain to Kansas City to a member of the board of trade, which was entirely free from dirt or foreign matter, under this rule 100 pounds would be deducted, and he loses the value of this 100 pounds, and receives no compensation therefor, but is told that he must submit to this because some other shipper may ship a car load of grain containing 200 pounds of dirt or foreign matter; thus the grain of A, which contains no dirt, is taken without compensation, and the man who shipped a car load of grain with 200 pounds of dirt suffers a deduction of only 100 pounds. . . . 1 Bishop, New Crim. Law, § 234. . . . It prohibits merely the taking of one man's property by another without compensation. It imposes no unjust burden upon the purchaser, but simply inhibits his deducting from the wheat he purchases, a part thereof which he would take without paying the seller therefor, by virtue, not of any *agreement with the seller, but by[284 virtue of a rule made by an association of which he is a member." [227 Mo. 639, 127 S. W. 309.]

Again, the supreme court of the state: "Petitioner insists that by prohibiting him from making the deduction on 100 pounds, his property is taken without due process of law. We agree with the attorney general that he has reversed the conditions. To strike down this act will be to permit him to continue to take the shipper's property without due process of law, and with-

out any compensation therefor. Without further elaboration, we are of the opinion that this act is a valid one, and it is wisely aimed to prevent unjust and unfair practice, and to repeal and nullify a rule of the board of trade which is unjust and unfair, and contrary to good morals and fair dealings, and the act offends against no provision of the Constitution."

Reference has been made to the fact that the board of trade of Kansas City is a voluntary association of individuals who perform great service to the public, and that its purpose is to enforce, as between its members, a high standard of business dealings. Let all this be granted, and yet it must be held that the board, in the management of its affairs, has such close and constant relations to the general public, that the conduct of its business may be regulated by such means, not arbitrary or unreasonable in their nature, as may be found by the state necessary or needful to protect the people against unfair practices that may likely occur from time to time. Such regulations do not, in any true sense, interfere with that "liberty of contract" which the individual members of the board of trade are undoubtedly entitled, under the Constitution, to enjoy, without unnecessary interference from government; for the liberty of contract which that instrument protects against invasion by the state is subject to such regulations of the character just stated, as the state may establish for the pro-

285] tection of the public *and the promotion of the general welfare. If such state regulations are not unreasonable, that is, not simply arbitrary nor beyond the necessities of the case, they are not forbidden by the Constitution of the United States. We so adjudge on both principle and authority.

The judgment of the Supreme Court of Missouri is affirmed.

Mr. Justice **McKenna**, concurring:

The CHIEF JUSTICE and myself concur in the judgment solely on the ground that it is competent for the state of Missouri to provide that, in the absence of an express contract to which the owner of the articles sold on the board is a party, the rule of the Kansas City board of trade shall not prevail.

THOMAS J. BROADNAX and Frank E. Essex, Plffs. in Err.,
v.
STATE OF MISSOURI.

(See S. C. Reporter's ed. 285–296.)

Constitutional law — regulating sales for future delivery — police power — due process of law — freedom to contract.

1. The keeping of a place where corporate stocks and bonds and grains, provisions, and other commodities are bought and sold, but not paid for and delivered at the time, and where no complete record of the transactions, including a minute of the time of delivery, is made in a book kept for the purpose, and no memorandum of the sale, properly stamped, is given the purchaser, may be made a criminal offense, as is done by Mo. act. of March 8, 1907, in the exercise of the police power of the state, without taking property without due process of law, or unconstitutionally interfering with the freedom to contract.

[For other cases, see Constitutional Law, IV. b, 7, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification — taxes — sales for future delivery.

2. Singling out the keeping of a place where corporate stocks and bonds, and grains, provisions, and other commodities are bought and sold, but not paid for or delivered at the time, as a proper business for the imposition of a stamp tax upon such sales, as is done by Mo. act of March 8, 1907, does not make the statute invalid, as denying the equal protection of the laws.

[For other cases, see Constitutional Law, IV. a, 4, in Digest Sup. Ct. 1908.]

Commerce — state regulation — sales for future delivery.

3. Interstate commerce is not unconstitutionally regulated by Mo. act of March 8, 1907, under which the keeping of a place where corporate stocks and bonds, and grains, provisions, and other commodities

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NOTE.—As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 305; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

For a discussion of police power generally, see notes to State v. Marshall, 1 L.R.A. 51; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; State v. Schlemmer, 10 L.R.A. 135; and Barbier v. Connolly, 28 L. ed. U. S. 923.

On the constitutionality of statutes restricting contracts and business—see note to State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

On contracts for futures to be executed in other states, as interstate commerce—see note to Ware v. Mobile County, 52 L. ed. U. S. 855.

are bought and sold, but not paid for and delivered at the time, is made criminal unless a complete record of the transaction, including a minute of the time of delivery, is made in a book kept for the purpose, and the purchaser is given a memorandum of the sale, properly stamped, although the grains, provisions, and other commodities sold may be, at the time of sale, in the course of transportation as articles of interstate commerce.

[For other cases, see Commerce, IV. b, 1, in Digest Sup. Ct. 1908.]

[No. 598.]

Argued December 14, 1910. Decided January 9, 1911.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment which affirmed a conviction in the Criminal Court of Jackson County, in that state, of persons charged with violating a statute of the state regulating sales for future delivery. Affirmed.

See same case below, 228 Mo. 25, 128 S. W. 177.

The facts are stated in the opinion.

Mr. **Frank Hagerman** argued the cause, and, with Mr. Kimbrough Stone, filed a brief for plaintiffs in error:

This act is not limited to the great exchanges, where the use of facilities of great value is obtained, as was the case in Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522, nor even to all sales thereat. Moreover, guilt exists if the commodity be not actually paid for, or if delivery be not made. There was no attempt to reach alone sales upon margins, nor to deal with options for future delivery, which are peculiar transactions, involving dangers and necessities for public protection justifying legislative prohibition or regulation (Otis v. Parker, 187 U. S. 606, 46 L. ed. 323, 23 Sup. Ct. Rep. 168). If the tax be sustained because of the facilities furnished, as in Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522, then it should be laid alike upon all who use the same. This would include those selling for cash and credit, with or without delivery.

The 14th Amendment secures to everyone the right to carry on a business and to make all contracts needful for the purpose.

Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 836, 17 Sup. Ct. Rep. 427; Holden v. Hardy, 169 U. S. 366, 390, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; Lochner v. New York, 198 U. S. 45, 53, 49 L. ed. 937, 940, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Adair v. United States, 208 U. S. 161, 172, 173, 52 L. ed. 436, 441, 442, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764.

The police power of the state cannot be exercised unreasonably nor in an arbitrary manner; and whether it has been or not is also a question solely for the courts.

Lochner v. New York, 198 U. S. 45, 56, 57, 49 L. ed. 937, 941, 942, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Adair v. United States, 208 U. S. 161, 172, 173, 52 L. ed. 436, 441, 442, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764.

The act, considered as a police regulation, is discriminatory.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; State v. Loomis, 115 Mo. 314, 21 L.R.A. 789, 22 S. W. 350; State v. Julow, 129 Mo. 177, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; State v. Walsh, 136 Mo. 405, 35 L.R.A. 231, 37 S. W. 1112; State v. Miksicek, 225 Mo. 577, 135 Am. St. Rep. 597, 125 S. W. 507.

This particular act, however treated, is subject to the same objections as if considered merely as an exercise of the police power.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

The act does not require a tax to be paid upon all sales made at broker's offices or market places, or even all sales made at exchanges, where special facilities are extended, as in Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; nor all sales made of some particular article or commodity, as in People ex rel. Hatch v. Reardon, 184 N. Y. 431, 8 L.R.A. (N.S.) 314, 112 Am. St. Rep. 628, 77 N. E. 970, 6 A. & E. Ann. Cas. 515, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736; nor does it deal with options in futures, as in Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; nor with sales upon margins, as in Otis v. Parker, 187 U. S. 606, 46 L. ed. 323, 23 Sup. Ct. Rep. 168,—where the danger to the public is such as to justify classification and regulation.

Considered solely even as a taxing measure, it is discriminatory.

Gray, Limitations of Taxing Power, § 1435; Southern R. Co. v. Greene, 216 U. S. 400, 417, 418, 54 L. ed. 536, 541, 542, 30 Sup. Ct. Rep. 291, 17 A. & E. Ann. Cas. 1247; People ex rel. Farrington v. Mensching, 187 N. Y. 8, 10 L.R.A. (N.S.) 625, 79 N. E. 884, 10

A. & E. Ann. Cas. 101; Barbier v. Connolly, 113 U. S. 27, 32, 28 L. ed. 923, 925, 5 Sup. Ct. Rep. 357; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 154, 156, 41 L. ed. 666, 668, 669, 17 Sup. Ct. Rep. 255; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 37, 52 L. ed. 78, 87, 28 Sup. Ct. Rep. 7, 12 A. & E. Ann. Cas. 757; Tiernan v. Rinker, 102 U. S. 123, 26 L. ed. 103; Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565; Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; State v. Garbroski, 111 Iowa, 496, 56 L.R.A. 570, 82 Am. St. Rep. 524, 82 N. W. 959; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; State v. Bengsch, 170 Mo. 81, 70 S. W. 710; State ex rel. Anheuser-Busch Brewing Asso. v. Eby, 170 Mo. 497, 71 S. W. 52; St. Louis v. Spiegel, 75 Mo. 145, 90 Mo. 587, 2 S. W. 839; Kansas City v. Grush, 151 Mo. 128, 52 S. W. 286; Kansas City v. Whipple, 136 Mo. 479, 35 L.R.A. 747, 58 Am. St. Rep. 657, 38 S. W. 295; O'Keeffe v. Somerville, 190 Mass. 110, 112 Am. St. Rep. 316, 76 N. E. 457, 5 A. & E. Ann. Cas. 684; Juniata Limestone Co. v. Fagley, 187 Pa. 193, 42 L.R.A. 442, 67 Am. St. Rep. 579, 40 Atl. 977; Fraser v. McConway & T. Co. 6 Pa. Dist. R. 555; State ex rel. White House School Dist. No. 7 v. Readington Twp. 36 N. J. L. 66; State ex rel. Mudeking v. Parr, 109 Minn. 147, 134 Am. St. Rep. 759, 123 N. W. 408; State ex rel. Luria v. Wagener, 69 Minn. 206, 38 L.R.A. 677, 65 Am. St. Rep. 565, 72 N. W. 67; Com. v. Snyder, 182 Pa. 630, 38 Atl. 356; State ex rel. Winkler v. Benzenberg, 101 Wis. 172, 76 N. W. 345; State v. Gardner, 58 Ohio St. 599, 41 L.R.A. 689, 65 Am. St. Rep. 785, 51 N. E. 136; Harrodsburg v. Renfro, 22 Ky. L. Rep. 806, 51 L.R.A. 897, 58 S. W. 795; Lassen County v. Cone, 72 Cal. 387, 14 Pac. 100.

This court will look through forms to the substance of things; and if in substance there is any interference with interstate commerce, state legislation so interfering must fall, no matter how general its form, and even though interstate transactions are not specifically mentioned.

Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190, 197, 198; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 487, 18 A. & E. Ann. Cas. 1103.

Whether considered as a police regulation or tax measure, the effect upon interstate commerce is as immediate and direct as in any of the instances mentioned or cases cited by Mr. Justice Harlan in Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190, 197, 198; especially as in Brimmer v. Rebman, 138 U. S. 78, 81, 34 L. ed. 862, 863, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213.

If, however, the act be treated as an occupation or license tax, or one for facilities used for each sale, still it is in substance and effect a tribute laid upon property engaged in interstate commerce. So it has been here repeatedly decided in many occupation, license, and privilege tax cases.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Lyng v. Michigan, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Stockard v. Morgan, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 163, 47 L. ed. 995, 999, 23 Sup. Ct. Rep. 817; Kehrer v. Stewart, 197 U. S. 60, 65, 49 L. ed. 663, 666, 25 Sup. Ct. Rep. 403.

The location of the property is not material; whether in interstate transit cuts no figure. The act cannot, then, by construction, be restrained to state commerce. It must stand or fall as a whole. If it deals with or reaches interstate commerce, it is void *in toto*.

United States v. Reese, 92 U. S. 214, 222, 23 L. ed. 563, 566; Trade-Mark Cases, 100 U. S. 82, 98, 99, 25 L. ed. 550, 553, 554; Poindexter v. Greenhow, 114 U. S. 270, 305, 29 L. ed. 185, 197, 5 Sup. Ct. Rep. 903, 962; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 529, 51 L. ed. 298, 304, 27 Sup. Ct. Rep. 153; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 500, 52 L. ed. 297, 310, 28 Sup. Ct. Rep. 141.

If a state law uses general language broad enough to include interstate commerce, it cannot be sustained even as to strictly state transactions.

Leloup v. Mobile, 127 U. S. 640, 643, 32 L. ed. 311, 312, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 738; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Pickard v. Pullman Southern Car Co. 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; Western U. Teleg. Co.

v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190.

If the act be treated as a mere police regulation, and not a measure to raise revenue, then it might possibly be upheld as one not affecting interstate commerce, provided the effect thereon was only incidental, and not direct, and the charge made only covered the cost of the service rendered by the state.

Western U. Teleg. Co. v. New Hope, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. Rep. 204; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817.

A tax upon facilities, for the purpose of raising revenue, as decided below, necessarily interferes with such interstate commerce transactions as are reached thereby.

Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817.

Mr. **Elliott W. Major**, Attorney General of Missouri, argued the cause, and, with Mr. John M. Atkinson, filed a brief for defendant in error:

The legislative act does not violate any of the provisions of the 14th Amendment to the Constitution of the United States.

People ex rel. Hatch v. Reardon, 184 N. Y. 442, 8 L.R.A.(N.S.) 314, 112 Am. St. Rep. 628, 77 N. E. 970, 6 A. & E. Ann. Cas. 515, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736; Brown-Forman Co. v. Kentucky, 217 U. S. 572, 54 L. ed. 886, 30 Sup. Ct. Rep. 578; McLean v. Arkansas, 211 U. S. 546, 53 L. ed. 319, 29 Sup. Ct. Rep. 206; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 N. Y. 161, 24 L.R.A.(N.S.) 201, 85 N. E. 1070; Otis v. Parker, 187 U. S. 609, 610, 47 L. ed. 327, 328, 23 Sup. Ct. Rep. 168.

Optional sales in grain were entirely prohibited by statute in the state of Illinois.

Booth v. People, 186 Ill. 43, 50 L.R.A. 762, 78 Am. St. Rep. 229, 57 N. E. 798; Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425.

We find analogous cases construing the stamp act passed by Congress in 1908, and among the leading cases are the following:

Nicol v. Ames, 173 U. S. 516, 43 L. ed. 792, 19 Sup. Ct. Rep. 522; United States v. Thomas, 115 Fed. 209.

Also analogous inheritance tax laws have been held valid by both Federal and state courts.

Re Keeney, 194 N. Y. 285, 87 N. E. 428; Beers v. Glynn, 211 U. S. 477, 53 L. ed. 290, 29 Sup. Ct. Rep. 186; Michigan C. R. Co. v. Powers, 201 U. S. 301, 50 L. ed. 764, 26 Sup. Ct. Rep. 459; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

The rule as to classification does not require absolute equality in taxation, even in the same class. Absolute equality in an excise or occupation license tax is a physical impossibility.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 300, 301, 42 L. ed. 1044, 1045, 18 Sup. Ct. Rep. 594; Clark v. Titusville, 184 U. S. 330, 46 L. ed. 572, 22 Sup. Ct. Rep. 382.

The act does not interfere with interstate commerce, and is not violative of the provisions of § 8 of art. 1 of the Constitution of the United States.

People ex rel. Hatch v. Reardon, 184 N. Y. 448, 8 L.R.A.(N.S.) 314, 112 Am. St. Rep. 628, 77 N. E. 970, 6 A. & E. Ann. Cas. 515, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736; Standard Oil Co. v. Tennessee, 217 U. S. 413, 54 L. ed. 817, 30 Sup. Ct. Rep. 543; Ware v. Mobile County, 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 A. & E. Ann. Cas. 1031, 146 Ala. 163, 14 L.R.A.(N.S.) 1081, 121 Am. St. Rep. 21, 41 So. 153; Pittsburg & S. Coal Co. v. Louisiana, 156 U. S. 590, 39 L. ed. 544, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459; Plumley v. Massachusetts, 155 U. S. 473, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Alexander v. State, 86 Ga. 246, 10 L.R.A. 859, 12 S. E. 408.

Mr. Justice **Harlan** delivered the opinion of the court:

This is an indictment in the criminal court of Jackson county, Missouri, against the plaintiffs in error, Broadnax and Essex. It is based on a statute of Missouri, approved March 8th, 1907 (Mo. Sess. Acts 1907, pp. 392, 393; Mo. Rev. Stat. 1909, §§ 10,228–10,230), which declares it to be "unlawful for any corporation, association, copartnership, or person to keep, or cause to be kept, in this state, any office, store, or other place wherein is permitted the buying or selling the shares of stocks or bonds of any corporation, or petroleum, cotton, grain, provisions, or other commodities, either on margins or otherwise, where the same is not at the time actually paid for and delivered, without at the time of the sale the seller shall cause to be made a complete record of the thing sold, the purchaser, and the time of delivery, in a book kept for that purpose; and at the time the seller shall deliver to the purchaser a written or printed memorandum

of said sale, on which he shall place, or cause to be placed, a stamp of the value of 25 cents, which the seller shall purchase of the state auditor, and have on hand before making such sale; and it shall be the duty of the state auditor, upon the passage of this act, to have printed or engraved stamps for this purpose, of such design as he may select; and on application and 290] *payment for said stamps, to immediately furnish the same to the applicants applying therefor: Provided, further, and it shall be unlawful for the purchaser to receive the memoranda aforesaid until it bears the stamp above provided for. § 1. The fund arising from the sale of the stamps provided for in § 1 of this act shall, in the hands of the state auditor, constitute a road fund; and it shall be the duty of the said auditor to distribute said fund, annually, to the counties in the state and the city of St. Louis, in the same proportion and in like manner as the state school funds are now distributed by him. § 2. Any person, whether acting individually or as a member, or as an officer, agent, or employee of any corporation, association, or copartnership, who shall be guilty of violating any of the provisions of § 1, shall, upon conviction thereof, be fined in any sum not less than fifty, nor more than one thousand dollars, and in addition thereto may be imprisoned in the county or city jail for a period of not less than thirty days, nor to exceed one year. § 3."

The indictment charges that the defendants, being officers and agents of the board of trade of Kansas City, Missouri, did, at a time specified, wilfully and unlawfully keep and caused to be kept a *place*, commonly called the trading floor of the board of trade of Kansas City, wherein was permitted the buying and selling of grain, provisions, and other commodities, on margins and otherwise, and where, at the time of such sales, so permitted, the grain, provisions, and other commodities so sold, were not actually paid for and delivered, and at such time and place the sellers, or any of them, of the grain, provisions, and other commodities, so sold on margins and otherwise, did not then and there cause to be made a complete record of the commodities sold and the time of delivery in a book kept for that purpose, and at said time and place neither the sellers, nor any 291] of them, delivered to the purchasers *a written or printed memoranda of said sales, on which they, the sellers, or any of them, had placed or caused to be placed a stamp of the value of 25 cents, which they had purchased of the state auditor, and had on hand before making such sales; contrary to the statutes, etc.

The defendants demurred to the indictment on the ground, among others, that the statute was in violation of the 14th Amendment, as well as of the commerce provision of the Constitution of the United States. The demurrer was overruled and the defendants excepted. A jury was waived, and the case was tried by the court.

Before the introduction of evidence, the defendants objected to any proof, resting their objection upon these grounds: 1. That the statute was discriminatory, abridged the privileges and immunities of citizens of the United States, deprived defendants of their property without due process of law, and denied to them the equal protection of the law, contrary to the provisions of the 14th Amendment of the Constitution of the United States. 2. That it was an unwarranted attempt to regulate interstate commerce.

The objection was also made that the statute was in violation of certain alleged provisions of the Constitution of Missouri. But with the latter ground we have, for obvious reasons, no concern on this writ of error from the state court. The above objections to the evidence were overruled, the defendants duly excepting.

For the purpose of the case, and subject to such objections as might be thereafter stated, facts were admitted which brought the case within the provisions of the statute and the averments of the indictment.

The defendants objected to these facts as incompetent and inconsistent with the Constitutions, both of the United States and of Missouri. The objections were overruled and the defendants excepted. To the above statement *of admitted facts[292 this was added: "A substantial part of the sales aforesaid being of grain, provisions, and other commodities which were, at the time of sale, in course of transportation as articles of interstate commerce." The state objected to the facts just stated as incompetent and irrelevant. The objection was overruled, and the state excepted.

The result of the trial was a judgment that the defendants were guilty, and they were fined each $50. Motions for a new trial and for the arrest of judgment having been severally denied, the case was taken by appeal to the supreme court of Missouri, where the judgment of the trial court was affirmed.

The assignments of error present the same questions of constitutional law that were raised by the defendants' demurrer and objections to evidence.

The words of the statute show that the keeping of a *place* where corporate stocks

and bonds, as well as grains, provisions, and other commodities were bought and sold, but not paid for at the time, without a complete record of the transaction (including a minute of the time of delivery) in a book kept for that purpose, and without the purchaser receiving a printed or written memorandum of the sale, needed to be regulated, so as to protect the public against unfair or fraudulent practices that might result to the injury or inconvenience of the general public. We are not prepared to hold that the state in this matter has exceeded the bounds of reason, or has legislated beyond the necessities of the case, or has arbitrarily interfered with the course of ordinary business among its people. While it is the duty of the Federal courts, if their jurisdiction be lawfully invoked, to see to it that the constitutional rights of the citizen are not infringed by the state, or by its authorized agents, they should not strike down an enactment or regulation adopted by the state under its police power, unless it be clear that the declaration 293] *of public policy contained in the statute is plainly in violation of the Federal Constitution. Much may be done by a state under its police power which many may regard as an unwise exertion of governmental authority. But the Federal courts have no power to overthrow such local legislation, simply because they do not approve it, or because they deem it unwise or inexpedient. What we have said in House v. Mayes, 219 U. S. 270, ante, 213, 31 Sup. Ct. Rep. 234, as to the nature and extent of the police power of the state, is applicable to this case, and need not be here repeated.

Suffice it on this point to adjudge, as we now do, that the Federal Constitution does not prevent the enforcement by the state of the provision making it unlawful to keep or cause to be kept in the state an office, store, or *place*, where things are omitted to be done which the statute requires to be done at the time bonds and stocks and commodities are sold and bought *in such place*. The defendants were indicted and found guilty of keeping and causing to be kept such a *place* as the statute forbade to be kept or caused to be kept. We do not perceive that any right secured by the 14th Amendment is or has been thereby violated. We could not adjudge otherwise without declaring that the statute was so unreasonable and so far beyond the necessities of the case as to be deemed a purely arbitrary interference with lawful business transactions. We are unwilling to so adjudge. Much was said at bar about the "liberty of contract." In a large sense every person has that liberty. It is secured

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by the provision in the Federal Constitution, forbidding a state to deprive any person of liberty or property without due process of law. But the Federal Constitution does not confer a liberty to disregard regulations as to the conduct of business which the state lawfully establishes for all within its jurisdiction.

It is contended that the statute is in violation of the 14th Amendment, in that the classification of subjects *within[294 the limits of the authorities levying the stamp tax is not a true classification. Construing the statute, the state court said: "In our opinion, this law clearly embraces every class, whether it be corporation, association, either voluntary or otherwise, partnership, or person which furnishes a *place* for dealing in sales of stocks, bonds, etc., upon margins or otherwise, where the same are not at the time actually paid for and delivered, and embraces all classes who may deal in such places so furnished. It is clear that the character of business which is treated of by the statute is fully recognized as a separate and distinct business from all other classes. That the statute embraces every class, whether it be corporation, association, partnership, or person who may furnish a place or who may deal in transactions in such places, there can be, in our opinion, no sort of doubt; therefore we conclude that, so far as the class of persons to whom this law is made applicable, whether natural or artificial, this statute embraces the entire class, and is not subject to the objection that it singles out a part of a legal class upon which the license or stamp tax is imposed, and exempts others of the same class. Manifestly, the selection of the business calling and the class pursuing such calling were proper and appropriately selected by the legislature of this state in dealing with that subject." [228 Mo. 42, 128 S. W. 182.] Of course, we take the statute as a local law to mean what the court says it means. Nor is there any force in the objection that the classification, as shown by the statute, is arbitrary and unreasonable. The same methods and means are applied equally to all of the same class. Kentucky R. Tax Cases, 115 U. S. 321, 337, 29 L. ed. 414, 419, 6 Sup. Ct. Rep. 57; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Barbier v. Connolly, 113 U. S. 27, 32, 28 L. ed. 923, 925, 5 Sup. Ct. Rep. 357.

Again, it is said that the statute, by its necessary operation, is a regulation of interstate commerce. Not so. It might suffice, in the present case, to say that, under *the facts admitted, there is no reason[295 whatever to invoke the commerce clause

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of the Federal Constitution. All that the defendants offered to show in this connection was that a substantial part of the sales referred to were of grain, provisions, and other commodities which were, at the time of sale, in course of transportation as articles of interstate commerce. With this state of facts, and *no more before it*, the supreme court of the state said: "The requirements of the statute now under consideration have no bearing or influence whatever upon property sold. It is addressed to those furnishing the *places*, as well as those who deal in the transaction *in such places*. In other words, in sales of property in the manner and *at the places pointed out* by the statute it is required, where a sale is made in the manner contemplated by that statute, that the seller shall make a memorandum of such sale, and place upon such memorandum a 25 cent stamp. We repeat that transactions of this character have no influence whatever upon commerce between different states, and, as was in substance said by the Supreme Court of the United States [New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736], sales of this character do not contemplate or have anything to do with the transportation of property from one state to another, as in the drummer cases, and the mere fact that the parties to such sale, or either one of them, happens to be a resident of another state, in no way, legally or practically, affects the transaction, and falls far short of subjecting such transaction to condemnation for the reason that it interferes with interstate commerce. Our conclusion upon this proposition is that this statute in no way interferes with interstate commerce, and should not be held invalid for that reason." We add that the indictment deals with the *place* where sales, such as the statute describes, are made. The offense is complete under the statute, by the keeping of such a place, and that occurs before 296] any question of interstate *commerce could arise, so far as this record discloses.

We do not perceive that any error of law was committed by the state court, and its judgment is affirmed.

WINSLOW HART REAVES, Second Lieutenant, Artillery Corps, U. S. Army, Plff. in Err.,

v.

FREDERICK C. AINSWORTH, Major General, Military Secretary, U. S. Army, and William H. Taft, Secretary of War.

(See S. C. Reporter's ed. 296–307.)

Military tribunals — jurisdiction — due process of law.

1. The proceedings before the examining board, convened under the act of October 1, 1890 (26 Stat. at L. 562, chap. 1241, U. S. Comp. Stat. 1901, p. 849), enacted to provide for the promotion or retirement of Army officers, which resulted in the discharge of an officer with one year's pay, by order of the President, were not had without jurisdiction, and hence without due process of law, because the board had previously made an order that such officer was then physically incapacitated for service from disability contracted in line of duty, but had a reasonable hope of recovery, and that he could not with safety proceed with his examination, since such order was merely provisional, and not a final decision, which, under the law, would have entitled him to be retired with three quarters pay for life.

[For other cases, see War, 62–71; Constitutional Law, 764, 773, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — military law.

2. Military law is due process of law to those in the military or naval service of the United States.

[Due process of law, generally, see Constitutional Law, IV. b, in Digest Sup. Ct. 1908.]

Courts — relation to military tribunal.

3. The decision of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts.

[For other cases, see Courts, I. e, 7, in Digest Sup. Ct. 1908.]

Courts — relation to military tribunal — certiorari.

4. Errors and injustice done in the proceedings before the examining board convened under the authority of the act of October 1, 1890, enacted to provide for the promotion or retirement of Army officers, which resulted in the discharge of an officer with one year's pay, by an order made by the President, in the exercise of his reserved power to review the proceedings and decisions of such board, cannot be corrected by the courts by certiorari.

[For other cases, see Courts, I. e, 7; Certiorari, I. b, 1, in Digest Sup. Ct. 1908.]

[No. 14.]

Argued December 2 and 5, 1910. Decided January 9, 1911.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, dismissing a petition for certiorari to review the proceedings of a military tribunal and the order made by the President, discharging an Army officer with one year's pay. Affirmed.

See same case below, 28 App. D. C. 157.

The facts are stated in the opinion.

NOTE.—On superintending control of civil courts over court-martial—see note to State ex rel. Poole v. Nuchols, 20 L.R.A.(N.S.) 413.

Mr. **Alexander S. Bacon** argued the cause and filed a brief for plaintiff in error.

Assistant Attorney General **Harr** argued the cause and filed a brief for defendants in error.

Mr. Justice **McKenna** delivered the opinion of the court:

Plaintiff in error filed a petition in the supreme court of the District of Columbia for a writ of certiorari to review the proceedings of a board of examination convened under the authority of the act of Congress of October 1, 1890, entitled, "An Act to Provide for the Examination of Certain Officers of the Army, and to regulate Promotions Therein" (26 Stat. at L. 562, chap. 1241, U. S. Comp. Stat. 1901, p. 849), and to annul an order made by the President, discharging plaintiff in error from the Army.

The basis of the petition is that, by a prior decision of the board, he became entitled, by virtue of the act of Congress, to be retired with three quarters pay for life.

A writ was issued, directed to General Frederick C. Ainsworth, Military Secretary.

He appeared and moved to quash the writ. The motion was granted and the petition dismissed. The order, however, was subsequently vacated, and, by leave of the court, the petition was amended by making William H. Taft, Secretary of War, one of the respondents.

An amended writ was issued, which the respondents moved to supersede upon the following grounds: The writ was granted improvidently, and upon an *ex parte* application; its allowance would be unjust and contrary to public policy; the petition does not set up any right of property, title, or interest in the alleged office; Congress has intrusted to the board of examination the 298] decision of *matters properly arising before it, and the court has no jurisdiction by certiorari to examine the proceedings of the board; the allowance of the writ would embarrass the operations of the military service of the United States and the proper administration of the manifold duties of the War Department, hindering the enforcement of its discipline and regulations, and the discharge of the legally ordained functions of that branch of the government; the record sought to be reviewed shows that the petitioner (plaintiff in error) "is not entitled to the issuance of the writ, as it appears by a duly certified and true extract from said record." The record was filed with the motion and will be given hereafter.

The motion to supersede was granted, the order reciting, "it appearing to the court, without considering the question of discretion, that the writ of certiorari" had been "improperly granted." The petition was dismissed at the cost of the petitioner, which ruling was affirmed by the court of appeals.

The court of appeals expressed the opinion that the board of examination was military in character, and having had jurisdiction of the subject-matter and of the person, the courts were without jurisdiction to review its decision.

By § 3 of the act of October 1, 1890, the President is authorized to prescribe a system of examination for all officers below the rank of major, to determine their fitness for promotion, and it is provided "that if any officer fails to pass a satisfactory examination and is reported unfit for promotion, the officer next below him in rank, having passed said examination, shall receive the promotion: And provided, That should the officer fail in his physical examination, and be found incapacitated for service by reason of physical disability contracted in line of duty, he shall be retired with the rank to which his seniority entitled him to be promoted; but if he should *fail for any other reason, he shall be[299 suspended from promotion for one year, when he shall be re-examined, and in case of failure of such re-examination he shall be honorably discharged with one year's pay from the Army; . . . and no act . . . shall be so construed as to limit or restrict the retirement of officers as herein provided for."

This statute constitutes the law of the case. The material facts are these: Plaintiff in error was a second lieutenant of artillery on sick leave at Fort Hamilton on account of neurasthenia, resulting from overwork in the Philippine Islands. On August 16, 1904, he was ordered for promotion before a board of examination, constituted of five members, two of whom were surgeons. The surgeons found him physically fit for duty, but he was, on their recommendation, allowed to return to Fort Hamilton. On October 5, 1904, while still on sick leave, he was again ordered to Fort Monroe before the same board and forced to take a mental examination. He broke down completely and was found deficient. On May 22, 1905, he was again ordered before the board for re-examination, and appeared before it on the 23d. On the 24th the board made the following order, which was referred to above in connection with the motion to supersede the writ:

"The board is of opinion that 2d Lieut. Winslow H. Reaves, Art'l Corps, is physically incapacitated for service at the present

time, but that there is a reasonable hope of his recovery. Lieut. Reaves's present condition is such that it is not possible for him to proceed with the mental examination without serious interference with his future recovery.

"His disability is due to severe cerebral and cardio-vascular neurasthenia, contracted in line of duty."

Subsequently he was ordered to appear before the same examining board, convened by special order of the President, but changed as to a majority of its members. 300] The *board convened at Fort Monroe August 21, 1905, and he appeared before it pursuant to orders. He was found physically fit for duty. He failed, however, in his mental examination, and, we may assume, although it is not directly averred, that in consequence of the report of the board, the President made the order above set out, honorably discharging the plaintiff in error from the service of the United States. This order he attacks, and urges that of the 24th of May as the foundation of his rights and contentions. He maintains that the surgeons having reported as therein set out, and their report having been confirmed by a full board of five officers, and forwarded to the Secretary of War, it, under the express wording of the statute of October 1, 1890, had the finality of an acquittal of a court-martial, "and that, by the operation of the statute," plaintiff in error "was thereupon retired and entitled to retired pay during life, instead of being dismissed from the service with one year's pay," and that, as such right became absolute by the report of the surgeons and the action of the board thereon, the subsequent proceedings of the board were without jurisdiction and void, and that they and the President's order deprived him of his property without due process of law.

Plaintiff in error misunderstands the order of May 24. It is not a final order, but a provisional one. It was an indulgence to the afflicted officer, giving him a chance for recovery and promotion and assignment to the active list of his profession. And we have no doubt of the power of the board to make it and reserve jurisdiction for further proceedings.

It is next contended that, even if the board had jurisdiction, its proceedings subsequent to the order of May 24, 1905, were arbitrary and illegal, and that the relief prayed does not involve the "question of interference with the discretion of the board; it is a question of the jurisdiction 301]*of the board and of the fact that discretion, if exercised, was abused." On this contention, the averments of the petition have a more pertinent bearing than on the first contention. The petition described with much detail and quite vividly his disability. He alleges that for the last two years he has been suffering from an extremely acute case of cerebral neurasthenia, or nervous exhaustion, for which he has been almost continuously under the care of physicians, some of whom are the most famous in the world as specialists for nervous diseases. And, further, that he is to-day in as bad a condition as at any time during the last two years, and is wholly unable to exercise mental effort; his memory is at times a blank, and it is, and for two years has been, utterly impossible for him "to study, read, or think consecutively, except for a few moments at a time, and 'his' sleep has not averaged more than about two and one-half hours per day." This was his condition, it is alleged, when he was ordered before the first board. The allegations are supported by an affidavit of Dr. Weir Mitchell and Dr. John K. Mitchell. The affidavit, which was submitted to the first board, illustrated his condition and its effects in various ways, and declared that from the experience and knowledge obtained from actual attendance upon him, he was not "competent to undergo a mental examination or to do any military duty."

This condition is further set forth in the petition, and the affidavit which accompanied it, with circumstances of emphasis, and there is an intimation that the final action of the board was contrived. The details we may omit. The important facts which are alleged, and which, as it is contended, give character to the action of the board as illegal and arbitrary, are the following: The board had before it papers from the War Department, and his counsel made a series of motions for permission to examine them and to inspect the other evidence, which included *documents of[302 all kinds, reports of surgeons, and the report of the surgeons made to the board May 23, 1905.

A motion was also made to strike out the report of the surgeons, on the ground that the report of the examining board of May 24, 1905, was final, and plaintiff in error's retirement was mandatory under said report and the act of Congress of October 1, 1890.

The motions were all denied except the request to produce witnesses. At the request of the board, he presented the names of about thirty witnesses who were physicians and had had him under observation for different periods of time, and all of whom could swear to facts, exact symptoms of his malady, and besides could give expert evidence as to his condition while under observation. The names of the wit-

nesses and the facts were given. It was offered to be shown that the reports of the surgeon who had charge of a hospital at Fort McPherson, Georgia, to which plaintiff had been sent, that he was competent to do duty, were not based on facts or the reports of the attendants, "but were prepared negligently, ignorantly, wickedly, and corruptly." And an offer was made to produce the attendants with their official reports.

The board refused to call in witnesses, on the ground that the doctors named had already filed certificates, and that the laymen were not expert witnesses. Plaintiff in error was not allowed to call witnesses, nor to inspect exhibits presented to the board, nor to cross-examine the surgeons on their report. All testimony, documentary or otherwise, was taken in secret.

The board went into executive session and formally reported plaintiff in error to be without physical disqualification, and competent to take the examination, and to do the duty of a first lieutenant of artillery. He was thereupon ordered to take such examination, and attempted to take the same, until prevented by spells of weeping and other marked symptoms of neurasthenia. 303] *Thereupon the post surgeon made a certificate as to his condition and put him on the sick report, and on the following day the surgeons of the board were sent to Fort Monroe and superseded the post surgeon, and plaintiff in error was forced to go through "the farcical form of an examination under the personal supervision of the board surgeons, turning in practically blank examination papers, petitioner's mind being almost a blank."

The prayer is for a writ of certiorari to bring up all of the proceedings which we have detailed, that they may be reviewed, and that the following order discharging him from the Army be annulled. The order is annexed to the petition as an exhibit, and is as follows:

4. By direction of the President, 2d Lieutenant Winslow Hart Reaves, Artillery Corps, is honorably discharged from the services of the United States, under the provision of the act of Congress approved October 1, 1890, to take effect September 14, 1905 (1,052,959, M. S. O.).

By order of the Acting Secretary of War.

J. C. Bates,

Major General, Acting Chief of Staff.

Official: F. C. Ainsworth,

The Military Secretary.

And it is further prayed that petitioner be put upon the retired list under the act of October 1, 1890, and the findings of the board of May 24, 1905, and that the proceedings of the board and of the Acting Secretary of War subsequent to that date be found to be void and without effect. And such further relief is prayed as may be just.

The petition is verified and is accompanied by an affidavit of plaintiff in error's counsel, corroborating with some detail its statements of the mental and physical condition of plaintiff in error.

It will be seen that the report of the board of May 24, 1905, *is made by[304 the petition, and urged in the argument, as the foundation of the rights of plaintiff in error. It is argued that his commission in the Army constituted property of which to be retired from the Army, with pay for life, was a valuable attribute, and of which he could not be deprived without due process of law. Such process, he urges, "consists of two independent parts, both of which must be lawful; one, the proceeding before the board of examination and its report, which conforms in all respects to a 'decision' by a judge, which is the foundation of a judgment; second, the confirmation of that report by the President." These being filed, it is further argued all subsequent proceedings affecting them, if without jurisdictional support, as it is contended they are, are void and may be declared so, and plaintiff in error's right to be promoted and put upon the retired list adjudged. But the contention and argument are without foundation, as we have seen, and the case presented by the petition does not exist. It is not necessary, therefore, to review the able argument of counsel. It is based entirely on the unsound assumption which we have pointed out. Besides, what is due process of law must be determined by circumstances. To those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts. Johnson v. Sayre, 158 U. S. 109, 39 L. ed. 914, 15 Sup. Ct. Rep. 773. See also Mullan v. United States, 212 U. S. 516, 53 L. ed. 632, 29 Sup. Ct. Rep. 330.

It is contended, however, that the board of examination did not observe the procedure required by law, and that they are bound, as retiring boards are bound under § 1248 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 886), to "inquire into and determine the facts touching the nature and occasion of the disability of any officer, . . . and shall have such powers of a court-martial and of a court of inquiry as may be necessary for that purpose."

*But the act of October 1, 1890, has[305

a different purpose from the retirement of an officer from service. Its purpose is to secure efficiency in those who are to be active in service, and physical capacity, of course, is as necessary as mental capacity, but no fixed procedure is provided by the statute to ascertain either; but by very comprehensive words power is conferred upon the President to "prescribe a system of examination of all officers of the Army, to be conducted at special times anterior to the acquiring of the right of promotion, as may be best for the interests of the service." This power is exercised through special orders creating examining boards, which define their membership and duties. For officers of artillery, the board shall consist of five members, two of whom shall be medical officers, and a recorder, all of whom take an oath to act and report impartially. The medical officers are required to make the necessary physical examination of all officers, reporting their opinion to the board, by which "all questions relating to the physical condition of an officer shall be determined." The orders directed that "if anything should arise during the examination regarding the introduction of evidence, the inquiry shall proceed upon written interrogatories as far as possible, the board determining to whom questions shall be forwarded." If it becomes necessary to take oral testimony, the fact must be reported to the War Department for the necessary orders in regard to witnesses summoned from a distance.

The record, where an officer is found physically disqualified, must be authenticated by all members of the board and the recorder. If the disability be the result of an incident of the service, and the proceedings of the board be approved by the President, the officer "shall be regarded as physically unfit for promotion, within the meaning of § 3 of the act of October 1, 1890, and shall be retired with the rank to which his
306] seniority entitles *him whenever a vacancy occurs that otherwise would result in his promotion on the active list."

If it be disputable whether these provisions guarantee to an officer "the safeguards of a trial in court," it is certain that the decision is not final with the board, but must be reported with the proceedings to the President, and may be approved or disapproved by him. This is the only relief from the errors or the injustice that may be done by the board which is provided. The courts have no power to review. The courts are not the only instrumentalities of government. They cannot command or regulate the Army. To be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the Army. And this was the motive of the act of October 1, 1890, and naturally its accomplishment was intrusted to the President. He executed the trust by constituting examining boards, defining their duty, and reserving to himself the ultimate review of their proceedings and decision. This is the protection which the act of Congress gives to the rights conferred by it. If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion, and carry them over the head of the President to the courts, and to be there litigated, it may be, through a course of years, upon the assertion of error or injustice in the board's rulings or decisions, such intention would have been explicitly declared. The embarrassment of such a right to the service, indeed, the detriment of it, may be imagined.

It is, however, contended, that People ex rel. Smith v. Hoffman, 166 N. Y. 462, 54 L.R.A. 597, 60 N. E. 187, sustains the right of review. The case does not support the contention. The decision was based on the statutes of the state, which made, it was *decided, the military board whose ac-[307 tion was reviewed, a judicial tribunal, and its decision subject to be reviewed by certiorari. And, replying to the argument against the existence of the power of the courts to review the determination of a military tribunal, and the cases from the Federal courts, adduced to support the argument, the court said: "There is a wide difference between the regular Army of the nation and the militia of a state, when not in the service of the nation;" and that "more rigid rules and a higher state of dicipline are required in the one case than in the other."

Judgment affirmed.

GERMAN ALLIANCE INSURANCE COMPANY, Plff. in Err.,
v.
FOSTER K. HALE, Junior.

(See S. C. Reporter's ed. 307-320.)

Constitutional law — due process of law — penalizing insurance company connected with tariff association.

1. Due process of law is not denied to an insurance company connected with a

NOTE.—As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A.

tariff association which fixes rates, by Ala. Code 1896, §§ 2619, 2620, under which the insured or beneficiary in a policy issued by such company may recover, in addition to the actual loss, 25 per cent of the amount of such actual loss or damage, any stipulation in the contract of insurance to the contrary notwithstanding; but such statute is a valid exercise of the police power of the state, to discourage monopolies and to encourage competition in the matter of insurance rates.

[For other cases, see Constitutional Law, 475–477, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — penalizing insurance company connected with tariff association.

2. An insurance company connected with a tariff association which fixes rates is not denied the equal protection of the laws by Alabama Code 1896, §§ 2619, 2620, under which the insured or beneficiary in a policy issued by such company may recover, in addition to the actual loss or damage, 25 per cent of the amount of such actual loss or damage, since such statute places upon an equality in every respect all insurers which, at the time of issuing the insurance or subsequently, and before trial, were in anyway connected with any other persons, associations, or corporations which acted together in fixing insurance rates.

[For other cases, see Constitutional Law, 279–284, in Digest Sup. Ct. 1908.]

Appeal — presumption — waiving or abandoning errors below.

3. The issues raised by a plea will be presumed to have been waived or abandoned at the trial, where, after a demurrer to

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655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

For a discussion of police power generally—see notes to State v. Marshall, 1 L.R.A. 51; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; State v. Schlemmer, 10 L.R.A. 135; and Barbier v. Connolly, 28 L. ed. U. S. 923.

As to the validity of class legislation—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

Legality of combinations among underwriters.

Combinations or agreements relating to insurance are ordinarily valid, both at common law and under statutes specifically relating to combinations and monopolies, where the principal purpose thereof is to promote the business welfare and convenience of the parties thereto. They must not, however, be unreasonably in restraint of trade, or for the purpose of regulating and controlling the rate of premium to be charged. Workman v. London & L. F. Ins. Co. 19 Times L. R. 360; Bloom v. Home Ins. Agency, 91 Ark. 367, 121 S. W. 293; Childs ex rel. Smith v. Firemen's Ins. Co. 66 Minn. 393, 35 L.R.A. 99, 69 N. W. 141.

Local insurance agents could sell and transfer to a corporation the entire insurance business of their respective agencies, including expirations and good will, and agree not to solicit insurance in the county for five years except on behalf of such corporation, without violating public policy or the Arkansas anti-trust act of July 23 1905, there being nothing in the sale which affected or regulated the insurance premiums. Bloom v. Home Ins. Agency, 91 Ark. 367, 121 S. W. 293.

A rule of a board of fire underwriters of a city, organized to promote harmony and correct practises in fire underwriting, that no member shall take the agency of a company which is already represented in the city, is not unreasonable, arbitrary, or oppressive, and violates no principle of public policy. Louisville Bd. of Fire Underwriters v. Johnson, 133 Ky. 797, 24 L.R.A. (N.S.) 153, 119 S. W. 153.

A combination of underwriters is not unlawful, the object of which is to compel people carrying insurance to insure through regular agents or brokers. Workman v. London & L. F. Ins. Co. 19 Times L. R. 360.

So, a combination of underwriters is lawful where the purpose is to assist firemen at fires, and especially to look after salvage. Childs ex rel. Smith v. Firemen's Ins. Co. 66 Minn. 393, 35 L.R.A. 99, 69 N. W. 141.

Generally, such a combination is unlawful at common law where the purpose is to regulate and control the rate of premiums to be charged, the effect being to enhance the price. McCarter v. Firemen's Ins. Co. 74 N. J. Eq. 372, 29 L.R.A. (N.S.) 1194, 135 Am. St. Rep. 708, 73 Atl. 80, 144, 18 A. & E. Ann. Cas. 1048; People v. Aachen & M. F. Ins. Co. 126 Ill. App. 636.

Thus, a contract in restraint of trade, entered into by a number of fire insurance companies, the necessary effect and actual result of which are to control such business within a certain area, and within such area to fix and regulate prices, and to limit or eliminate competition, to the injury of the public, is contrary to public policy, and may be restrained in equity at the suit of the attorney general. McCarter v. Firemen's Ins. Co. 74 N. J. Eq. 372, 29 L.R.A. (N.S.) 1194, 135 Am. St. Rep. 708, 73 Atl. 80, 144, 18 A. & E. Ann. Cas. 1048.

But see Continental Ins. Co. v. Fire Underwriters, 67 Fed. 310, which holds that an association of fire underwriters for the purpose of regulating premium rates, the prevention of rebates, fixing the compensation of agents, and providing for nonintercourse with companies not members, is not an unlawful combination at common law. To same effect is People ex rel. Pinckney v. New York Fire Underwriters, 7 Hun, 248.

such plea had been sustained without exception taken, defendant went to trial upon the merits without objection, and introduced evidence upon other issues, and no evidence was offered or introduced on either side relating to the matters set out in such plea.

[For other cases, see Appeal and Error, VIII. d, 3, in Digest Sup. Ct. 1908.]

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Argued and submitted November 29, 1910. Decided January 16, 1911.

IN ERROR to the Circuit Court of the United States for the Southern District of Alabama to review a judgment in favor of plaintiff in an action on a policy of insurance. Affirmed.

The facts are stated in the opinion.

Mr. **Alexander C. King** argued the cause, and, with Messrs. Shelton Sims, J. H. Webb, Pillans, Hanaw, & Pillans, and King & Spalding, filed a brief for plaintiff in error:

The statute assailed is not made, or sustainable, as a condition to the doing of business.

Carroll v. Greenwich Ins. Co. 199 U. S. 401, 409, 50 L. ed. 246, 249, 26 Sup. Ct. Rep. 66.

At least, all coinsurers on the same risk should, in litigation about said risk, stand in the same class. Classification between

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The authorities are not agreed as to whether combinations of agencies or underwriters for the purpose of regulating and controlling rates of premium to be charged are within the terms of anti-trust laws relating to combinations in restraint of trade.

The act of the 22d general assembly of Iowa, chap. 84, § 1 (McClain's Code, 5454), inhibiting any pool, trust, agreement, or combination or confederation to fix the price of oil, lumber, coal, grain, flour, provisions, or any other commodity or article whatever, covers a compact between local insurance agents to fix rates upon all risks of insurance within a certain locality, as insurance is a commodity. Beechley v. Mulville, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428.

Support for this view may be found in the decision in Re Pinkney, 47 Kan. 89, 27 Pac. 179, where the court held that the provisions of the Kansas statute which prohibit combinations to control insurance rates are embraced within the title, "An Act to Declare Unlawful Trusts and Combinations in Restraint of Trade and Products."

And in Fire Ins. Cos. v. State, 75 Miss. 24, 22 So. 99, the court after sustaining a demurrer to an indictment charging a combination among underwriters to fix insurance premiums, contrary to Miss. Code 1892, § 4437g, which defines a trust and combine as a combination, contract, understanding, or agreement, express or implied, between two or more persons, corporations, or firms, or associations of persons, or between one or more of either with one or more of the others, to place the control, to any extent, of business, or of the products of, or earnings thereof, in the power of trustees, by whatever name called; and declares the same to be inimical to the public welfare, unlawful, and a criminal conspiracy,—held that insurance trusts were within the purview of this section. The court said: "It is insisted that an insurance trust is not within the purview of our statute (§ 4437), and Queen Ins. Co. v. State, 86 Tex. 250, 22 L.R.A. 483, 24 S. W. 397 [see infra], is relied on as showing this. But this decision was a construction of the Texas anti-trust act of 1889. Tex. Stat. 1889, p. 141, § 1. And it is perfectly manifest that that act did not embrace insurance trusts, for, by its plain terms (see § 1) it prohibited only trusts dealing by way of trade or commerce in commodities. Such are its express terms. The word 'business' does not occur in it at all. The decision is therefore not in point, and to meet that very decision the legislature of Texas, in 1895, amended the said act of 1889 (Tex. Rev. Stat. 1895, p. 1090, art. 5313, § 1), and prohibited any trust the object of which was to 'create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws' of that state. Such is our statute (§ 4437g)."

It is not settled whether the anti-trust law of Ohio, relating to combinations affecting commerce, commodities, or combinations in restraint of trade, is sufficiently broad to include combinations of insurance underwriters or agencies to regulate and control rates of premium, so as to make such combinations criminal. That such combinations are not within the terms of this statute was held by the common pleas court of Lorain county, in State v. Bovee, 6 Ohio N. P. N. S. 337, 17 Ohio S. & C. P. Dec. 663; and also by the superior court of Cincinnati in Runck v. Cloud, 8 Ohio N. P. 436, 11 Ohio S. & C. P. Dec. 444, as to combinations of fire insurance agencies; while the contrary was held by the common pleas court of Ashtabula county in State ex rel. Taylor v. Ross, 4 Ohio N. P. N. S. 377, 16 Ohio S. & C. P. Dec. 704.

Contracts regulating insurance rates are not within Ky. Stat. § 3915, prohibiting combinations to regulate, control, or fix the price of "any merchandise, manufactured articles, or property of any kind." Ætna Ins. Co. v. Com. 106 Ky. 864, 45 L.R.A. 355, 51 S. W. 624.

A combination of insurance companies to establish uniform rates of insurance and of agents' commissions was not illegal under the Texas anti-trust law of March 30, 1889, prohibiting trusts for restrictions in trade

them, for purposes of litigating identical defenses with the same plaintiff, is unreasonable and no classification, but is a denial to a part of the same class of litigants of the equal protection of the laws.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 153, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 100, 108, 46 L. ed. 92, 105, 108, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

While classification is allowed, it must not be arbitrary; it must be reasonable with relation to the subject-matter, and such reasonableness is a judicial question.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 153, 155, 159, 165, 41 L. ed. 666–668, 17 Sup. Ct. Rep. 255; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 558, 560, 46 L. ed. 679, 689, 690, 22 Sup. Ct. Rep. 431.

This statute is invalid both under the Constitution of Alabama and the 14th Amendment of the Constitution of the United States.

South & North Ala. R. Co. v. Morris, 65 Ala. 193; Louisville & N. R. Co. v. Baldwin, 85 Ala. 627, 7 L.R.A. 266, 5 So. 311; Randolph v. Builders' & Painters' Supply Co. 106 Ala. 501, 17 So. 721.

If the operation of this statute, as construed by the supreme court of Alabama, creates a discrimination between litigants, without any reasonable foundation therefor, or discrimination between those whom the fundamental law puts in one class, then a mere declaration that the purpose of the statute is otherwise will not control.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

No distinction can be made under the Alabama Constitution between a corporation and an individual, as a litigant, or as between different persons as litigants.

South & North Ala. R. Co. v. Morris, 65 Ala. 199; Louisville & N. R. R. Co. v. Baldwin, 85 Ala. 627, 7 L.R.A. 266, 5 So.

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or production, or for the increase or reduction of price or rates of transportation for commodities or articles of commerce, since a contract of insurance is not "trade," nor is it "an article of commerce," nor a "commodity." Queen Ins. Co. v. State, 86 Tex. 250, 22 L.R.A. 483, 24 S. W. 397.

Combinations of agencies or underwriters for the purpose of regulating and controlling premium rates are expressly legislated against in some states. Ætna F. Ins. Co. v. Kennedy, 161 Ala. 600, 135 Am. St. Rep. 160, 50 So. 73; Continental Ins. Co. v. Parkes, 142 Ala. 650, 39 So. 204; Hartford F. Ins. Co. v. State, 76 Ark. 303, 89 S. W. 42; Re Pinkney, 47 Kan. 89, 27 Pac. 179; Hartford F. Ins. v. Raymond, 70 Mich. 485, 38 N. W. 474; State ex rel. Crow v. Firemen's Fund Ins. Co. 152 Mo. 1, 45 L.R.A. 363, 52 S. W. 595; State v. Phipps, 50 Kan. 609, 18 L.R.A. 657, 4 Inters. Com. Rep. 299, 34 Am. St. Rep. 152, 31 Pac. 1097.

Such statutes, where the object is to prevent agreements relating to rates of premium, and to keep up competition, are constitutional. Carroll v. Greenwich Ins. Co. 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. Rep. 66 (sustaining constitutionality of Iowa statute); Continental Ins. Co. v. Parkes, 142 Ala. 650, 39 So. 204; Fireman's Fund Ins. Co. v. Hellner, 159 Ala. 447, 49 So. 297, 17 A. & E. Ann. Cas. 793; Ætna F. Ins. Co. v. Kennedy, 161 Ala. 600, 135 Am. St. Rep. 160, 50 So. 73 (all sustaining the Alabama statute considered in the principal case).

The Kansas statute does not, as applied to foreign insurance companies doing business in Kansas, amount to a regulation of interstate commerce. State v. Phipps, 50 Kan. 609, 18 L.R.A. 657, 4 Inters. Com. Rep. 299, 34 Am. St. Rep. 152, 31 Pac. 1097.

In an action against an insurance company to recover a penalty for violation of the anti-trust law of Arkansas (act 1899, p. 50), where the complaint alleges that the defendant, while enagaged in business in this state, became and was "a member of a pool, trust, agreement, combination, confederation, or understanding with the corporations engaged in similar business, to regulate or fix the price or terms for insuring property" (the language quoted being the language of the act),—a demurrer on the ground that the complaint is insufficient in failing to aver that the pool, trust, agreement, etc., was formed for the purpose, or had the effect, of influencing the company's business in the state, will not be sustained. State v. Ætna F. Ins. Co. 66 Ark. 480, 51 S. W. 638.

A foreign insurance company doing business in Arkansas, which enters into an agreement with other insurance companies formed outside the state, for the purpose of fixing the rates of insurance in foreign countries, not intended to affect, and which does not affect, persons, property, or prices of insurance in the state, does not thereby subject itself to the penalty imposed by the act of March 6, 1899, upon any corporation transacting any kind of business in the state, which becomes a party to any pool or combination to fix or limit rates of insurance. State v. Lancashire F. Ins. Co. 66 Ark. 466, 45 L.R.A. 348, 51 S. W. 633.

Previous to the passage of the statute of Missouri providing that any corporation, either domestic or foreign, which should enter into any pool, trust, agreement, confederation, or understanding with any other corporation, person, or association to regu-

311; Randolph v. Builders' & Painters' Supply Co. 106 Ala. 510, 17 So. 721.

The right to make contracts in relation to his business is part of the liberty of the individual, protected by the 14th Amendment of the Federal Constitution.

McLean v. Arkansas, 211 U. S. 539–547, 53 L. ed. 315–319, 29 Sup. Ct. Rep. 206; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Welch v. Swasey, 214 U. S. 91, 105, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Louisville & N. R. Co. v. Baldwin, 85 Ala. 629, 7 L.R.A. 266, 5 So. 311.

Mr. **Thomas M. Stevens** submitted the cause for defendant in error. Messrs. Stevens & Lyons were on the brief:

The statute in question is constitutional.

Carroll v. Greenwich Ins. Co. 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. Rep. 66; Continental Ins. Co. v. Parkes, 142 Ala. 650, 39 So. 204; Fireman's Fund Ins. Co. v. Hellner, 159 Ala. 447, 49 So. 297, 17 A. & E. Ann. Cas. 793; Ætna F. Ins. Co. v. Kennedy, 161 Ala. 600, 135 Am. St. Rep. 160, 50 So. 73.

The statute in question is strictly a police regulation, and therefore presents no subject for Federal interference unless clearly arbitrary and unreasonable.

McLean v. Arkansas, 211 U. S. 546, 547, 53 L. ed. 319, 320, 29 Sup. Ct. Rep. 206; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633.

Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought in one of the courts of Alabama by the defendant in error, Hale, on a policy of fire insurance issued by the German Alliance Insurance Company, a New York corporation.

The policy covered "lumber and squared timber while stacked on the banks of Byrne's Mill pond, near Bay Minette, Baldwin county, Alabama, said lot of lumber and timber containing 300,000 feet," etc.

Upon the petition of the defendant, the case was removed into the circuit court of

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late or fix the price or premium to be paid for insuring property against loss by fire, lightning, or storm, or maintain such price when so fixed, should be deemed and adjudged guilty of a conspiracy to defraud, and liable to a penalty, an association of fire underwriters of the state had existed for the purpose of establishing and maintaining rates at which property in the state would be insured, and had in its employ a person to fix and maintain the rates. After the adoption of the statute, the association dissolved, but the person mentioned published a book, which he sold to the various insurance companies who were defendants in this proceeding, in which the rates were fixed, and a clerk in his office was made the secretary of a club at a city in the state; and the reports of all the agents doing business in that state were required by the rules of the club to be delivered to him, and he forwarded them to the several defendant companies. If he discovered that an agent had insured at a rate less than stated in the book mentioned, he reported it to the club and the general manager of the company represented by that agent, which resulted in the agent being disciplined. In an information in the nature of a quo warranto by the attorney general, the club was held to be a plain, palpable, but bungling, pool, trust, agreement, combination, confederation, and understanding organized to evade the anti-trust laws of Missouri, but wholly insufficient for such a purpose. It was held that what was done was done by the local agents, and all knew it, and their knowledge was the knowledge of their companies, and their acts the acts of their companies, and judgment of ouster was rendered, forbidding the several different insurance companies to do business in the state. State ex rel. Crow v. Firemen's Fund Ins. Co. 152 Mo. 1, 45 L.R.A. 363, 52 S. W. 595, supra.

While the unlawfulness of combinations such as those under consideration was recognized in Freed v. American F. Ins. Co. 90 Miss. 72, 11 L.R.A.(N.S.) 368, 122 Am. St. Rep. 307, 43 So. 947, it was held that such fact would not prevent a member thereof from suing on a claim, where its right to sue was wholly derivative, accruing under the doctrine of subrogation to the right of the insured.

So, a combination between fire insurance agencies, for the simple purpose of controlling the rates of premium to be charged for insurance, and thus restricting competition, is not of such illegality at common law as will *per se* confer a right of action upon persons injuriously affected by it. Such a combination, however, is void at common law, and so opposed to public policy that no agreements or contracts incident thereto, or arising therefrom and dependent thereon, will be enforced by the courts. Runck v. Cloud, 8 Ohio N. P. 436, 11 Ohio S. & C. P. Dec. 444.

In Liverpool & L. & G. Ins. Co. v. Clunie, 88 Fed. 160, the fact that an insurance company was a member of such an unlawful combination was held not to bar it from invoking the aid of equity to restrain the insurance commissioner of the state from unlawfully interfering with its business, where the right to interfere was not based on the claim that it was a member of the unlawful combination.

See also note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, on illegal trusts under modern anti-trust laws.

the United States for the southern district of Alabama, where a verdict was returned for $5,198.93 in favor of the plaintiff. For that amount judgment was rendered against the company. The circuit court suggested that the verdict was excessive, and that the motion for new trial would be granted, unless the plaintiff reduced the verdict to $4,112. The required reduction was made and the new trial denied. Northern P. R. Co. v. Herbert, 116 U. S. 642, 647, 29 L. ed. 755, 758, 6 Sup. Ct. Rep. 590.

The principal question presented by the 313]assignments of *error arises out of certain provisions of the Code of Alabama, as follows:

"§ 2619. Every contract or policy of insurance hereafter made or issued shall be construed to mean that, in the event of loss or damage thereunder, the assured or beneficiary thereunder may, in addition to the actual loss or damage suffered, recover 25 per cent of the amount of such actual loss, any provision or stipulation in such contract or policy to the contrary notwithstanding. Provided, at the time of the making of such contract or policy of insurance, or subsequently, before the time of trial, the insurer belonged to, or was a member of, or in any way connected with, any tariff association or such like thing, by whatever named called, or who had made any agreement or had any understanding with any other person, corporation, or association engaged in the business of insurance, as agent or otherwise, about any particular rate of premium which should be charged or fixed for any kind or class of insurance risk; and provided further, no stipulation or agreement in such contract or policy of insurance to arbitrate loss or damage, nor to give notice or make proofs of loss or damage, shall in any such case be binding on the assured or beneficiary, but right of action accrues immediately upon loss or damage.

"§ 2620. If it is shown to the reasonable satisfaction of the jury by a preponderance of the weight of the testimony that such insurer, at the time of the making of such agreement or policy of insurance, or subsequently, before the time of trial, belonged to, or was a member of, or in any way connected with, any tariff association or such like thing, by whatever name called, either in or out of this state, or had made any agreement or had any understanding, either in or out of this state, with any other person, corporation, or association engaged in the business of insurance, as agent or otherwise, about any particular rate of premium which should be charged or fixed 314]for any risk of *insurance on any person or property, or on any kind or class of insurance risk, they must, if they find for the assured or beneficiary, in addition to his actual damages, assess and add 25 per cent of the amount of such actual loss, and judgment shall be rendered accordingly, whether claimed in the complaint or not." Ala. Code 1896, §§ 2619, 2620; Id. 1907, §§ 4594, 4595.

At the time of the contract of insurance, the defendant corporation was connected with a tariff association which prescribed the rates of premium to be charged by its constituent members. The verdict and judgment against the company gave effect to that clause of the statute providing that, under every contract or policy of insurance, thereafter made or issued by any such association, the assured or beneficiary may, in addition to the actual loss or damage suffered, recover 25 per cent of the amount of such actual loss, any provision or stipulation in such contract or policy to the contrary notwithstanding.

The assignments of error present a question of practice which is supposed to be raised by those provisions of the policy which contained a covenant and warranty in these words:

"1st. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned. 2d. The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit, from date of inventory, as provided for in the first section of this clause, and during the continuance of this policy. 3d. The assured will keep such books and inventory, and *also the last preceding inventory, if[315 such has been taken, securely locked in a fireproof safe at night. In the event of failure to produce such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon. And defendant avers that the assured wholly disregarded the terms, stipulations and conditions of said policy in the following respects, to wit: 1st. He did not keep a set of books, as therein provided; 2d. He did not keep said books securely locked in a fireproof safe at night and at other times, as therein provided; 3d. He failed to produce said books for the in-

spection of the defendant after said alleged loss, wherefore said policy became and was null and void. And the defendant says by reason of the failure and refusal of said plaintiff to comply with the said covenant and warranty in the said particulars, the said plaintiff is not entitled to recover in this action, nor to have and maintain this action against the defendant."

The principal question arising on this writ of error is whether the above sections of the Alabama Code are consistent with the Constitution of the United States. The contention is that the provision allowing the insured or beneficiary in a named contingency to recover, in addition to the actual loss or damage suffered by him, 25 per cent of the amount of loss or damage so suffered,—any stipulation in the contract of insurance to the contrary notwithstanding,—deprives the company of its property without due process of law, and also denies to it the equal protection of the laws; thus, it is contended, violating the 14th Amendment of the Constitution of the United States.

In our opinion the statute is not liable to objection on constitutional grounds. The state—as we may infer from the words of the statute alone—regarded the fixing of insurance rates by self-constituted tariff 316]associations or combinations *as an evil against which the public should be guarded by such legislation as the state was competent to enact. This question was before the supreme court of Alabama, and the statute was there assailed as violating both the state and Federal Constitutions. That court held that the object of the legislature of Alabama was to prevent monopoly and to encourage competition in the matter of insurance rates, and that the statute was a legitimate exercise to that end of the police power of the state, not inconsistent with either the state or Federal Constitution. Constitutional Ins. Co. v. Parkes, 142 Ala. 650, 658, 659, 39 So. 204. The same view of the statute was taken by the state court in subsequent cases. Fireman's Fund Ins. Co. v. Hellner, 159 Ala. 447, 49 So. 297, 17 A. & E. Ann. Cas. 793; Ætna F. Ins. Co. v. Kennedy, 161 Ala. 600, 50 So. 73. We concur entirely in the opinion expressed by the state court, that the statute does not infringe the Federal Constitution, nor deprive the insurance company of any right granted or secured by that instrument. The business of fire insurance is, as everyone knows, of an extensive and peculiar character, and its management concerns a very large number of people, particularly those who own property and desire to protect themselves by insurance. We can well understand that fire insurance companies, acting together, may have owners of property practically at their mercy in the matter of rates, and may have it in their power to deprive the public generally of the advantages flowing from competition between rival organizations engaged in the business of fire insurance. In order to meet the evils of such combinations or associations, the state is competent to adopt appropriate regulations that will tend to substitute competition in the place of combination or monopoly. Carroll v. Greenwich Ins. Co. 199 U. S. 401, 411, 50 L. ed. 246, 250, 26 Sup. Ct. Rep. 66. Regulations having a real, substantial relation to that end, and which are not essentially arbitrary, cannot properly be characterized as a deprivation of property without due process of law. They are enacted *under the power[317 with which the states have never parted, of caring for the common good within the limits of constitutional authority. Insurance companies, indeed, all corporations, associations, and individuals, within the jurisdiction of a state, are subject to such regulations, in respect of their relative rights and duties, as the state may, in the exercise of its police power, and in harmony with its own and the Federal Constitution, prescribe for the public convenience and the general good. Jacobson v. Massachusetts, 197 U. S. 11, 27, 31, 49 L. ed. 643, 651, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 297, 43 L. ed. 702, 706, 19 Sup. Ct. Rep. 465; House v. Mayse, 219 U. S. 270, ante, 213, 31 Sup. Ct. Rep. 234.

Much stress is placed by the insurance company on that clause of the statute allowing the insured to recover, in addition to the actual loss or damage suffered, 25 per cent of the amount of such loss or damage, if the company, before or at the time of trial, belonged to or was connected with a tariff association that fixed rates. We do not think that this provision is in excess of the power of the state. As a means to effect the object of the statute,—the discouragement of monopoly or combination,—and the encouragement of competition in the matter of insurance rates,—the state adopted the regulations here in question. It was for the state, keeping within the limits of its constitutional powers, to say what particular means it would prescribe for the protection of the public in such matters. The court certainly cannot say that the means here adopted are not, in any real or substantial sense, germane to the end sought to be attained by the statute. Those means may not be the best that could have been devised, but the court cannot, for any such reason, declare them illegal or beyond the

power of the state to establish. So far as the Federal Constitution is concerned, the state could forbid, under penalty, combinations to be formed within its limits, by persons, associations, or corporations engaged in the business of insurance, for the purpose of fixing rates. But it is not bound 318] to go to that extent in its *legislation. It may, in its discretion, go only so far as to impose upon associations or corporations acting together in fixing rates, a liability to pay to the insured, as part of the recovery, a certain per cent beyond the actual loss or damage suffered, if, before or at the time of suit on the contract of insurance, it is made to appear that the company or corporation sued is part of or connected with a tariff rate association. Such a provision manifestly tends to discourage monopoly or combination and to encourage competition in a business in the conduct of which the general public is largely interested.

Equally without basis on which to rest is the contention that the statute violates the clause of the 14th Amendment, forbidding a state to "deny to any person within its jurisdiction the equal protection of the laws." We will assume, for the purposes of this case, that this company is within the jurisdiction of the Federal court, so as to entitle it to claim the benefit of that provision of the 14th Amendment. Blake v. McClung, 172 U. S. 239, 260, 43 L. ed. 432, 440, 19 Sup. Ct. Rep. 165. We are yet clearly of the opinion that the statute does not, within the meaning of the Constitution, deny the insurance company the equal protection of the laws. The statute applies only to associations or corporations that unite in fixing the rates of insurance to be charged by each constituent member of the combination. Looking at the evil to be remedied, that was such a classification as the state could legally make. It is neither unreasonable nor arbitrary within the rule that a classification must rest upon some difference indicating "a reasonable and just relation to the act in respect of which the classification is proposed." The legislature naturally directed its enactment against insurance companies or corporations which, before or at the time of trial, were found to be members of an insurance tariff association that fixed rates. No principle or classification required it to include insurance associations that were free 319] to act, in *the matter of rates, upon the merits of each application for insurance, unaffected by any agreement or arrangement with other companies. All insurance companies, persons, or corporations engaged in the business of insurance, as agent or otherwise, with associations, persons, or corporations which acted together in fixing rates, are placed by the statute upon an equality in every respect, and therefore it cannot rightfully be contended that the plaintiff in error is denied the equal protection of the laws. Whatever "liberty of contract" they had must have been exercised in subordination to any valid regulations the state prescribed for the conduct of their business. Statutes that apply equally to all of the same class and under like conditions cannot be held to deny the equal protection of the laws; for, as this court has adjudged, "the equal protection of the laws is a pledge of the protection of equal laws" to all under like circumstances. Yick Wo v. Hopkins, 118 U. S. 356, 367, 30 L. ed. 220, 221, 6 Sup. Ct. Rep. 1064; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730.

One of the assignments of error for this court, the ninth, is that the circuit court erred in sustaining the plaintiff's demurrer to the plea numbered two, in which reference was made to the above provisions, alleged to be embodied in the policy, and which make it the duty of the assured at stated times to take an inventory of stock on hand, and keep a set of books, to be securely locked in a fireproof safe at night. To that plea the plaintiff demurred upon these separate grounds: 1. It did not appear that the plaintiff was bound by the provision of the policy referred to in the plea. 2. The property insured was of such a character that the policy set up in the plea was not applicable thereto. 3. It did not appear that the property insured was of such a character that the provision of the policy, as set up in the plea, was applicable thereto. 4. It was not made to appear by the plea that there was any purchase, sales, and shipment or other business transacted from the time the *policy was issued[320 until the time of the loss which affected or related to the property insured. The demurrer was sustained, but no exception appears to have been taken to this action of the courts. The defendant did not stand upon his plea, and went to trial upon the merits of the case, without objection, and introduced evidence upon other issues in the case, but at the trial no evidence was offered or introduced on either side relating to the matters set out in the second plea. Under these circumstances, we are not required to consider the questions raised by that plea. On this record we may fairly assume that the defendant at the trial waived or abandoned the issues raised by the plea. Garrard v. Reynolds, 4 How. 123, 126, 11 L. ed. 903, 905; Weed v. Crane, 154 U. S. 570, and 19 L. ed. 712, 14 Sup. Ct. Rep. 1215.

Restricting this decision to the points hereinbefore discussed, the judgment must be affirmed.

Judgment affirmed.

WILLIAM W. BIERCE, Limited, Plff. in Err.,
v.
WILLIAM WATERHOUSE and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased.

(See S. C. Reporter's ed. 320–338.)

Appeal — scope of review — effect of earlier appeal to lower court.

1. The entire case is open for the consideration of the Federal Supreme Court on a writ of error to a territorial supreme court, to review a judgment of that court, which, on a second writ of error, affirmed a judgment below, entered pursuant to its mandate, issued on the first writ of error.

[For other cases, see Appeal and Error, 5649–5651, in Digest Sup. Ct. 1908.]

Appeal — scope of review — errors not considered by intermediate appellate court.

2. Errors assigned in the supreme court of a territory, but passed by it without decision, are open for review in the Federal Supreme Court on writ of error, if that court finds that the former court erred in reversing the judgment of the trial court upon the single error considered.

[Scope of appellate review, generally, see Appeal and Error, VIII., in Digest Sup. Ct. 1908.]

Judgment — parties and privies — principal and surety.

3. The surety on a redelivery bond in replevin cannot object that his liability was enlarged beyond his undertaking, so as to discharge him from liability, by the allowance of amendments to the declaration in replevin suit, increasing the alleged value of the property, where the issue as to the propriety of such amendments was in issue in the replevin suit, and was decided against the principal in such bond, and the penalty of the bond was not thereby exceeded.

[For other cases, see Judgment, III. k, 4, in Digest Sup. Ct. 1908.]

Appeal — finality of judgment below — effect of rehearing.

4. A judgment of the Hawaiian supreme court did not become final before the enactment of the act of March 3, 1905, and hence not reviewable in the Federal Supreme Court under that act, where, although the opinion was filed prior to that enactment, a petition for rehearing was duly filed and entertained by the court, and was not denied until after the passage of such statute.

[For other cases, see Appeal and Error, I. d, 9, in Digest Sup. Ct. 1908.]

Principal and surety — release of surety — change in remedy or procedure.

5. A redelivery bond in replevin must be regarded as having been entered into subject to such changes in remedy or procedure as do not change the contractual rights of the parties, *e. g.*, the statutory allowance of a writ of error from the Federal Supreme Court, to review the final judgment in the replevin suit, where no such review had theretofore been permissible, or subsequent legislation authorizing the issuance of an execution during the pendency of a writ of error to review such judgment if the defendant should be ruled to give a new redelivery bond upon an affidavit of insufficiency.

[For other cases, see Principal and Surety, III., in Digest Sup. Ct. 1908.]

Action — prematurity — suit on redelivery bond.

6. An action upon the redelivery bond in replevin is not premature because started during the pendency of a writ of error in the supreme court of Hawaii, to review the judgment in the replevin suit, where, pursuant to Hawaii Laws 1903, chap. 32, §§ 17–19, enacted after the making of the redelivery bond, an execution had been issued and returned unsatisfied, because of the failure to give a new redelivery bond upon an affidavit of insufficiency.

[For other cases, see Action or Suit, I. b, in Digest Sup. Ct. 1908.]

Trial — question for jury — tender.

7. Whether the evidence in a suit on a redelivery bond in replevin shows a tender of redelivery of the property by the principal obligor after judgment requiring such return is for the jury to determine, upon proper instructions.

[For questions of law and fact, see Trial, VI. c, in Digest Sup. Ct. 1908.]

[No. 508.]

Argued December 12, 1910. Decided January 16, 1911.

IN ERROR to the Supreme Court of the Territory of Hawaii to review a judgment which affirmed, on a second writ of error, a judgment of the Circuit Court for

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NOTE.—As to review by the United States Supreme Court of territorial decisions—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

As to what judgments or decrees are final for purposes of review—see notes to Brush Electric Co. v. Electric Improv. Co. 2 C. C. A. 379; Central Trust Co. v. Madden, 17 C. C. A. 238; Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co. 28 C. C. A. 482; Gibbons v. Ogden, 5 L. ed. U. S. 302; and Schlosser v. Hemphill, 49 L. ed. U. S. 1001.

On release of surety—see notes to Bank of Uniontown v. Mackey, 35 L. ed. U. S. 486, and Griswold v. Hazard, 35 L. ed. U. S. 679.

On premature commencement of actions—see notes to American Bonding & T. Co. v. Gibson County, 76 C. C. A. 159; and Trinidad v. Hokasona, 102 C. C. A. 424.

the First Circuit, in that territory, in favor of defendants *non obstante veredicto* in an action upon a redelivery bond in replevin. Reversed and remanded, with directions to affirm the judgment of the trial court, entered on the verdict in favor of plaintiff.

See same case below, 19 Haw. 594.

Statement by Mr. Justice **Lurton:**

This was an action for breach of the condition of a redelivery or return bond executed by the defendant to a certain replevin suit instituted in a circuit court for the territory of Hawaii. The bond was in these words:

Circuit Court, Third Circuit, Territory of Hawaii.

$1 stamp.

William W. Bierce, Limited, a Corporation, Plaintiff,

v.

Clinton J. Hutchins, Trustee.

Replevin.

Return Bond.

Know all men by these presents:

That we, Clinton J. Hutchins, trustee, as principal, and Henry Waterhouse and 322] Arthur B. Wood, as sureties, *are held and firmly bound unto William Bierce Company, Limited, its successor or successors and assigns, in the sum of thirty thousand (30,000) dollars, for the payment of which, well and truly to be made, we bind ourselves, our successors herein and administrators, jointly and severally, firmly by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce, Limited, has begun in the circuit court of the third circuit of the territory of Hawaii a replevin suit against Clinton J. Hutchins, trustee, to recover from him certain property specifically set forth in the bill of complaint filed in said suit, and of the value of $15,000, as stated in the affidavit filed therein, and has requested that the said property be taken possession of by the high sheriff of the territory of Hawaii, or his deputies, and turned over to said plaintiff; and whereas said defendant is desirous of having said property returned, and has required the return thereof from said high sheriff and his deputies:

Now, therefore, if the said property and all thereof shall be well and truly delivered to said plaintiff, if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause, be recovered against the defendant, then this obligation to be null and void; otherwise to be and remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 21st day of July, A. D. 1903.

(Signed) Clinton J. Hutchins, Trustee.
(Signed) Henry Waterhouse, Surety.
(Signed) Arthur B. Wood, Surety.

The foregoing bond is approved as to its sufficiency of sureties.

Dated July 21, 1903.

(Signed) A. M. Brown,
High Sheriff.

*The replevin suit referred to was[323 instituted July 20, 1903, by a corporation styled William W. Bierce, Limited, against Clinton J. Hutchins, trustee, and was for the recovery of certain railway material which had been conditionally sold to the Kona Sugar Company, another corporation. The property of the latter company, including this material, was acquired at a receiver's sale by Hutchins, trustee, with notice that the title had been retained by the Bierce Company, and that the property had not been paid for. The plaintiff's affidavit (Rev. Laws [Hawaii] § 2102) stated the value of the material which it was sought to reclaim at $15,000, and a bond in double that sum was duly executed, with the usual conditions of such replevin bonds. The defendant Hutchins thereupon, in order to retain possession of the material claimed, executed a redelivery or return bond under § 2112, Rev. Laws (Hawaii), being the bond upon which the present action is based.

The replevin suit resulted, on March 19, 1904, in a judgment for the plaintiff and against the defendant Hutchins, trustee, for the return of the property and damages for its detention, or in default of return, that the defendants pay the value of the property, which was adjudged to be $22,000.

Inasmuch as the defense by the surety in the action upon the return bond referred to grows in part out of matters which were litigated in the replevin suit, we must state somewhat fully the proceedings in that action. That case, upon a bill of exceptions, was taken to the supreme court of Hawaii. Certain of the exceptions taken by the defendant Hutchins were sustained in a judgment rendered January 28, 1905, one of which was that the trial court had erred in not rendering judgment for the defendant *non obstante veredicto.* See William W. Bierce v. Hutchins, 16 Haw. 418. A motion for a rehearing was disposed of in that court April 29, 1905 (see 16 Haw. 717). On May 6, 1905, *a judgment was[324 entered reversing the judgment of the circuit court, and remanding the case, with direction to render a judgment for defendant *non obstante verdicto.* Thereupon an

appeal to this court was allowed, where the judgment of the Hawaiian supreme court was reversed, for the reasons appearing in the opinion reported in 205 U. S. 340, 51 L. ed. 828, 27 Sup. Ct. Rep. 524, and the case remanded to that court. Thereupon the supreme court of Hawaii held that the defendant Hutchins was then entitled to have a hearing upon other exceptions not passed upon at the first hearing. These were therefore heard and overruled. 18 Haw. 374. An appeal from that judgment was taken to this court, and dismissed, as not from a final judgment. 211 U. S. 429, 53 L. ed. 267, 29 Sup. Ct. Rep. 122.

Pending the review proceedings above referred to, the plaintiff, upon cause shown, obtained a rule on the defendant Hutchins to give a new redelivery bond. Failing in this, an execution issued to recover the property which the defendant had been directed to return, and for the damage for detention and costs. These damages, amounting to $1,050, and the taxed costs, were paid and may be dropped from consideration. The sheriff returned that he was unable to obtain possession of the materials for which the action had been instituted, and therefore returned the execution unsatisfied.

Pending the review proceedings already stated this action was begun against the obligors and the executors of Henry Waterhouse, one of the sureties upon the return bond given by Hutchins, as stated. Wood, the other surety, was sued, but was not found. Hutchins, for reasons immaterial, was dropped out. Upon the issued joined there was a verdict and judgment against the executors of Waterhouse for $22,000, the value of the property which the obligor had failed to return, as required by the judgment in the replevin suit, that being the value adjudged in that action, together 325]with interest and costs of former *actions not paid, the whole aggregating $28,156.74, for which there was judgment.

A bill of exceptions was taken from this judgment to the supreme court of Hawaii, which court, passing over the great majority of exceptions without ruling, sustained one which assigned error in the overruling of the motion of the defendants below for judgment *non obstante veredicto*.

The case having been remanded for judgment pursuant to the opinion and mandate, there was a judgment notwithstanding the verdict for the defendant. This in turn was affirmed by the supreme court of the territory, and the present writ is sued out to review that judgment.

Mr. **Frederic D. McKenney** argued the cause, and, with Mr. Henry W. Prouty, filed a brief for plaintiff in error:

As a general rule, amendments to the complaint or declaration may be made in actions of replevin, when authorized by statute, and the *ad damnum* increased, without affecting the liability of the sureties on the replevin bond or redelivery bond, so long as no new cause of action is introduced by the amendment, whereby the liability of the surety would be increased beyond the amount of the penalty named in the bond.

Wood v. Denny, 7 Gray, 540; Townsend Nat. Bank v. Jones, 151 Mass. 454, 24 N. E. 593; Jamieson v. Capron, 95 Pa. 15; Hare v. Marsh, 61 Wis. 435, 50 Am. Rep. 141, 21 N. W. 267; Evers v. Sager, 28 Mich. 52; Merrick v. Greely, 10 Mo. 106; Hanna v. International Petroleum Co. 23 Ohio St. 622; New Haven Bank v. Miles, 5 Conn. 587; Carr v. Sterling, 114 N. Y. 558, 22 N. E. 37.

In an action on a replevin or redelivery bond, the judgment in the replevin suit is conclusive upon the sureties on the bond.

23 Cyc. Law & Proc. p. 1278; Shepard v. Pebbles, 38 Wis. 378; Cobbey, Replevin, § 1331; Bradford v. Frederick, 101 Pa. 445; Jamieson v. Capron, 95 Pa. 15; Hocker v. Woods, 33 Pa. 466; Tracy v. Maloney, 105 Mass. 90; Cutter v. Evans, 115 Mass. 27; Knight v. Dorr, 19 Pick. 48; Smith v. Mosby, 98 Ind. 445; Schott v. Youree, 142 Ill. 243, 31 N. E. 591; Kennedy v. Brown, 21 Kan. 171; Council v. Averett, 90 N. C. 168; Mason v. Richards, 12 Iowa, 74; Richardson v. People's Nat. Bank, 57 Ohio St. 308, 48 N. E. 1100; Christiansen v. Mendham, 45 App. Div. 554, 61 N. Y. Supp. 326; Waldrop v. Wolff, 114 Ga. 620, 40 S. E. 830; Irwin v. Backus, 25 Cal. 214, 85 Am. Dec. 125; Braiden v. Mercer, 44 Ohio St. 339, 7 N. E. 155; Heard v. Lodge, 20 Pick. 58, 32 Am. Dec. 197; 2 Brandt, Suretyship & Guaranty 3d ed. § 563; Parish v. Smith, 66 S. C. 424, 45 S. E. 16; Stovall v. Banks, 10 Wall. 583, 19 L. ed. 1036.

The case at bar is clearly distinguishable from an action on a replevin bond following a judgment of dismissal of the replevin suit for want of prosecution, where there is no trial on the merits.

Smith v. Mosby, 98 Ind. 448.

Such a case as that at bar has been distinguished in Bridgeport F. & M. Ins. Co. v. Wilson, 34 N. Y. 280, from a case where the covenant is one of general indemnity, merely, against claims or suits.

Parties to contracts have no vested right to insist that legislatures, during the pendency of said contract, or the continuance of rights and liabilities thereunder, shall refrain from adding to or taking from statutory remedies theretofore provided for

the enforcement of or defense against such rights and liabilities, provided always that adequate remedy for such enforcement or the making of defense thereto shall remain.

Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143.

The statute of limitations commences to run as against a right of action for breach of the condition of a replevin or delivery bond from the date of the judgment for a return of the property, which in this case was March 19, 1904.

Cobbey, Replevin, 2d ed. §§ 1299, 1311, 1313, 1314; Hagan v. Lucas, 10 Pet. 400, 9 L. ed. 470; Lovejoy v. Bright, 8 Blackf. 206; Evans v. King, 7 Mo. 411; Lockwood v. Perry, 9 Met. 444; Burkle v. Luce, 1 N. Y. 163; M'Rae v. M'Lean, 3 Port. (Ala.) 138; Delay v. Yost, 59 Kan. 496, 53 Pac. 482.

Every question of law raised in the lower court, and presented by the record before this court, is open for the consideration of this court, and its judgment in the premises should be accepted as final and conclusive of the entire matter.

Tyler v. Magwire, 17 Wall. 253, 283, 21 L. ed. 576, 583; Stewart v. Salamon, 97 U. S. 361, 24 L. ed. 1044; Illinois v. Illinois C. R. Co. 184 U. S. 77, 91, 46 L. ed. 440, 446, 22 Sup. Ct. Rep. 300.

Mr. **David L. Withington** argued the cause, and, with Messrs. William R. Castle, W. A. Greenwell, and Alfred L. Castle, filed a brief for defendants in error:

The bond was given in an ancillary proceeding to secure the possession of property before judgment. The foundation of this ancillary proceeding is an affidavit in which the plaintiff fixes the actual value, and the contract is entered into with reference to the value so fixed.

Ah Leong v. Kee You, 8 Haw. 418; Achi v. Alapai, 9 Haw. 592; 34 Cyc. Law & Proc. p. 1429; Smith v. Fisher, 13 R. I. 624; Simpson v. Wilcox, 18 R. I. 40, 25 Atl. 391.

This is a statutory bond, into which all existing provisions of law enter, including that under which the plaintiff fixes the actual value on which the bond is conditioned. The sureties can rely upon this statutory provision, and in order to be bound to an increased value, or by subsequent legislation, the intent of the surety to be bound must appear on the face of the bond.

Lee v. Hastings, 13 Neb. 508, 14 N. W. 476; Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; Von Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403; West River Bridge Co. v. Dix, 6 How. 507, 12 L. ed. 535; Walker v. Whitehead, 16 Wall. 314, 21 L. ed. 357; Barnitz v. Beverly, 163 U. S. 118, 127, 41 L. ed. 93, 99, 16 Sup. Ct. Rep. 1042; Miller v. Stewart, 9 Wheat. 680, 6 L. ed. 189; United States v. Kirkpatrick, 9 Wheat. 720, 6 L. ed. 199; United States v. Powell, 14 Wall. 493, 20 L. ed. 726; Mix v. Vail, 86 Ill. 40; Berwick v. Oswald, 3 El. & Bl. 678.

The defendants' contract is to be strictly construed, and doubts are resolved in favor of the surety.

Smith v. United States, 2 Wall. 219, 17 L. ed. 788; United States v. Price, 9 How. 84, 91, 13 L. ed. 56, 59; Crane v. Buckley, 203 U. S. 441, 447, 51 L. ed. 260, 263, 27 Sup. Ct. Rep. 156; United States v. Hough, 103 U. S. 72, 26 L. ed. 305; Magee v. Manhattan L. Ins. Co. 92 U. S. 93, 23 L. ed. 699; Prairie State Nat. Bank v. United States, 164 U. S. 227, 41 L. ed. 412, 17 Sup. Ct. Rep. 142; United States v. Boecker, 21 Wall. 652, 22 L. ed. 472; Stull v. Hance, 62 Ill. 55; Holloway v. Richardson, 18 Haw. 525.

The surety has a right to stand upon the exact terms of his contract. The actual value fixed by the affidavit was an exact term of his contract, made so by statute. A variation from this term is fatal to his liability.

Recse v. United States, 9 Wall. 13, 19 L. ed. 541; Bierce v. Waterhouse, 19 Haw. 405; Cross v. Allen, 141 U. S. 528, 35 L. ed. 843, 12 Sup. Ct. Rep. 67; United States Fidelity & G. Co. v. United States, 191 U. S. 416, 48 L. ed. 242, 24 Sup. Ct. Rep. 142; Prairie State Nat. Bank v. United States, 164 U. S. 227, 41 L. ed. 412, 17 Sup. Ct. Rep. 142; Leggett v. Humphreys, 21 How. 66, 76, 16 L. ed. 50, 54; Bauer v. Cabanne, 105 Mo. 118, 16 S. W. 521; State v. Medary, 17 Ohio, 565; Robeson v. Thompson, 9 N. J. L. 97.

The plaintiff is estopped by its affidavit, on the faith of which the surety contracted. It is a solemn admission on its part, which it cannot retract as against these defendants.

1 Greenl. Ev. 16th ed. §§ 22, 27, pp. 117, 122; Parker v. Simonds, 8 Met. 212; Kafer v. Harlow, 5 Allen, 348; Leighton v. Brown, 98 Mass. 515; Huggeford v. Ford, 11 Pick. 223; Swift v. Barnes, 16 Pick 194; Vulcan Iron Works v. Cyclone Steam Snow-Plow Co. 48 Fed. 652; Smith v. Packard, 39 C. C. A. 294, 98 Fed. 793; Weyerhauser v. Foster, 60 Minn. 224, 61 N. W. 1129; Wiseman v. Lynn, 39 Ind. 259; Trimble v. State, 4 Blackf. 437; Capital Lumbering Co. v. Learned, 36 Or. 548, 78 Am. St. Rep. 792, 59 Pac. 454; Butts v. Woods, 4 N. M. 343, 16 Pac. 618; Wells, Replevin, § 453, pp. 251, 252, § 569, pp. 310, 311, § 660, p. 360; Tuck v. Moses, 58

Me. 477; Washington Ice Co. v. Webster, 125 U. S. 426, 31 L. ed. 799, 8 Sup. Ct. Rep. 947.

The better rule is that any increase in the pecuniary obligation, without assent, discharges the surety.

Sage v. Strong, 40 Wis. 575; Tyler Min. Co. v. Last Chance Min. Co. 32 C. C. A. 498, 61 U. S. App. 193, 90 Fed. 15, 19 Mor. Min. Rep. 525; Langley v. Adams, 40 Me. 125; Morse v. Sleeper, 58 Me. 331; Ruggles v. Berry, 76 Me. 262; Willis v. Crooker, 1 Pick. 205.

The petition for rehearing pending in the supreme court would not have authorized an appeal, although acted on after March 3, 1905.

Harrison v. Magoon, 205 U. S. 501, 51 L. ed. 900, 27 Sup. Ct. Rep. 577.

Even if the sureties' principal could waive the question of jurisdiction in the Supreme Court of the United States, it could not be waived as to the surety.

Oshkosh Waterworks Co. v. Oshkosh, 106 Wis. 83, 81 N. W. 1040, 187 U. S. 437, 47 L. ed. 249, 23 Sup. Ct. Rep. 234.

If the amendment to the organic act applied, then the granting of the new right of appeal to another jurisdiction extended the liability of the surety, exposed him to the judgment of a court with reference to which he did not contract, and imposed upon him a new pecuniary obligation, *viz.*, the costs of that court.

Lafayette v. James, 92 Ind. 240, 47 Am. Rep. 140; Bryson v. McCreary, 102 Ind. 1, 1 N. E. 55; Pritchard v. Norton, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547; Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; Aycock v. Martin, 37 Ga. 124, 92 Am. Dec. 64; Von Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190; Shapleigh v. San Angelo, 167 U. S. 646, 42 L. ed. 310, 17 Sup. Ct. Rep. 957; Butz v. Muscatine, 8 Wall. 583, 19 L. ed. 493; Dillingham v. Hook, 32 Kan. 189, 4 Pac. 168; McGahey v. Virginia, 135 U. S. 693, 34 L. ed. 314, 10 Sup. Ct. Rep. 972; Christmas v. Russell, 5 Wall. 290, 18 L. ed. 475; Daniels v. Tearney, 102 U. S. 419, 26 L. ed. 187; Barnitz v. Beverly, 163 U. S. 118, 127, 41 L. ed. 93, 99, 16 Sup. Ct. Rep. 1042; Clark v. Reyburn, 8 Wall. 322, 19 L. ed. 356; Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858; Planters' Bank v. Sharp, 6 How. 301, 12 L. ed. 447; Phinney v. Phinney, 81 Me. 450, 4 L.R.A. 348, 10 Am. St. Rep. 266, 17 Atl. 405; People v. Jansen, 7 Johns. 332, 5 Am. Dec. 275; McCurdy v. Brown, 8 Mo. 550; Schuster v. Weiss, 114 Mo. 158, 19 L.R.A. 182, 21 S. W. 438; State use of Carroll County v. Roberts, 68 Mo. 234, 30 Am. Rep. 788; Nofsinger v. Hartnett, 84 Mo. 549; Brookshier v. McIlrath, 112 Mo. App. 687, 87 S. W. 607; Mix v. Vail, 86 Ill. 40; Alwood v. Mansfield, 81 Ill. 314; Lapsley v. Brashears, 4 Litt. (Ky.) 47; Haldeman v. Powers, 103 Ky. 525, 45 S. W. 662; Reusch v. Demass, 34 Mich. 95; Stockwell v. Kemp, 4 McLean, 80, Fed. Cas. No. 13,465; Woodson v. Johns, 3 Munf. 230; Blair v. Williams, 4 Litt. (Ky.) 35; Jeter v. Langhorne, 5 Gratt. 193; Bailey v. McCormick, 22 W. Va. 95; Winston v. Rives, 4 Stew. & P. 269.

The action was prematurely brought against the executors, the claim being still in their hands for consideration, not having been rejected.

Ellsworth v. Thayer, 4 Pick. 122; Goff v. Kellogg, 18 Pick. 256; Espy v. Comer, 76 Ala. 501; Hentsch v. Porter, 10 Cal. 555; Keenan v. Saxton, 13 Ohio, 41; Dredla v. Baache, 60 Neb. 655, 83 N. W. 916; Fulton v. Black, 21 Tex. 424; Walters v. Prestidge, 30 Tex. 71; 18 Cyc. Law & Proc. p. 503; Hoyt v. Bonnett, 50 N. Y. 543.

Mr. Justice **Lurton**, after making the above statement, delivered the opinion of the court:

The right to have this judgment reviewed by this court involves the review of the judgment upon which the mandate issued, and necessarily brings here the first as well as *the second bill of exceptions and[332 transcript as one case. As it appears from the first bill of exceptions and the opinion and judgment in that case that the plaintiffs in error in that case, the defendants in error here, had taken many exceptions to the judgment against them which were not passed upon by the supreme court of the territory, it must follow that, if we shall find that that court erred in reversing the judgment upon the single error considered, that the other exceptions and errors not considered are now open for review, inasmuch as the judgment might have been reversible for other errors not considered. The practice adopted by the supreme court of the territory of passing without deciding other errors assigned upon a judgment is not approved, since it is likely to involve further review proceedings and duplicate appeals. Especially is this so in cases which are subject to the appellate jurisdiction of this court. The single ground upon which the supreme court of Hawaii reversed the judgment in favor of the Bierce Company, and against the executors of the surety upon the return bond made by the defendants in the replevin suit, was that, by two amendments made to the declaration in the

replevin suit, the value of the property which the plaintiff sought to reclaim was increased from $15,000 to $22,000, whereby, as the court below held, the liability of the sureties was enlarged beyond their undertaking. The effect of this was held to discharge the sureties. In this we think the court erred.

The plaintiff, to make out its case, introduced in evidence, together with other matters, the pleadings, the judgment, the return of the sheriff upon the execution for a return of the property unsatisfied, and the return bond. The judgment, as before stated, was for a return of the property and costs, and $1,045, damages for detention, and, in default of a delivery of the property, that the defendant Hutchins, trustee, pay the value thereof, found to be $22,000, for which there was judgment.

333] *The penalty of the return bond was $30,000. The damages laid in the complaint, as amended, were $28,156.74, and the judgment in the trial court upon the verdict was for the full damages claimed.

At the close of all the evidence, the defendants moved the court to instruct a verdict for the defendants. This motion was based upon several grounds. The principal one was that the transcript of the record in the replevin action showed (a) that the plaintiff in that action had, in the affidavit required by § 2102, Rev. Laws (Hawaii), executed before the issuance of the writ of replevin, stated the value of the property claimed to be $15,000; (b) that the penalty of the replevin bond was in double this value; (c) that the return bond recited that the value of the property claimed had been stated in the complaint in the replevin proceeding to be $15,000; (d) that the complaint had been subsequently amended so as to state the actual value to be $20,000, and a second time amended so as to state the actual value to be $22,000; and that the legal effect of these amendments was to release and discharge the sureties.

The motion for an instructed verdict was overruled and the case submitted to the jury, who found the actual value of the property claimed to be $22,000, and for this there was an alternative judgment, as stated before.

After verdict the defendants moved a judgment *non obstante veredicto* upon like grounds. This too was denied.

On the appeal of the defendants to the supreme court of Hawaii, the action of the trial court in allowing the amendment of the complaint so as to increase the value of the property in the manner stated was assigned as error. Upon this matter the supreme court said:

"The only exceptions to rulings prior to the judgment on which the defendant relied in argument are (1) to allowing the plaintiff to amend its complaint by changing the averment of the value of the property, first from $15,000 to $20,000, and then to $22,000. . . .

*"The amendments were properly al-[334 lowed under the statute (Rev. Laws, § 1738). Before the property was delivered to the plaintiff, the defendant obtained a return of it to himself upon his statutory bond in double the value of the property as originally stated by the plaintiff. It does not appear that the defendant's rights were affected by the amendment increasing the value." William W. Bierce v. Hutchins, 18 Haw. 511, 522.

This brings us to the proposition as to whether a question thus once litigated and decided in the replevin suit is open for relitigation by the surety when sued upon the return bond. The surety on such a bond, given in the course of a judicial proceeding, is represented in that proceeding by his principal. That the court possessed the power of allowing an amendment which introduced no new cause of action is plain. The surety became such in contemplation of the possible exercise of that power. The penalty of the bond was not exceeded, and an increase in the *ad damnum* did not introduce a new cause of action. Townsend Nat. Bank v. Jones, 151 Mass. 454, 24 N. E. 593. By the execution of the bond, the surety consented to become responsible to the amount of the penal sum therein named.

The only possible objection lay in the question as to whether the plaintiff was estopped from laying the damages in excess of the value of the property stated in the original complaint or affidavit. There are cases which hold that, in the replevin action, the plaintiff, having himself fixed the value of the property claimed by an affidavit, is estopped thereby from showing that it is of a less value, if he failed in his suit, though the defendant may show, if he can, that it was of a greater value. Washington Ice Co. v. Webster, 125 U. S. 426, 31 L. ed. 799, 8 Sup. Ct. Rep. 947. But we are not disposed to think that a plaintiff in such a suit may not show, especially when, as here, the defendant upon a return bond was suffered to retain the possession, that he had mistakenly *undervalued[335 the property. We have been cited to no authorities which extend the principle of estoppel to shut out such an amendment of the *ad damnum* clause of the complaint in a replevin action. However this may be, the questions were directly in issue in the replevin suit, and decided against the defendant therein.

One who becomes a surety for the per-

formance of the judgment of a court in a pending case is represented by his principal, and is bound by the judgment against his principal within the limits of his obligation. Washington Ice Co. v. Webster, 125 U. S. 426, 444, 446, 31 L. ed. 799, 806, 807, 8 Sup. Ct. Rep. 947; Stovall v. Banks, 10 Wall. 583, 19 L. ed. 1036.

The issue as to whether the value of the property redelivered to the defendants was greater than alleged in the plaintiff's affidavit and claimed in the original complaint, as well as whether the amendment of that complaint was such as to change the cause of action, were issues made and decided against the principal in the bond upon which the sureties were bound, and cannot be relitigated, in the absence of fraud and collusion, by a surety when sued upon the bond. Townsend Nat. Bank v. Jones, 151 Mass. 454, 459, 24 N. E. 593; Greenlaw v. Logan, 2 Lea, 185; Kennedy v. Brown, 21 Kan. 171; Hare v. Marsh, 61 Wis. 435, 50 Am. Rep. 141, 21 N. W. 267; Mason v. Richards, 12 Iowa, 74.

The motion of the executors of Waterhouse in the trial court for a judgment *non obstante veredicto* was predicated upon several distinct grounds. To the action of the trial court in overruling this motion exceptions were duly taken, and this action was made the subject of distinct assignments of error upon the writ of error to the supreme court of Hawaii. That court, as we have already seen, considered only such of the grounds relied upon as raised the question of the effect of the increase of the plaintiff's *ad damnum* clause from $15,000 to $22,000. Concluding that the necessary legal effect of that amendment of the 336]complaint *was to relieve the sureties upon the return bond, it reversed the judgment and remanded, with direction to give judgment for the said executors, notwithstanding the verdict against them. See 19 Haw. 398.

The learned counsel for the executors have insisted that if we shall conclude that the action of the supreme court of Hawaii is not to be supported upon the single ground considered by it, that it is then the duty of this court to consider the grounds for the motion not passed upon, and if upon any one of them the judgment of the supreme court of Hawaii may be sustained, its judgment should not be disturbed. Upon this contention each of the several grounds upon which such motion was based has been covered by the briefs filed by the present defendants in error.

Among the grounds for a judgment notwithstanding the verdict, not considered, was, that the judgment of the supreme court of Hawaii, reversing the judgment in favor of William W. Bierce, Limited, against Hutchins, trustee, was final as to the surety upon the return bond, and was not subject, so far, at least, as the surety was concerned, to be reviewed or set aside by any writ of error to this court, and that the judgment of this court (205 U. S. 340, 51 L. ed. 828, 27 Sup. Ct. Rep. 524), reversing the judgment of the Hawaiian supreme court, should not in anywise affect the present defendants in error as representatives of Waterhouse, one of the sureties upon the return bond. But the judgment of the Hawaiian supreme court was not final prior to the act of Congress referred to. It is true that the opinion of the Hawaiian court reversing the judgment of the Hawaiian circuit court was filed on January 28, 1905, a date prior to the act of Congress referred to. But the record shows that thereupon a petition for rehearing was filed, and that a rehearing was denied April 29, 1905 (see William W. Bierce v. Hutchins, 16 Haw. 717), and that the final judgment, which was reversed by this court, was not rendered until May 6, 1905, a date after the law referred to. The effect of the pending petition *for a rehearing, if filed in due[337 time and entertained by the court, as was the case, was to prevent the judgment from becoming final and reviewable until disposed of. Aspen Min. & Smelting Co. v. Billings, 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 4; Re McCall, 76 C. C. A. 430, 145 Fed. 898. Since, therefore, there was no final judgment prior to the going into effect of the act of Congress of March 3, 1905 [33 Stat. at L. 1035, chap. 1465], the pending litigation was subject to the power of Congress to allow a review after final judgment, although no such review had theretofore been admissible. No fundamental right was thereby denied and the bond must be regarded as having been entered into subject to such change in remedy or procedure as did not change the contractual rights of the parties.

It is next claimed that this action upon the return bond was premature, because started during the pendency of the defendant's writ of error in the supreme court of Hawaii from the judgment in the replevin case. But that writ did not annul the judgment. The Hawaiian act of 1903, chap. 32, §§ 17, 18, and 19, Rev. Laws of Hawaii, 1905, §§ 1861, 1864, and 1865, provided for the issuance of an execution if the defendant should be ruled to give a new return bond upon an affidavit of insufficiency. This was done and the objection of the defendant overruled. An execution issued, which was duly returned unsatisfied. The contention that this act of 1903 did not go into force until after the execution of the return bond

has no merit. Such a bond is always entered into subject to the possibility of changes in the law of procedure which do not change the contract. The defendant refused to give the new bond required, and, under the act referred to, an execution was issued, which was returned unsatisfied. This fact authorized an immediate suit upon the return bond. There was no error in holding that the suit was not premature under the act referred to.

Another group of assignments relate to an alleged tender of redelivery of the property 338]by Hutchins, trustee, after *the judgment requiring a return. The insistence was and is that there should have been a directed verdict for the defendant upon the evidence showing such tender and a rejection by the plaintiff. The letter in evidence making a tender was not an unequivocal tender. There was also evidence tending to show the existence of obstacles to a repossession, which it was the duty of the defendant to have removed; and also evidence of a conveyance by the defendant of record, which clouded the title. There was an absence of evidence tending to show any active exertion to restore the plaintiff's possession, and no evidence that the plaintiff was ever actually put in repossession. The question was one for the jury, who found for the plaintiff. The charge was full and fair.

There were a vast number of errors assigned. We have referred to those which were either pressed in argument or have otherwise been deemed of such importance as to require particular notice. Those not referred to have been considered, with the result that we find none of them well taken.

The conclusion we reach is that the judgment of the Supreme Court for the territory of Hawaii, reversing the judgment of the Circuit Court, and directing a judgment *non obstante veredicto*, was erroneous. The second judgment, affirming the judgment of the Circuit Court upon its mandate, is also erroneous.

The case must be remanded, with direction to set both judgments aside, and affirm the judgment of the trial court in favor of the plaintiff, William W. Bierce, Limited.

Reversed.

339]*LAWRENCE E. SEXTON, as Trustee in Bankruptcy of Kessler & Company, Appt.,

v.

LEOPOLD LOUIS DREYFUS, Louis Louis Dreyfus, and Charles Louis Dreyfus, Composing the Firm of Louis Dreyfus & Company. (No. 662.)

SAME

v.

LLOYDS BANK, Ltd. (No. 663.)

(See S. C. Reporter's ed. 339–346.)

Bankruptcy — secured creditors — application of proceeds of sale.

1. Secured creditors of a bankrupt, selling their security after the filing of the petition in bankruptcy, and finding the proceeds insufficient to pay the whole amount of their claims, are not entitled to apply such proceeds first to interest accrued since the filing of the petition, then to the principal debt, and then prove for the balance, although, by the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 67d, liens remain unaffected by that statute, and the value of securities is, by § 57h, to be determined by converting them into money, "according to the terms of the agreement."

[Secured creditors in bankruptcy, see Bankruptcy, X. c, 2, in Digest Sup. Ct. 1908.]

Bankruptcy — secured creditors — application of interest and dividends accruing on security.

2. Interest and dividends accruing upon pledged securities after the filing of a petition in bankruptcy against the pledgeor may be first applied by the pledgees to the after-accruing interest upon the debt.

[Secured creditors in bankruptcy, see Bankruptcy, X. c, 2, in Digest Sup. Ct. 1908.]

[Nos. 662 and 663.]

Submitted January 6, 1911. Decided January 23, 1911.

APPEALS from the United States Circuit Court of Appeals for the Second Circuit to review decrees which affirmed decrees of the District Court for the Northern District of New York, affirming orders of the referee in bankruptcy, permitting secured creditors to apply the proceeds of the sale of the securities first to interest accrued since the filing of the petition, then to the principal debt, and to prove for the balance. Reversed.

See same case below, 180 Fed. 979.

The facts are stated in the opinion.

Messrs. **Wallace Macfarlane** and **George H. Gilman** submitted the cause for appellant.

Mr. **Frederic R. Coudert** submitted the cause for Dreyfus & Company.

Mr. **Rufus W. Sprague, Jr.**, submitted the cause for Lloyds Bank, Ltd.

Mr. Justice **Holmes** delivered the opinion of the court:

In both of these cases, secured creditors, selling their security some time after the

filing of the petition in bankruptcy, and finding the proceeds not enough to pay the whole amount of their claims, were allowed by the referee to apply the proceeds first to interest accrued since the filing of the petition, then to principal, and to prove for the balance. The referee certified the question whether the creditors had a right to the interest. The district judge answered the question in the affirmative, giving the matter a very thorough and persuasive discussion, and declining to follow the English rule. Re Kessler, 171 Fed. 751. On appeal, his decision was affirmed by a majority of the circuit court of appeals. 103 C. C. A. 582, 180 Fed. 979.

The argument certainly is strong. A secured creditor could apply his security to interest first when the parties were solvent (Story v. Livingston, 13 Pet. 359, 371, 10 L. ed. 200, 206), the liens are not affected by the statute. § 67d [30 Stat. at L. 564, chap. 541, U. S. Comp. Stat. 1901, p. 3449]. The law is not intended to take away any part of the security that a creditor may have, as it would seem at first sight to do if the course adopted below were not followed. Some further countenance to that course is thought to be found in § 57h, which provides 344]that the value of securities shall *be determined by converting them into money "according to the terms of the agreement," for it is urged that, by construction, the right to apply them to interest is as much part of the agreement as if it had been written in. Nevertheless, it seems to us that, on the whole, the considerations on the other side are stronger and must prevail.

For more than a century and a half the theory of the English bankrupt system has been that everything stops at a certain date. Interest was not computed beyond the date of the commission. Ex parte Bennet, 2 Atk. 527. This rule was applied to mortgages as well as to unsecured debts (Ex parte Wardell, 1787; Ex parte Hercy, 1702, 1 Cooke, Bankrupt Laws, 4th ed. 181 [1st ed. Appx.]); and notwithstanding occasional doubts, it has been so applied with the prevailing assent of the English judges ever since (Ex parte Badger, 4 Ves. Jr. 165; Ex parte Ramsbottom, 2 Mont. & A. 79; Ex parte Penfold, 4 De G. & S. 282; Ex parte Lubbock, 9 Jur. N. S. 854; Re Savin, L. R. 7 Ch. 760, 764; Ex parte Bath, L. R. 22 Ch. Div. 450, 454; Quartermaine's Case [1892] 1 Ch. 639; Re Bonacino, 1 Manson, 59). As appears from Cooke, supra, the rule was laid down not because of the words of the statute, but as a fundamental principle. We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system, somewhat as the established construction of a law goes with the words where they are copied by another state. No one doubts that interest on unsecured debts stops. See § 63 (1). Shawnee County v. Hurley, 94 C. C. A. 362, 169 Fed. 92, 94.

The rule is not unreasonable when closely considered. It simply fixes the moment when the affairs of the bankrupt are supposed to be wound up. If, as in a well-known illustration of Chief Justice Shaw's (Parks v. Boston, 15 Pick. 198, 208), the whole matter could be settled in a *day by[345 a pie-powder court, the secured creditor would be called upon to sell or have his security valued on the spot, would receive a dividend upon that footing, would suffer no injustice, and could not complain. If, under § 57 of the present act, the value of the security should be determined by agreement or arbitration, the time for fixing it naturally would be the date of the petition. At that moment the creditors acquire a right *in rem* against the assets. Chemical Nat. Bank v. Armstrong, 28 L.R.A. 231, 8 C. C. A. 155, 16 U. S. App. 465, 59 Fed. 372, 378, 379; Merrill v. National Bank, 173 U. S. 131, 140, 43 L. ed. 640, 643, 19 Sup. Ct. Rep. 360. When there is delay in selling because of the hope of getting a higher price, it is more for the advantage of the secured creditor than of anyone else, as he takes the whole advance, and the others only benefit by a percentage, which does not seem a good reason for allowing him to prove for interest by indirection. Whenever the creditor proves, his security may be cut short. That is the necessarily possible result of bankruptcy. The rule under discussion fixes the moment in all cases at the date which the petition is filed; but beyond the fact of being compelled to realize his security and look for a new investment, there is no other invasion of the secured creditor's contract rights, and that invasion is the same in kind whatever moment may be fixed.

It is suggested that the right of a creditor having security for two claims, one provable and the other unprovable, to marshal his security against the unprovable claim (see Hiscock v. Varick Bank, 206 U. S. 28, 37, 51 L. ed. 945, 951, 27 Sup. Ct. Rep. 681), is inconsistent with the rule applied in this case. But that right is not affected by fixing a time for winding up, and the bankruptcy law does not touch securities otherwise than in this unavoidable particular. The provision in § 57h for converting securities into money according to the terms of the agreement has no appreciable bearing on the question. Apart from indicating, in accordance with § 67d, that liens are not to be

346]affected, it would seem rather to be intended to secure the right of the trustees and general creditors in cases where the security may be worth more than the debt. The view that we adopt is well presented in the late Judge Lowell's work on Bankruptcy, § 419; seems to have been entertained in Coder v. Arts, 15 L.R.A. (N.S.) 372, 82 C. C. A. 91, 152 Fed. 943, 950 (affirmed without touching this point, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 A. & E. Ann. Cas. 1008), and is somewhat sustained by analogy in the case of insolvent banks (Merrill v. National Bank, supra; White v. Knox, 111 U. S. 784, 787, 28 L. ed. 603, 604, 4 Sup. Ct. Rep. 686).

Interest and dividends accrued upon some of the securities after the date of the petition. The English cases allow these to be applied to the after-accruing interest upon the debt. Ex parte Ramsbottom; Ex parte Penfold; and Quartermaine's Case,—supra. There is no more reason for allowing the bankrupt estate to profit by the delay beyond the day of settlement than there is for letting the creditors do so. Therefore to apply these subsequent dividends, etc., to subsequent interest, seems just.

Decrees reversed.

DAVID MUSKRAT and J. Henry Dick, on Their Own Behalf, etc., Appts.,
v.
UNITED STATES. (No. 330.)

WILLIAM BROWN and Levi B. Gritts, on Their Own Behalf, and on Behalf of All Other Cherokee Citizens Having Like Interest in the Property Allotted under the Act of July 1, 1902, Appts.,
v.
UNITED STATES. (No. 331.)

(See S. C. Reporter's ed. 346–363.)

Federal Supreme Court — jurisdiction — unalterability by Congress.

1. Congress could not, as was attempted by the act of March 1, 1907 (34 Stat. at L. 1015, chap. 2285), confer jurisdiction upon the court of claims, and, by appeal, upon the Federal Supreme Court, of suits against the United States, to be brought by certain named Cherokee Indians, for themselves and all others similarly situated, to determine the validity of acts of Congress passed since the act of July 1, 1902 (32 Stat. at L. 716, chap. 1375), so far as such acts purport to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of the Cherokee lands and funds, since this is nothing more than an attempt to provide for a final judicial determination in the Supreme Court of the constitutional validity of congressional legislation, without a "case" or "controversy" to which, under the Federal Constitution, the judicial power alone extends.

[For other cases, see Supreme Court of the United States, I. a, in Digest Sup. Ct. 1908.]

Federal Supreme Court — jurisdiction — unalterability by Congress.

2. The pendency in the courts of the District of Columbia of suits to enjoin the Secretary of the Interior from carrying into effect certain congressional legislation when Congress attempted, by the act of March 1, 1907, to confer jurisdiction upon the court of claims, and, by appeal, upon the Federal Supreme Court, of suits against the United States, to be brought by the petitioners in the then pending litigation, to determine the validity of such legislation, does not remove the objection that action not judicial in its nature within the meaning of the Federal Constitution was thereby required of the Supreme Court.

[For other cases, see Supreme Court of the United States, I. a, in Digest Sup. Ct. 1908.]

Statutes — invalid in part.

3. The invalidity, so far as the Federal Supreme Court is concerned, as requiring nonjudicial action, of the provisions of the act of March 1, 1907, attempting to confer jurisdiction upon the court of claims, and, by appeal, upon the Supreme Court, of suits against the United States, to be brought by certain named Cherokee Indians, for themselves and all others similarly situated, to determine the validity of Congressional legislation subsequent to the act of July 1, 1902, in so far as such legislation purports to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of the Cherokee lands and funds, defeats the jurisdiction of the court of claims as well, since an intention cannot be imputed to Congress to confer jurisdiction on that court separately considered.

[For other cases, see Statutes, I. d, 4, in Digest Sup. Ct. 1908.]

[Nos. 330, 331.]

Argued November 30 and December 1 and 2, 1910. Decided January 23, 1911.

APPEALS from the Court of Claims to review decrees dismissing petitions in suits by Cherokee Indians against the United States, brought solely to determine the validity of certain congressional legislation.

Note.—On statutes part valid and part invalid—see notes to Titusville Iron Works v. Keystone Oil Co. 1 L.R.A. 363, and Fayette County v. People's & D. Bank, 10 L.R.A. 196.

Reversed and remanded, with directions to dismiss for want of jurisdiction.

See same case below, No. 330, 44 Ct. Cl. 137; No. 331, 44 Ct. Cl. 283.

The facts are stated in the opinion.

Messrs. **Daniel B. Henderson, John J. Hemphill,** and **William H. Robeson** argued the cause, and, with Mr. Frank J. Boudinot, filed a brief for appellants.

Mr. **Wade H. Ellis** argued the cause, and, with Mr. Henry E. Colton, filed a brief for appellee.

Mr. **William W. Hastings** argued the cause and filed a brief for the Cherokee Nation.

Messrs. S. T. Bledsoe and Evans Browne filed a brief as *amici curiæ*.

Mr. Charles West, Attorney General of Oklahoma, filed a brief in behalf of the state of Oklahoma.

Mr. Justice **Day** delivered the opinion of the court:

These cases arises under an act of Congress undertaking to confer jurisdiction upon the court of claims, and upon this court, on appeal, to determine the validity of certain acts of Congress hereinafter referred to.

Case No. 330 was brought by David Muskrat and J. Henry Dick, in their own behalf, and in behalf of others in a like situation, to determine the constitutional validity of the act of Congress of April 26, 1906 (34 Stat. at L. 137, chap. 1876), as amended by the act of June 21, 1906 (34 Stat. at L. 325, et seq., chap. 3504), and to have the same declared invalid in so far as the same undertook to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled on September 1, 1902, in accordance with the act of Congress passed July 1, 1902 (32 Stat. at L. 716-720, 349]721, chap. 1375). The *acts subsequent to that of July 1, 1902, have the effect to increase the number of persons entitled to participate in the division of the Cherokee lands and funds, by permitting the enrolment of children who were minors, living on March 4, 1906, whose parents had theretofore been enrolled as members of the Cherokee tribe, or had applications pending for that purpose.

Case No. 331 was brought by Brown and Gritts on their own behalf and on behalf of other Cherokee citizens having a like interest in the property allotted under the act of July 1, 1902 (32 Stat. at L. 716, chap. 1375). Under this act, Brown and Gritts received allotments. The subsequent act of March 11, 1904 (33 Stat. at L. 65, chap. 505, U. S. Comp. Stat. Supp. 1909, p. 638), empowered the Secretary of the Interior to grant rights of way for pipe lines over lands allotted to Indians under certain regulations. Another act, that of April 26, 1906 (34 Stat. at L. 137, chap. 1876), purported to extend to a period of twenty-five years the time within which full-blooded Indians of the Cherokee, Choctaw, Chickasaw, Creek, and Seminole tribes were forbidden to alienate, sell, dispose of, or encumber certain of their lands.

The object of the petition of Brown and Gritts was to have the subsequent legislation of 1904 and 1906 declared to be unconstitutional and void, and to have the lands allotted to them under the original act of July 1, 1902, adjudged to be theirs free from restraints upon the rights to sell and convey the same. From this statement it is apparent that the purpose of the proceedings instituted in the court of claims, and now appealed to this court, is to restrain the enforcement of such legislation subsequent to the act of July 1, 1902, upon the ground that the same is unconstitutional and void. The court of claims sustained the validity of the acts and dismissed the petitions. 44 Ct. Cl. 137, 283.

These proceedings were begun under the supposed authority of an act of Congress passed March 1, 1907 (a part *of the[350 Indian appropriation bill). 34 Stat. at L. 1015, 1028, chap. 2285. As that legislation is important in this connection, so much of the act as authorized the beginning of these suits is here inserted in full:

"That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens, having like interests in the property allotted under the act of July first, nineteen hundred and two, entitled, 'An Act to Provide for the Allotment of Lands of the Cherokee Nation, for the Disposition of Town Sites Therein, and for Other Purposes,' and David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the court of claims to determine the validity of any acts of Congress passed since the said act of July first, nineteen hundred and two, in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two,

and provided for in the said act of July first, nineteen hundred and two.

"And jurisdiction is hereby conferred upon the court of claims, with the right of appeal, by either party, to the Supreme Court of the United States, to hear, determine, and adjudicate each of said suits.

"The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and, for the speedy disposition of the questions involved, preference shall be given to the same by said courts, and by the Attorney General, who is hereby charged with the defense of said suits.

351] *"Upon the rendition of final judgment by the court of claims or the Supreme Court of the United States, denying the validity of any portion of the said acts authorized to be brought into question, in either or both of said cases, the court of claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries, under the said act of July first, nineteen hundred and two."

This act is the authority for the maintenance of these two suits.

The first question in these cases, as in others, involves the jurisdiction of this court to entertain the proceeding, and that depends upon whether the jurisdiction conferred is within the power of Congress, having in view the limitations of the judicial power, as established by the Constitution of the United States.

Section 1 of article 3 of the Constitution provides:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish."

Section 2 of the same article provides:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects."

*It will serve to elucidate the nature[352 and extent of the judicial power thus conferred by the Constitution to note certain instances in which this court has had occasion to examine and define the same. As early as 1792 an act of Congress (1 Stat. at L. 243, chap. 11), was brought to the attention of this court, which undertook to provide for the settlement of claims of widows and orphans, barred by the limitations theretofore established regulating claims to invalid pensions. The act was not construed by this court, but came under consideration before the then chief justice and another justice of this court and the district judge, and their conclusions are given in the margin of the report of Hayburn's Case, 2 Dall. 409, 1 L. ed. 436. The act undertook to devolve upon the circuit court of the United States the duty of examining proofs, of determining what amount of the monthly pay would be equivalent to the disability ascertained, and to certify the same to the Secretary of War, who was to place the names of the applicants on the pension list of the United States in conformity thereto, unless he had cause to suspect imposition or mistake, in which event he might withhold the name of the applicant and report the same to Congress.

In the note to the report of the case in 2 Dall. it appeared that Chief Justice Jay, Mr. Justice Cushing, and District Judge Duane unanimously agreed:

"That by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.

"That neither the legislative nor the executive branches can constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner.

"That the duties assigned to the circuit courts by this act are not of that description, and that the act itself does not appear to contemplate them as such; inasmuch as *it subjects the decisions of these[353 courts, made pursuant to those duties, first to the consideration and suspension of the Secretary at War, and then to the revision of the legislature; whereas by the Constitution, neither the Secretary at War, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court."

A further history of the case—and of another brought under the same act, but unreported—will be found in United States

v. Ferreira, 13 How. 40, 14 L. ed. 42, in which the opinion of the court was by the chief justice, and the note by him on page 52 was inserted by order of the court. Concluding that note, it was said:

"In the early days of the government, the right of Congress to give original jurisdiction to the Supreme Court, in cases not enumerated in the Constitution, was maintained by many jurists, and seems to have been entertained by the learned judges who decided Todd's Case. But discussion and more mature examination has settled the question otherwise; and it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the Constitution, and that Congress cannot enlarge it. In all other cases its power must be appellate."

In the Ferreira Case this court determined the effect of proceedings under an act of Congress, authorizing the district judge of the United States for the northern district of Florida to receive and adjudicate claims for losses for which this government was responsible under the treaty of 1819 between the United States and Spain [8 Stat. at L. 252]; decisions in favor of claimants, together with evidence given in connection therewith, to be reported to the Secretary of the Treasury, who, being satisfied that the same were just and equitable and within the treaty, was to pay the amount thereof. It was held that an award 354]of the district *judge under that act was not the judgment of a court, and did not afford a basis of appeal to this court.

In 1793, by direction of the President, Secretary of State Jefferson addressed to the justices of the Supreme Court a communication soliciting their views upon the question whether their advice to the Executive would be available in the solution of important questions of the construction of treaties, laws of nations and laws of the land, which the Secretary said were often presented under circumstances which *"do not give a cognizance of them to the tribunals of the country."* The answer to the question was postponed until the subsequent sitting of the Supreme Court, when Chief Justice Jay and his associates answered to President Washington that, in consideration of the lines of separation drawn by the Constitution between the three departments of government, and being judges of a court of last resort, afforded strong arguments against the propriety of extrajudically deciding the questions alluded to, and expressing the view that the power given by the Constitution to the President, of calling on heads of departments for opinions, "seems to have been purposely, as well as expressly, united to the executive departments." Correspondence & Public Papers of John Jay, vol. 3, p. 486.

The subject underwent a complete examination in the case of Gordon v. United States, reported in an appendix to 117 U. S. 697, in which the opinion of Mr. Chief Justice Taney, prepared by him and placed in the hands of the clerk, is published in full. It is said to have been his judicial utterance, and the whole subject of the nature and extent of the judicial power conferred by the Constitution is treated with great learning and fullness. In that case an act of Congress was held invalid which undertook to confer jurisdiction upon the court of claims, and thence by appeal to this court, the judgment, however, not to be paid until an appropriation had been estimated therefor *by the Secretary of[355 the Treasury; and, as was said by the chief justice, the result was that neither court could enforce its judgment by any process, and whether it was to be paid or not depended on the future action of the Secretary of the Treasury and of Congress. "The Supreme Court," says the Chief Justice, "does not owe its existence or its powers to the legislative department of the government. It is created by the Constitution, and represents one of the three great divisions of power in the government of the United States, to each of which the Constitution has assigned its appropriate duties and powers, and made each independent of the other in performing its appropriate functions. The power conferred on this court is exclusively judicial, and it cannot be required or authorized to exercise any other."

Concluding his discussion of the subject, the chief justice said, after treating of the powers of the different branches of the government, and laying emphasis upon the independence of the judicial power as established under our Constitution:

"These cardinal principles of free government had not only been long established in England, but also in the United States from the time of their earliest colonization, and guided the American people in framing and adopting the present Constitution. And it is the duty of this court to maintain it unimpaired as far as it may have the power. And while it executes firmly all the judicial powers intrusted to it, the court will carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the Constitution."

At the last term of the court, in the case of Baltimore & O. R. Co. v. Interstate Com-

merce Commission, 215 U. S. 216, 54 L. ed. 164, 30 Sup. Ct. Rep. 86, this court declined to take jurisdiction of a case which undertook to extend its appellate power to the consideration of a case in which there was no judgment in the court below. In that case 356]former cases were reviewed *by Mr. Chief Justice Fuller, who spoke for the court, and the requirement that this court adhere strictly to the jurisdiction, original and appellate, conferred upon it by the Constitution, was emphasized and enforced. It is therefore apparent that from its earliest history this court has consistently declined to exercise any powers other than those which are strictly judicial in their nature.

It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this court, and, with the aid of appropriate legislation, upon the inferior courts of the United States. "Judicial power," says Mr. Justice Miller, in his work on the Constitution, "is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." Miller, Const. 314.

As we have already seen, by the express terms of the Constitution, the exercise of the judicial power is limited to "cases" and "controversies." Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.

What, then, does the Constitution mean in conferring this judicial power with the right to determine "cases" and "controversies." A "case" was defined by Mr. Chief Justice Marshall as early as the leading case of Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60, to be a suit instituted according to the regular course of judicial procedure. And what more, if anything, is meant in the use of the term "controversy?" That question was dealt with by Mr. Justice Field, at the circuit, in the case of Re Pacific R. Commission, 32 Fed. 241, 255. Of these terms that learned justice said:

"The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehen-357]sive *than the latter, and includes only suits of a civil nature. Chisholm v. Georgia, 2 Dall. 431, 432, 1 L. ed. 445, 446, 1 Tucker's Bl. Com. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication."

The power being thus limited to require an application of the judicial power to cases and controversies, Is the act which undertook to authorize the present suits to determine the constitutional validity of certain legislation within the constitutional authority of the court? This inquiry in the case before us includes the broader question, When may this court, in the exercise of the judicial power, pass upon the constitutional validity of an act of Congress? That question has been settled from the early history of the court, the leading case on the subject being Marbury v. Madison, supra.

In that case Chief Justice Marshall, who spoke for the court, was careful to point out that the right to declare an act of Congress unconstitutional could only be exercised when a proper case between opposing parties was submitted for judicial determination; that there was no general veto power in the court upon the legislation of Congress; and that the authority to declare an act unconstitutional sprang from the requirement that the court, in administering the law and pronouncing judgment between the parties to a case, and choosing between the requirements of the fundamental law established by the people and embodied in the Constitution and an act of the agents *of the people, acting under authority[358 of the Constitution, should enforce the Constitution as the supreme law of the land The Chief Justice demonstrated, in a manner which has been regarded as settling the question, that with the choice thus given between a constitutional requirement and a conflicting statutory enactment, the plain duty of the court was to follow and enforce the Constitution as the supreme law established by the people. And the court recognized, in Marbury v. Madison and subsequent cases, that the exercise of this great power could only be invoked in cases which came regularly before the courts for determination, for, said the chief justice, in Osborn v. Bank of United States, 9 Wheat. 819, 6 L. ed. 223, speaking of the third article of the Constitution, conferring judicial power:

"This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question

respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States."

Again, in the case of Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257, Chief Justice Marshall, amplifying and reasserting the doctrine of Marbury v. Madison, recognized the limitations upon the right of this court to declare an act of Congress unconstitutional, and granting that there might be instances of its violation which could not be brought within the jurisdiction of the courts, and referring to a grant by a state of a patent of nobility as a case of that class, and conceding that the court would have no power to annul such a grant, said:

"This may be very true; but by no means justifies the inference drawn from it. The [359 article does not extend the *judicial power to every violation of the Constitution which may possibly take place, but to 'a case in law or equity' in which a right under such law is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the Constitution, to which the judicial power of the United States would extend. The same observation applies to the other instances with which the counsel who opened the cause has illustrated this argument. Although they show that there may be violations of the Constitution of which the courts can take no cognizance, they do not show that an interpretation more restrictive than the words themselves import ought to be given to this article. They do not show that there can be 'a *case* in law or equity' arising under the Constitution, to which the judicial power does not extend."

See also, in this connection, Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400. On page 345 of the opinion in that case the result of the previous decisions of this court was summarized in these apposite words by Mr. Justice Brewer, who spoke for the court:

"Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, state or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a *party beaten in the legis-[360 lature could transfer to the courts an inquiry as to the constitutionality of the legislative act."

Applying the principles thus long settled by the decisions of this court to the act of Congress undertaking to confer jurisdiction in this case, we find that William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens having like interest in the property allotted under the act of July 1, 1902, and David Muskrat and J. Henry Dick, for themselves and representatives of all Cherokee citizens enrolled as such for allotment as of September 1, 1902, are authorized and empowered to institute suits in the court of claims to determine the validity of acts of Congress passed since the act of July 1, 1902, in so far as the same attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902, and provided for in the said act of July 1, 1902.

The jurisdiction was given for that purpose first to the court of claims, and then upon appeal to this court. That is, the object and purpose of the suit is wholly comprised in the determination of the constitutional validity of certain acts of Congress; and furthermore, in the last paragraph of the section, should a judgment be rendered in the court of claims or this court, denying the constitutional validity of such acts, then the amount of compensation to be paid to attorneys employed for the purpose of testing the constitutionality of the law is to be paid out of funds in the Treasury of the United States belonging to the beneficiaries, the act having previously provided that the United States should be made a party, and the Attorney General be charged with the defense of the suits.

*It is therefore evident that there is[361 neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress. Is such a determination within the judicial

power conferred by the Constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a "case" or "controversy," to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is 362]to settle the doubtful character *of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question. Confining the jurisdiction of this court within the limitations conferred by the Constitution, which the court has hitherto been careful to observe, and whose boundaries it has refused to transcend, we think the Congress, in the act of March 1, 1907, exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution.

Nor can it make any difference that the petitioners had brought suits in the supreme court of the District of Columbia to enjoin the Secretary of the Interior from carrying into effect the legislation subsequent to the act of July 1, 1902, which suits were pending when the jurisdictional act here involved was passed. The latter act must depend upon its own terms and be judged by the authority which it undertakes to confer. If such actions as are here attempted, to determine the validity of legislation, are sustained, the result will be that this court, instead of keeping within the limits of judicial power, and deciding cases or controversies arising between opposing parties, as the Constitution intended it should, will be required to give opinions in the nature of advice concerning legislative action,—a function never conferred upon it by the Constitution, and against the exercise of which this court has steadily set its face from the beginning.

The questions involved in this proceeding as to the validity of the legislation may arise in suits between individuals, and when they do and are properly brought before this court for consideration they, of course, must be determined in the exercise of its judicial functions. For *the reasons we[363 have stated, we are constrained to hold that these actions present no justiciable controversy within the authority of the court, acting within the limitations of the Constitution under which it was created. As Congress, in passing this act, as a part of the plan involved, evidently intended to provide a review of the judgment of the court of claims in this court, as the constitutionality of important legislation is concerned, we think the act cannot be held to intend to confer jurisdiction on that court separately considered. Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 565, 46 L. ed. 679, 693, 22 Sup. Ct. Rep. 431; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

The judgments will be reversed and the cases remanded to the Court of Claims, with directions to dismiss the petitions for want of jurisdiction.

EX PARTE: IN THE MATTER OF GEORGE F. HARDING, Petitioner.

(See S. C. Reporter's ed. 363-380.)

Mandamus — to review judicial action — remand of cause to state court.

The refusal of a Federal circuit court to remand a civil cause to the state court

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NOTE.—As to when mandamus is the proper remedy—see notes to United States ex rel. International Contracting Co. v. Lamont, 39 L. ed. U. S. 160; M'Cluny v.

whence it had been removed as presenting a separable controversy between citizens of different states cannot be reviewed by mandamus, which may not be used to perform the office of an appeal or writ of error.
[For other cases, see Mandamus, 61–66, in Digest Sup. Ct. 1908.]

[No. —, Original.]

Submitted December 12, 1910. Decided February 20, 1911.

PETITION for mandamus to compel the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, to remand a civil cause to the state court whence it had been removed as presenting a separable controversy between citizens of different states. Leave to file petition denied.

The facts are stated in the opinion.

Messrs. **George F. Harding** and **William J. Ammen** submitted the cause for petitioner.

Mr. Chief Justice **White** delivered the opinion of the court:

By a motion for leave to file a petition for mandamus, George F. Harding seeks the reversal of the action of the circuit court of the United States for the northern district of Illinois, eastern division, in taking jurisdiction over a cause as the result of a refusal to grant a request of Harding to remand the case to a state court. The facts shown on the face of the motion papers are these:

On October 19, 1907, George F. Harding, the petitioner, alleging himself to be a resident of the state of California, sued in an Illinois state court various corporations alleged to be created by and citizens of the state of New Jersey, and fourteen individuals whose citizenship and residence were not given. The suit was brought by Harding as a stockholder in the Corn Products Company, one of the defendants, and the object of the suit was to annul an alleged [367] *unlawful merger of that company, and for relief in respect of an asserted misappropriation of its assets. On November 6, 1907, the Corn Products Company applied to remove to the circuit court of the United States for the northern district of Illinois, eastern division, on the ground that there was a separable controversy between it and Harding. By separate petitions all the other defendants united in the prayer for removal. The state court, not having acted on the petition for removal, the judge of the United States court, upon the application of the Corn Products Company, ordered the transcript of record from the state court to be filed and the case to be docketed. This being done, the Corn Products Company filed what was styled an amendment and supplement to the petition for removal, stating the residence and citizenship of the individuals named as defendants in the original bill, four of them being averred to be residents of Chicago, Illinois, one of Pekin, Illinois, and the others citizens and residents of states other than Illinois.

In December, 1907, Harding moved to remand to the state court, in substance upon the ground that there was no separable controversy, and that the requisite diversity of citizenship was not shown by the petition for removal, and especially directed attention to the fact that at the time of the commencement of the suit in the state court, he, Harding, was not a resident of the district, and that none of the corporate defendants were such residents.

Prior to the bringing of the Harding suit, a suit had been brought in an Illinois state court by the Chicago Real Estate & Trust Company, an Illinois corporation and a stockholder in the Corn Products Company, upon substantially the same grounds as those subsequently alleged in the Harding suit, against the principal corporations and individuals who were thereafter made defendants in the Harding suit. This cause had been removed by the Corn Products Company into the circuit court of the United States for the northern district of [368] Illinois, eastern division, and on its removal, at the instance of the Corn Products Company, the court had restrained the real estate company, its officers, agents, attorneys, etc., from further prosecuting the cause in the state court. Immediately after the bringing of the Harding suit in the state court, the Corn Products Company applied to the circuit court, in the real estate company suit, to restrain Harding from prosecuting his suit, on the ground that the bringing of the same was a violation of the previous restraining order. The court issued a temporary restraining order. Thereafter, as we have said, the Harding suit was removed on the application

Silliman, 4 L. ed. U. S. 263; Fleming v. Guthrie, 3 L.R.A. 54; Burnsville Turnp. Co. v. State, 3 L.R.A. 265; State ex rel. Charleston, C. & C. R. Co. v. Whitesides, 3 L.R.A. 777; and Ex parte Hurn, 13 L.R.A. 120.

On mandamus to control judicial action —see notes to State ex rel. Bayha v. Kansas City Ct. of Appeals, 3 L.R.A. 476, and Ex parte Morgan, 29 L. ed. U. S. 135.

On superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal—see note to State ex rel. Fourth Nat. Bank v. Johnson, 51 L.R.A. 33.

of the Corn Products Company to the circuit court of the United States, and the motion to which we have referred was made by Harding to remand. That motion to remand, however, in consequence of the restraining order, which had been made permanent, was not heard until the summer of 1909, after the restraining order above referred to had been dissolved by the circuit court of appeals. 94 C. C. A. 144, 168 Fed. 658. Before the motion to remand, however, was passed upon, the circuit court granted permission to the Corn Products Company to amend its removal petition by alleging that, at the time of the commencement by Harding of his suit, and continuously thereafter, he was a citizen of Illinois and a resident of Chicago, in that state. To this Harding objected on the ground that the court was without power to allow an amendment, and that its jurisdiction was to be tested by the averments of the original removal petition. The permitted amendments having been filed, the motion to remand was denied. Harding thereupon, reiterating his objection to the allowance of the amendment and to the jurisdiction of the court to do other than remand the cause, traversed the averment in the amended removal petition as to his Illinois citizenship and residence, and specially prayed "that there may be a speedy hearing and a decision of such issue of citi-
369]zenship *and a remand of this cause to the state court by the order of this court. . . ." The request for hearing was granted. A large amount of evidence was introduced on such hearing, which extended over a period of more than fifteen months, and the taxable costs, it is said, "ran up into several thousands of dollars." Finally, on October 25, 1910, the issue was decided against Harding. 182 Fed. 421. The court, finding from the proof that Harding was, as alleged in the amended petition, a citizen and resident of the state of Illinois, expressly refused the prayer for removal, made by Harding in his answer to the amended petition; in other words, the court reaffirmed and reiterated its previous action in refusing to remand the cause. Whether these facts give such color of right to the contention that we have jurisdiction to review the action of the trial court by the writ of mandamus as to lead us to be of opinion that further argument at bar is necessary, and therefore a rule to show cause should issue, is then the question for decision.

The doctrine that a court which has general jurisdiction over the subject-matter and the parties to a cause is competent to decide questions arising as to its jurisdiction, and therefore that such decisions are not open to collateral attack, has been so often expounded (see Dowell v. Applegate, 152 U. S. 327, 337, 38 L. ed. 463, 467, 14 Sup. Ct. Rep. 611, and cases cited), and has been so recently applied (United States use of Hine v. Morse, 218 U. S. 493, 54 L. ed. 1123, 31 Sup. Ct. Rep. 37), that it may be taken as elementary and requiring no further reference to authority Nor is there any substantial foundation for the contention that this elementary doctrine has no application to decisions of courts of the United States, refusing to remand causes to state courts, since there is nothing peculiar in an order refusing to remand which differentiates it from any other order or judgment of a court of the United States concerning its jurisdiction. The importance of the subject which is involved in the contrary assertion, the apparent conflict between certain *decided[370 cases dealing with the right to review by mandamus orders of circuit courts refusing to remand, and a long and settled line of other cases relating to the same subject, the confusion and misapprehension which must result unless the conflict is reconciled or abated, and the duty to remove obscurity, as far as it may be done, concerning the review of questions of jurisdiction, all lead us to give the subject a more extended examination than it would otherwise be entitled to receive.

In Ex parte Hoard, 105 U. S. 578, 26 L. ed. 1176, the court was called upon to consider whether the judgment of a circuit court of the United States, declining to remand a civil cause to a state court from which it had been removed, was reviewable by the extraordinary process of mandamus. In refusing to exert jurisdiction by mandamus, and considering the inherent nature of the powers of a circuit court, it was declared that "jurisdiction has been given to the circuit court to determine whether the cause is one that ought to be remanded," and it was also observed that "no case can be found in which a mandamus has been used to compel a court to remand a cause after it has once refused a motion to that effect." Calling attention to the fact that the act of 1875, in § 5 [18 Stat. at L. 472, chap. 137, U. S. Comp. Stat. 1901, p. 511], expressly gave an appeal to or a writ of error from this court for the review of orders of circuit courts remanding causes, without regard to the amount involved, the court said: "The same remedy has not been given if the cause is retained. It rests with Congress to determine whether a cause shall be reviewed or not. If no power of review is given, the judgment of the court having jurisdiction to decide is final."

In Re Pollitz, 206 U. S. 323, 51 L. ed. 1081, 27 Sup. Ct. Rep. 729, the facts were these: Pollitz, a citizen of the state of New York, sued in the supreme court of that state the Wabash Railroad Company, a consolidated corporation existing under the laws of the states of Ohio, Michigan, Illinois, and Missouri, and a citizen of the state of Ohio, and various other defend-
371]ants, *chiefly citizens and residents of the state of New York. The Wabash Company removed the cause to the circuit court of the United States, on the ground of a separable controversy. A motion of Pollitz to remand was denied. The controversy was decided by this court on the hearing of a rule, which was granted on the application of Pollitz for a writ of mandamus to direct the remanding of the cause. The court, after stating (p. 331) the general rule that "mandamus cannot be issued to compel the court below to decide a matter before it in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error," refused to take jurisdiction and review the action of the court below, and therefore declined to issue the writ.

Ex parte Nebraska, 209 U. S. 436, 52 L. ed. 876, 28 Sup. Ct. Rep. 581, presented the following facts: In a suit against a railway company, commenced in a court of the state of Nebraska, the state, its attorney general, the railway commission, and the members of the commission individually, were plaintiffs. The defendant railway removed the cause to the United States court, upon the ground that the state was not a proper or necessary party to the suit, and that the controversy was wholly between citizens of different states. A motion to remand having been denied by the circuit court, this court issued a rule to show cause why a mandamus should not be allowed, ordering the remanding of the cause. Upon the hearing on the return to this rule, the court declined to take jurisdiction and review the action of the trial court. It was said that the circuit court had jurisdiction to pass upon the questions raised by the motion to remand, and if error was committed in the exercise of its judicial discretion, "the remedy is not by writ of mandamus, which cannot be used to perform the office of an appeal or writ of error." After declaring that "the applicable principles have been laid down in in-
372]numerable cases," the court cited *Ex parte Bradley, 7 Wall. 364, 19 L. ed. 214; Ex parte Loring, 94 U. S. 418, 24 L. ed. 165; Re Rice, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149; Re Atlantic City R. Co. 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208. The case of Pollitz was also cited and reviewed

In Ex parte Gruetter, 217 U. S. 586, 54 L. ed. 892, 30 Sup. Ct. Rep. 690, the doctrine of Re Pollitz and Ex parte Nebraska was reaffirmed. The case was this: An action commenced by Gruetter in a state court was removed into a circuit court of the United States, and Gruetter moved to remand. One ground of the motion was that the case was not removable because it was not an action of a civil nature, but was one to recover penalties. It was also urged that the petition and record did not show that the suit was sought to be removed to the circuit court of the United States for the district in which either the plaintiff or the defendant resided. On return to a rule to show cause why a mandamus should not be granted, the court declined to take jurisdiction of the case, saying (p. 588):

"There was no controversy as to there being diversity of citizenship. The defendant was a corporation of Kentucky, and plaintiff was a citizen of Tennessee. Inasmuch as we are of opinion that the circuit court of the United States had jurisdiction to determine the questions presented, we hold that mandamus will not lie. The final order of the circuit court cannot be reviewed on this writ. Re Pollitz, supra.

It is patent from the review of the decided cases just made that the contention that the order of the court below, refusing to remand the cause, is susceptible of being here reviewed by the extraordinary process of a writ of mandamus,—in other words, that that writ may be used to subserve the purpose of a writ of error or an appeal,—is so completely foreclosed as not to be open to contention, unless it be that other cases which are relied upon as sustaining our jurisdiction to issue the writ of mandamus have either overruled the line of cases to which we have referred, or have *so qualified them as to cause them to[373
be here inapplicable. We therefore come to consider the cases upon which petitioner relies, to ascertain whether they sustain either of these views. The cases are Ex parte Wisner, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150; Re Moore, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706, 14 A. & E. Ann. Cas. 1164, and Re Winn, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. Rep. 515. But to an elucidation of these cases it is necessary that the briefest possible recurrence be had to two leading cases which long preceded them; *viz.*, Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667, 3 Am. Crim. Rep. 524, and Virginia v. Paul, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536.

In Virginia v. Rives a prosecution of per-

sons accused of murder was removed from a state court to a circuit court of the United States. The latter court, moreover, under a writ of habeas corpus cum causa, took the prisoners from the custody of the state authorities. The case in this court arose upon an application by the commonwealth of Virginia for a rule to show cause why the prisoners should not be returned to the state court for trial. On hearing, this court took jurisdiction over the cause, issued the writ of mandamus, and directed the return of the accused. Speaking of the functions of the writ of mandamus, the court said (p. 323): "It does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside the jurisdiction of the court or officer to which or to whom the writ is addressed." It is obvious from the opinion of the court and the concurring opinion that jurisdiction over the cause was taken because of the extraordinary abuse of discretion disclosed by the power attempted to be exerted, the confusion and disregard of constitutional limitations which the asserted power implied, and because, under the law as it then stood, no power would otherwise have existed to correct the wrongful assumption of jurisdiction by the circuit court.

In Virginia v. Paul, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536, a person in the custody of the state authorities, charged with murder, was released under a writ of habeas corpus issued by a district 374]*judge. Subsequently the circuit court of the United States took, by way of removal, jurisdiction over the prosecution. The commonwealth of Virginia applied to this court for a mandamus to remand the prosecution and to restore the accused to the custody of the state authorities The court, reaffirming the doctrine of Virginia v. Rives, pointed out that to wrongfully devest the state of its right to prosecute in its own courts for crimes committed against its authority was a gross abuse of discretion, which, if not corrected by mandamus, could not be done in any other form. A mandamus to remand was issued. The court, however, declined to review the order discharging on habeas corpus, on the ground that, on the face of the application for habeas corpus, issue had been presented which the judge had a right to decide, and, if error was committed, there was a remedy by appeal.

In Ex parte Wisner, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150, mandamus was sought to compel a circuit court of the United States to remand a civil cause to the state court from which it had been removed, and which the circuit court had refused to remand. The case was one where, although there was diversity of citizenship, neither of the parties resided in the particular district to which the suit had been removed. This court took jurisdiction. Reviewing the action of the court below, it was observed that the absence of residence within the district of either of the parties demonstrated the absolute want of authority of the circuit court over the cause, and that even if the objection was susceptible of being waived, a waiver by both parties was essential, and the record did not disclose that there had been such waiver. Considering the right to revise by mandamus the action of the circuit court in refusing to remand, no reference whatever was made to the existence of statutory remedies to correct the error found to have been committed, and no authority was cited, it being simply observed: "Our conclusion is that the case should have been remanded; and, *as the circuit court had no ju-[375 risdiction to proceed, that mandamus is the proper remedy."

Re Moore, supra, was also a case of removal, where there was diversity of citizenship, but neither of the parties resided in the particular district. The circuit court had refused to remand. Taking jurisdiction to review such action, an application for a writ of mandamus, this court held that, as there was diversity of citizenship, there was general jurisdiction in the circuit court, and that the objection that neither party resided within the district was a matter susceptible of being waived by the parties, and that such waiver had taken place. The observations in Ex Parte Wisner to the contrary were expressly disapproved. The action of the circuit court in refusing to remand was consequently approved. No discussion was had or authority referred to upon the question of the right to review by mandamus the action of the circuit court, the right to exert such authority having in effect been assumed as the result of the decision in the Wisner Case.

Re Winn, supra, an action commenced in a state court had been removed into a circuit court of the United States, not upon diversity of citizenship, but upon the ground that the case stated was one arising under the laws of the United States. The circuit court denied a motion to remand. Upon application for mandamus, this court took jurisdiction to review such action, and directed that the case be remanded, upon the ground that the cause of action, when rightly construed, did not arise under any provision of the Constitution, or under any law of the United States. Referring to

some of the previous cases, and manifestly noting an apparent conflict between them, it was said that this court had declined to exert jurisdiction by mandamus in Ex parte Nebraska and Re Pollitz, because those cases but exemplified the exercise of judicial discretion by the circuit court as to a matter [376 within *its jurisdiction, while the case in hand presented a question of a want of jurisdiction in the circuit court, clearly apparent on the face of the record, and therefore that court, when it decided that the cause of action alleged arose under a law of the United States, could not possibly have exercised a discretion to decide a matter which was within its jurisdiction. Virginia v. Rives and Virginia v. Paul were approvingly cited, and it was said that, in case of a refusal to remand, "although the aggrieved party may also be entitled to a writ of error or appeal," mandamus may be resorted to. On this subject it was further observed: "Mandamus, it is true, never lies where the party praying for it has another adequate remedy, . . . but where, without any right, a court of the United States has wrested from a state court the control of a suit pending in it, an appeal or writ of error, at the end of long proceedings, which must go for naught, is not an adequate remedy."

Comprehensively considering the two lines of cases, one beginning with Ex parte Hoard, 105 U. S. 578, 26 L. ed. 1176, and ending with Ex parte Gructter, supra, and the other beginning with Virginia v. Rives, supra, and ending with Re Winn, supra, it is to be conceded that they are apparently in conflict, both as to the assertion of power which one line upholds to review by mandamus the action of the United States circuit court in refusing to remand, and the nonexistence of such power which the other line of cases expounds, and also as to much of the reasoning in the opinions in some of the cases. Thus the ruling in Ex parte Hoard, that where, in a civil case, statutory remedies by error or appeal are provided for the ultimate review of errors, committed by a court in determining its jurisdiction, such statutory provisions are, in their nature, exclusive, and therefore deprive of the right to resort to the remedy by mandamus, is directly in conflict with the jurisdiction which was exercised in Ex parte Wisner, Re Moore, and Re Winn, as those cases were civil cases, and the right [377 *to review the error, if any, committed by the circuit court in refusing to remand, was regulated by statute. So, also, the statement, by way of reasoning, in the opinion in Re Winn, to the effect that, in case of a refusal to remand, "the remedy by mandamus is available, although the aggrieved party may also be entitled to a writ of error or appeal," is in direct conflict with the reasoning upon which the decision in Ex parte Hoard was based. The conflict just stated becomes more manifest when the ruling in Virginia v. Paul is considered, since in that case the court declined by mandamus to review the action of the court below in taking one accused of crime by a writ of habeas corpus from the custody of the state authorities, on the ground that prima facie there was jurisdiction to issue the writ of habeas corpus, and a remedy by appeal existed to review the action of the circuit court. Moreover, the decision in Re Pollitz, that there was not power to review the action of the court below in refusing to remand, because the circuit court, in passing upon the question as to whether, on the face of the papers, a separable controversy was alleged, decided a matter within its jurisdiction, and which involved the exercise of judicial discretion, cannot be harmonized with the ruling in Ex parte Wisner and Re Moore, that the action of a circuit court in refusing to remand could be reviewed by mandamus, because the court, in deciding whether the parties had waived the right to be sued in a particular district, had not been called upon to decide a matter within its jurisdiction, involving the exercise of judicial discretion. This conflict becomes more obvious when the ruling in Re Winn and Ex parte Gructter are contrasted, the one deciding that the action of the circuit court in refusing to remand because, from an analysis of the pleadings, it was found that a claim of Federal right was presented, was reviewable by mandamus, since it was plain, as a matter of law, that the court erred, and therefore its decision involved no element of judicial discretion, and *the other decid- [378 ing that the denial by a circuit court of a motion to remand based upon the ground, among others, that, on the face of the papers, the suit was not removable, because it was not of a civil nature, but was for a penalty, was not reviewable by mandamus, because the decision of such a question was within the jurisdiction of the circuit court, and therefore involved the exercise of judicial discretion.

We must, then, either reconcile the cases, or, if this cannot be done, determine which line rests upon the right principle; and having so determined, overrule or qualify the others, and apply and enforce the correct doctrine. This is the case, since to do otherwise would serve only to add to the seeming confusion and increase the uncertainty in the future as to a question which it is our plain duty to make free from uncertainty. Coming to the origin of

the two lines of cases, it is manifest that it was not conceived that there was conflict between them, since Virginia v. Rives and Ex parte Hoard were practically contemporaneously decided, and were treated, the one as relating to an exceptional condition, that is, an effort to remove a criminal prosecution, which, if wrong was committed, no power otherwise to redress than by mandamus existed, and the other but involved the application of the well-settled rule as to civil cases, concerning which the right to review by error or appeal was generally regulated by statute. Following down the two lines of cases, it is equally manifest that it was never conceived that they conflicted with each other, because some of the cases were also practically contemporaneously decided without the suggestion that one was in conflict with the other; indeed, the decisions in Re Moore and Ex parte Nebraska were announced on the same day. When the cases are closely analyzed, we think the cause of the conflict between them becomes at once apparent. As we have previously pointed out, no authority was referred to in Ex parte Wisner sustain-
379]ing the taking in that case of *jurisdiction to review by mandamus the ruling of the circuit court, although, in the course of the opinion, the statement was made with emphasis that the face of the record disclosed an entire absence of jurisdiction in the court below. In the opinion, however, in Re Pollitz, the Wisner Case was referred to, and in pointing out why it was not apposite and controlling, it was observed that that case (the Wisner) presented a total absence of jurisdiction, involving no element of discretion, and Virginia v. Rives was cited, manifestly as indicating the basic authority on which the jurisdiction to review by mandamus had been exerted in the Wisner Case. Again, in Re Winn it is to be observed that not only was Virginia v. Rives cited, but the cases of Virginia v. Paul and Kentucky v. Powers, 201 U. S. 1, 50 L. ed. 633, 26 Sup. Ct. Rep. 387, 5 A. & E. Ann. Cas. 692 (the last of which also concerned a criminal prosecution in which the doctrine of Virginia v. Rives had been applied), were also cited, evidently for the purpose of pointing out the source from whence came the doctrine of the right to review by mandamus under the facts presented. Bearing these matters in mind, it plainly results that the conflict presented has arisen, not because of the announcement in any of the cases of any mistaken doctrine as to jurisdiction, or of any wrongful decision of any of the cases on the merits, but has simply been occasioned, beginning with Ex parte Wisner, from applying the exceptional rule announced in Virginia v. Rives to cases not governed by such exceptional rule, but which fell under the general principle laid down in Ex parte Hoard and the line of cases which have followed it. Under these circumstances it becomes our plain duty, while not questioning the general doctrine announced in any of the cases, yet to disapprove and qualify Ex parte Wisner, Re Moore, and Re Winn to the extent that those cases applied the exceptional rule of Virginia v. Rives, and thereby obscured the broad distinction between the general doctrine announced in Ex parte Hoard and the cases which have followed it, and the *exception estab-[380
lished by Virginia v. Rives and the cases which have properly applied the doctrine of that case. Our duty to take this course arises not only because of the misconception which must otherwise continue to exist, but also because it is to be observed that material portions of the act of 1875, which were made the basis of the ruling in Ex parte Hoard, are yet in force, and because the cogency of the considerations arising from this fact are greatly increased by the duty to give effect to the provisions of the judiciary act of 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488], concerning the review of final orders and judgments or decrees of the circuit courts of the United States.

As, then, our conclusion is that the case under consideration is not controlled by the ruling in Ex parte Wisner or kindred cases, but is governed by the general rule expressed in Ex parte Hoard, and followed in Re Pollitz and Ex parte Nebraska, and, lastly, applied in Ex parte Gruetter, it clearly results that the application for leave is without merit, and leave to file is denied.

FREDERICK WEYERHAEUSER and John A. Humbird, Appts.,
v.
HERBERT H. HOYT.

(See S. C. Reporter's ed. 380-424.)

Public lands — railroad land grant — indemnity selections — approval.

1. Lands lawfully embraced in a list of indemnity selections filed by the Northern Pacific Railroad Company with the Land Department, and subsequently approved by the Secretary of the Interior,. were not subject to entry or purchase under the Federal land laws during the interim between the

Note.—As to land grants to railroads—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

As to bona fide purchasers of public lands—see note to United States v. Detroit Timber & Lumber Co. 67 C. C. A. 13.

date of filing and the date of such approval.
[For other cases, see Public Lands, 125–131, in Digest Sup. Ct. 1908.]

Public lands — railroad land grants — indemnity lands — basis for selection.

2. A valid basis is afforded for the selection by the Northern Pacific Railroad Company of lands within the second indemnity limits, under the joint resolution of May 31, 1870 (16 Stat. at L. 378), where certain lands did not pass under its land grant of July 2, 1864 (13 Stat. at L. 365, 367, chap. 217), because they fell within the indemnity limits of the grant of May 5, 1864 (13 Stat. at L. 64, chap. 79), in aid of another railroad, as adjusted to the line of definite location of that road, and were selected by that road after the date of the Northern Pacific land grant, but prior to the definite location of that line of road.
[For other cases, see Public Lands, 243–252, in Digest Sup. Ct. 1908.]

Public lands — railroad land grants — selection of indemnity land.

3. A selection of indemnity lands by the Northern Pacific Railroad Company, under the act of July 2, 1864, and the joint resolution of May 31, 1870, is not unlawful because the tract selected was not on the same side of the railroad as the tract lost, and was not the nearest unappropriated land.
[For other cases, see Public Lands, 243–252, in Digest Sup. Ct. 1908.]

Public lands —— judicial review — approval of indemnity selection.

4. The courts must assume that the facts which, under the joint resolution of May 31, 1870, establishing the second indemnity limits of the land grant to the Northern Pacific Railroad Company, must appear in order to entitle that company to the lands selected as indemnity lands, were shown to the satisfaction of the Secretary of the Interior, where he has approved the company's selections.
[For other cases, see Public Lands, I. h, 2, in Digest Sup. Ct. 1908.]

Public lands — railroad land grants — rights of purchaser.

5. Lands within the indemnity limits of the land grant to the Northern Pacific Railroad Company could not be claimed under the provisions of the act of July 1, 1898 (30 Stat. at L. 620, chap. 546), enacted to settle the disputes arising out of conflicting rulings of the Land Department with reference to the eastern terminus of the railroad as affecting its land grant, by a person relying upon an alleged purchase under the timber and stone act, where, prior to January 1, 1898, nothing more had been done than to file application for the land.
[For other cases, see Public Lands, 330–342, in Digest Sup. Ct. 1908.]

Public lands — railroad land grants — rights of purchaser — title of grantor.

6. The failure of the Northern Pacific Railway Company to acquire title to lands lawfully selected by the Northern Pacific Railroad Company as within the second indemnity limits of its land grant will not avail persons claiming such lands by virtue of an alleged purchase under the timber and stone act, who are seeking to charge as trustees the grantees of the railway company.
[For other cases, see Public Lands, 330–341, in Digest Sup. Ct. 1908.]

[No. 24.]

Argued April 27, 28, 1910. Ordered for reargument December 19, 1910. Reargued January 19, 20, 1911. Decided February 20, 1911.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which reversed a decree of the Circuit Court for the District of Minnesota, dismissing a bill seeking to charge as trustees persons claiming under a patent issued under a railroad land grant. Decree of Circuit Court of Appeals reversed and that of Circuit Court affirmed.

See same case below, 88 C. C. A. 404, 161 Fed. 324.

The facts are stated in the opinion.

Mr. **Charles W. Bunn** argued the cause and filed a brief for appellants.

Mr. **F. B. Kellogg** also argued the cause for appellants.

Mr. **M. H. Stanford** argued the cause and filed a brief for appellee.

Mr. H. H. Hoyt also filed a brief for appellee.

Mr. Chief Justice **White** delivered the opinion of the court:

Conflicting claims to 40 acres of land in the state of Minnesota is the controversy which this case involves. Both parties assert title derived from the United States, the appellants in virtue of a patent issued under a land grant made to the Northern Pacific Railroad Company, and the appellee as the result of an alleged purchase under the timber and stone act. The facts are these:

The Northern Pacific Railroad Company in 1883 filed in the Land Department a list of indemnity selections which embraced the land in question. In 1893 a rearranged list was filed, differing from the previous one, in that it specified the particular tract of land lost in the place limits for which each described selection within the indemnity limits was made. The Land Department having ruled that the eastern terminus of the Northern Pacific Railroad Company was not at Ashland, but at Duluth, a point west of Ashland, the selections, so far as they related to lands east of Duluth, among which was the land in controversy, *were[383 canceled by order of the Secretary of the Interior. Following this, in December of that

year, Richard B. Jones applied to purchase the land under the timber and stone act. A few months after, on February 28, 1898, the Secretary of the Interior made an order formally withdrawing from entry the selected land east of Duluth in order, as was declared, to preserve the right of the railroad company, if any, resulting from the selections previously filed, pending the decision by this court of cases involving whether the eastern terminus was at Duluth or at Ashland. About nine months after this withdrawal, in December, 1898, Jones made his final proof and paid the purchase money, $100. The receiver of the local land office, however, recited in the receipt issued to Jones that his rights were "subject to any claim the Northern Pacific Railroad Company may have to the lands herein described."

In 1900 (177 U. S. 421, 44 L. ed. 830, 20 Sup. Ct. Rep. 677; 177 U. S. 435, 44 L. ed. 836, 20 Sup. Ct. Rep. 706), it was decided that the eastern terminus of the Northern Pacific road was at Ashland, and therefore that the Land Department had erred in holding that such terminus was at Duluth. The Secretary of the Interior then formally reinstated the list of selections previously filed by the railroad company, the entry of Jones was canceled, and the selections were approved and patents issued to the Northern Pacific Railway Company as entitled to all rights under the selections. The railway company conveyed the tract in controversy to Weyerhaeuser and Humbird, the present appellants.

This suit was then begun by Hoyt in a court of the state of Minnesota, against Weyerhaeuser and Humbird, to compel a conveyance of the land, and to restrain the cutting or removal of timber during the pendency of the suit, on the ground that the title was held by the defendants in trust for complainant. The right to relief was principally based upon the contention that the
384]purchase by Jones under the *timber and stone act was paramount to the indemnity selection previously made by the railroad company, and hence that the Land Department had fallen into an error of law in patenting the land to the company. In addition there were numerous other grounds upon which the right to relief was predicated, but we do not deem it necessary now to detail them, as we shall come to state and dispose of them after we have passed upon the contention concerning the paramount nature of the timber and stone entry. The case, having been removed into a circuit court of the United States upon the ground that on the face of the bill it involved the construction of acts of Congress, was in that court tried and a decree was entered dismissing the bill. The circuit court of appeals, whose action is now under review, reversed the decree of the circuit court, and remanded the cause, with directions to enter a decree for the complainant, granting the relief prayed. 88 C. C. A. 404, 161 Fed. 324.

The decision of the court was based upon the conclusion that the application to purchase, made by Jones, although subsequent in date to the filing by the railroad company of its list of indemnity selections, was paramount to such selections, even although they had been subsequently approved by the Secretary of the Interior. This was not, however, the result of an interpretation originally considered of the granting act, but was exclusively caused, as shown by the opinion of the court, by what was held to be the authoritative and controlling operation of a decision of this court,—Sjoli v. Dreschel, 199 U. S. 564, 50 L. ed. 311, 26 Sup. Ct. Rep. 154. The soundness of this view lies at the threshold of the case; since, if it be that the rights of the parties are authoritatively concluded by the ruling in the Sjoli Case, it will not be necessary to further consider the subject. Coming at once to analyze the ruling in the Sjoli Case in order to fix its true import, we think it is apparent that the court below was mistaken in holding that the decision was here authoritatively *de-[385
cisive. This is said because we see no escape from that conclusion when the issues in the Sjoli Case are accurately ascertained and are compared with those here presented.

The Sjoli controversy, succinctly stated, thus arose: A homestead settler went in 1884 upon land within the indemnity limits of the grant to the Northern Pacific Railroad Company. He erected a dwelling house and moved into it with his family and cultivated a portion of the land, all prior to the filing in 1885 of a list of selections by the railroad company, embracing the tract settled upon by Sjoli. Although the settler had thus, prior to the filing of the list of selections, entered upon and improved the land with the intention of perfecting title under the homestead laws, his application to enter, for reasons which need not be here adverted to, was not made until subsequent to the filing by the railroad company of its list of selections. Relying upon this fact, the railroad company opposed the application of Sjoli, and the proceedings which took place in the Land Department simply required the Department to determine whether the railroad company, by the filing of its list of selections, could deprive the settler Sjoli of his rights, despite the fact that his settlement

and improvement of the land had occurred prior to the filing by the company of its list of selections. The Land Department decided in favor of the settler, and a patent was issued to him.

The matter decided by this court in the Sjoli Case arose from the bringing of a suit by Dresehel, as assignee of the rights of the railroad company, asserting that Sjoli held the land in trust for him as the grantee of the railway company, because the Land Department had, as a matter of law, erred in deciding that the rights of the settler Sjoli were paramount to the subsequent selection by the railroad company, since, at the time of the filing of such list of selections, no record evidence existed in 386]the Land *Department of the asserted settlement by Sjoli, or of his intention to avail of the benefit of the homestead laws. The action of the Land Department in maintaining the paramount right of the settler was sustained. As it is manifest from the statement we have made that the controversy in this case involves no question whatever concerning the rights of a settler initiated prior to the filing by the railroad company of its list of selections, but simply calls upon us to determine whether the Land Department erred in deciding that a filed list of selections was, after approval, paramount to a subsequent application to purchase, it is at once demonstrated that the question here involved is wholly different from that which was decided in the Sjoli Case. This difference is as wide as that which would exist between a ruling that one who was prior in time was prior in right, and a directly antagonistic decision that one who was subsequent in time was yet prior in right. And the broad distinction which obtains between the matter which was involved and decided in the Sjoli Case and the question presented on this record is made, if need be, more apparent when it is considered that, in the Sjoli Case, the action of the Land Department in issuing the patent to the settler, because he was prior in time, was sustained, while to hold that decision applicable here would reverse the action of the Land Department in issuing a patent to the railway company because it was prior in time. While, in view of this difference between the issues involved in the Sjoli Case and those here arising, we are constrained to the conclusion that the former case cannot be held to be here authoritatively decisive, of course, the due persuasive force of the reasoning of the opinion in the Sjoli Case, if here applicable, remains, and must be considered when we come, as we now do, to pass upon the controversy here arising, enlightened by the true interpretation of the granting act, as elucidated by the applicable decisions of this court.

*It is beyond dispute on the face of[387 the granting act of July 2, 1864 (13 Stat. at L. 365, 367, chap. 217), and of the joint resolution of May 31, 1870 (16 Stat. at L. 378), extending the indemnity limits, that it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits. It is also beyond dispute that, as the only method provided by the granting act for executing the grant in this respect was a selection of the lieu lands by the railroad company, subject to the approval of the Secretary of the Interior, that a construction which would deprive the railroad company of its substantial right to select, and would render nugatory the exertion of power of the Secretary of the Interior to approve lawful selections when made, would destroy the right which it was the purpose of Congress to confer. That the effect of holding that lands lawfully embraced in a list of selections duly filed and awaiting the approval of the Secretary of the Interior could, in the interim, be appropriated at will by others, would be destructive of the right of selection, is not only theoretically apparent from the mere statement of the proposition, but has, moreover, in actual experience, been found to be the practical result of carrying that doctrine into effect. See 25 Ops. Atty. Gen. 632. Considering the language of the granting act from a narrower point of view, a like conclusion is in reason rendered necessary. The right to select within indemnity limits was conferred to replace lands granted in place which were lost to the railroad company because removed from the operation of the grant of lands in place by reason of the existence of the rights of others originating before the definite location of the road. The right to select within indemnity limits excluded lands to which rights of others had attached before the selection, and hence simply required that the selection, when made, should not include lands which, at that time, were subject to the rights of others. The requirement *of approval[388 by the secretary consequently imposed on that official the duty of determining whether selections were lawful at the time they were made, which is inconsistent with the theory that anyone could appropriate the selected land pending action of the Secretary. The scope of the power to approve lists of selections, conferred on the Secretary, was clearly pointed out in Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 511, 33 L. ed. 687, 694, 10 Sup. Ct. Rep.

341, where it was said that the power to approve was judicial in its nature. Possessing that attribute, the authority therefore involved not only the power, but implied the duty, to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections. This view, while it demonstrates the unsoundness of the interpretation of the granting act which the contrary proposition involves, serves also at once to establish that the obvious purpose of Congress in imposing the duty of selecting and submitting the selections when made to the final action of the Secretary of the Interior was to bring into play the elementary principle of relation, repeatedly sanctioned by this court and uniformly applied by the Land Department from the beginning up to this time, under similar circumstances, in the practical execution of the land laws of the United States. Without attempting to cite the many cases in this court illustrating and applying the doctrine, a few only which are aptly pertinent and here decisive are referred to. Gibson v. Chouteau, 13 Wall. 92, 100, 20 L. ed. 534, 536; Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424; St. Paul & S. C. R. Co. v. Winona & St. P. R. Co. 112 U. S. 720, 733, 28 L. ed. 872, 877, 5 Sup. Ct. Rep. 334; Oregon & C. R. Co. v. United States, 189 U. S. 103, 112, 47 L. ed. 726, 730, 23 Sup. Ct. Rep. 615; United States v. Detroit Lumber Co. 200 U. S. 321, 334, 50 L. ed. 499, 504, 26 Sup. Ct. Rep. 282, and cases cited.

In Shepley v. Cowan, there was conflict between a pre-emption claim and a selection on behalf of the state of Missouri under an act of Congress conveying to the state a large quantity of land to be se-
389]lected by the governor, *the act providing that if the selection should be approved by the Secretary of the Interior, patents were to issue. The court said (p. 337):

"The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right, as against others, to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus, the patent upon a state selection takes effect as of the time when the selection is made and reported to the land office; and the patent upon a pre-emption settlement takes effect from the time of the settlement, as disclosed in the declaratory statement or proofs of the settler to the register of the local land office."

On page 338, after distinguishing Frisbie v. Whitney, 9 Wall. 187, 19 L. ed. 668, and Yosemite Valley Case (Hutchings v. Low) 15 Wall. 77, 21 L. ed. 82, the court said:

"But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land when the United States have determined to sell or donate the property. In all such cases the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

In St. Paul & S. C. R. Co. v. Winona & St. P. R. Co. 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334, one of the questions arising for decision was which of two railroad companies was entitled to certain tracts of lieu lands situated within overlapping indemnity limits of certain grants made by an act of Congress to the territory of Minnesota, to aid in the construction of the roads of the contesting companies. The selections were to be made by the governor, and required the approval of the Secretary of the Interior. The Winona Company filed a list of selections. *The[390 St. Paul Company made no selections, but nevertheless, on grounds which need not be stated, the Secretary of the Interior certified the lands to the state for the use of that company. The Winona Company brought suit in the state court to have a declaration of its rights in the land, and to restrain the St. Paul Company and others from receiving a patent or other evidence of title to the lands from the governor of the state. The state court decreed in favor of the Winona Company, and this court affirmed its action. In the course of the opinion it was said (page 731):

"The time when the right to lands becomes vested, which are to be selected within given limits under these land grants, whether the selection is in lieu of lands deficient within the primary limits of the grant or of lands which, for other reasons, are to be selected within certain secondary limits, is different in regard to those that are ascertained within the primary limits by the location of the line of the road."

After referring to prior decisions, the conclusion was reached that, as to the lands to be selected, "priority of selection secures priority of right;" and that, as the Winona Company alone had made selection of the lands, and that selection was lawful, the right to the land as against third parties vested in the Winona Company as of

the date of the filing of its lists of selections. In concluding the opinion it was said (p. 733):

"It is no answer to this to say that the Secretary of the Interior certified these lands to the state for the use of the appellant. It is manifest that he did so under a mistake of the law; namely, that appellant, having made the earlier location of its road through these lands, became entitled to satisfy all its demands, either for *lieu* lands or for the extended grant of 1864, out of any odd sections within 20 miles of that location, without regard to its proximity to the line of the other road. We have already shown that such is not the 391]law, and this erroneous decision *of his cannot deprive the Winona Company of rights which became vested by its selection of those lands. Johnson v. Towsley, 13 Wall. 72, 80, 20 L. ed. 485, 486; Gibson v. Chouteau, 13 Wall. 92, 102, 20 L. ed. 534, 537; Shepley v. Cowan, 91 U. S. 330, 340, 23 L. ed. 424, 427; Moore v. Robbins, 96 U. S. 530, 536, 24 L. ed. 848, 851."

So, also, in Oregon & C. R. Co. v. United States, 189 U. S. 103, 47 L. ed. 726, 23 Sup. Ct. Rep. 615, the court said (p. 112):

"Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd-numbered sections within its place or granted limits,—which interest relates back to the date of the granting act,—the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the Land Department; and then its right relates to the date of the selection. And nothing stands in the way of a disposition of indemnity lands, prior to selection, as Congress may choose to make."

The doctrine thus affirmatively established by this court, as we have said, has been the rule applied by the Land Department in the practical execution of land grants from the beginning. Porter v. Landrum, 31 Land Dec. 352; Re Southern P. R. Co. 32 Land Dec. 51; Re Santa Fe P. R. Co. 33 Land Dec. 161; Eaton v. Northern P. R. Co. 33 Land Dec. 426; Santa Fe P. R. Co. v. Northern P. R. Co. 37 Land Dec. 669. The well-settled rule of the Land Department on the subject was thus stated by the then assistant attorney general in the department, now Mr. Justice Van Devanter, as follows:

"Under this legislation the company was, by the direction or regulations of the Secretary of the Interior, required to present at the local land office selections of indemnity lands, and these selections, when presented conformably to such direction or regulations, were to be entertained and noted or recognized on the records of the local office. When this was done the selections became lawful filings; *and while, un-[392 til approved and patented, they would remain subject to examination, and to rejection or cancelation where found for any reason to be unauthorized, they, like all other filings, were entitled to recognition and protection so long as they remained undisturbed upon the records.

"There is no question in this case as to the sufficiency of the loss assigned, or as to the formality and regularity of the selection.

"What effect has been given to a pending railroad indemnity selection?

"Prior to 1887 the rights of a railroad company within the indemnity belt of its grant were protected by executive withdrawal; but on August 15, that year, these withdrawals were revoked, and the land restored to settlement and entry; but such orders, although silent upon the subject, were held not to restore lands embraced in pending selections. Dinwiddie v. Florida R. & Nav. Co. 9 Land Dec. 74. In the circular of September 6, 1887 (6 Land Dec. 131), issued immediately after the general revocation of indemnity withdrawals, it was provided that any application thereafter presented for lands embraced in a pending railroad indemnity selection, and not accompanied by a sufficient showing that the land was for some cause not subject to the selection, was not to be accepted, but was to be held subject to the claim of the company under such selection. In fact a railroad indemnity selection, presented in accordance with departmental regulations, and accepted or recognized by the local officers, has been uniformly recognized by the Land Department as having the same segregative effect as a homestead or other entry made under the general land laws." [32 Land Dec. 53.]

Despite the doctrine of this court, as expounded in the cases previously referred to, the unbroken practice of the Land Department from the beginning in the execution of land grants, impliedly sanctioned by Congress during the *many years that ad-[393 ministrative construction has prevailed, and the destructive effect upon rights conferred by land-grant acts which would result from applying the contrary view, it is yet urged that this must be done because of decisions of this court which it is insisted constrain to that conclusion. One of the decisions thus referred to is Sjoli v. Dreschel, to which we have previously

referred, and others are cited in the margin.†

What we have already said as to the Sjoli Case would suffice to dispose of the suggestion concerning that case, but we shall recur to it. As to the other cases, it would be adequate to say that not one of them involved the question here under consideration, nor even by way of *obiter* was an opinion expressed on such question. Indeed, all the cases relied upon may be placed in one of three classes: (a) those involving the nature and character of the right, if any, to indemnity lands prior to selection; (b) whether such lands, after the filing of a list of selections, and before action by the Secretary of the Interior thereon, could be taxed by a state to the railroad company as the owner thereof; and (c) those which were concerned with the nature and character of acts which were adequate to initiate a right to public land which would be paramount to a list of selections when the acts were done before the filing of the list of selections. In none of the cases, moreover, was the well-settled doctrine of this court as to relation, even by remote implication, questioned. Indeed, in most of the cases relied upon, the previous decisions to which we have referred, expounding the doctrine of relation, were approvingly cited or expressly reaffirmed.

394] *The Sjoli Case, from the facts we hav already stated, is clearly here inapplicable, because it falls in the third of the above classes. If it be conceded that general language was used in the opinion in that case which, when separated from its context and disassociated from the issues which the case involves, might be considered as here controlling, that result could not be accomplished without a violation of the fundamental rule announced in Cohen v. Virginia, 6 Wheat. 399, 5 L. ed. 290, so often since reiterated and expounded by this court, to the effect that "general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." The wisdom of the rule finds apt illustration here when it is considered that not even an intimation was conveyed in the Sjoli Case of any intention to overrule the repeated prior decisions of this court concerning the operation and effect of the doctrine of relation upon the approval, by the Secretary of the Interior, of a lawful list of selections. That the general expressions in the Sjoli Case are not persuasive here clearly results from the demonstration which we have previously made, that to apply them would be in effect to destroy the indemnity provisions of the granting act. Moreover, that serious general injurious consequences would arise from treating the expressions relied upon in the Sjoli Case as persuasive is clear (a) because to do so would result in the overthrow of the uniform rule by which the Land Department has administered land grants from the beginning,—a rule continued in force after the decision in the Sjoli Case, because of the administrative conclusion that that case should be confined to a like state of facts, and not be extended to other and different conditions (25 Ops. Atty. Gen. 632); (b) because of the destructive effect upon rights of property and the infinite confusion which would now arise from *extending, un-[395 der the circumstances stated, the observations in the Sjoli Case to the wholly different state of facts presented upon this record.

While the foregoing disposes of the main propositions which the case presents, there are additional contentions which it is necessary to pass upon. Irrespective of any question as to the paramount nature of a list of selections, it is contended on behalf of appellee, contrary to the ruling of the Secretary of the Interior: (a) that the selection by the railroad company of the tract in controversy was void and it could not lawfully be approved; (b) in any event, that he was entitled to the land by virtue of the provisions of an act approved July 1, 1898 (30 Stat. at L. 620, chap. 546); and (c) the Northern Pacific Railway Company did not succeed to the rights of the Northern Pacific Railroad Company in the land, if any right thereto became vested in the latter company.

a. This contention is predicated upon the claim that the selecting company had not sustained a legal loss of the tract in lieu of which the land in controversy was selected and that if it had sustained the loss, the selection was not lawful, because the tract selected was not on the same side of the

†Sjoli v. Dreschel, 199 U. S. 564, 50 L. ed. 311, 26 Sup. Ct. Rep. 154; Ryan v. Central P. R. Co. 99 U. S. 382, 25 L. ed. 305; Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 112 U. S. 414, 28 L. ed. 794, 5 Sup. Ct. Rep. 208; Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629, 639, 644, 28 L. ed. 1122, 1125, 1127, 5 Sup. Ct. Rep. 566; Wisconsin C. R. Co. v. Price County, 33 U. S. 496, 511, 33 L. ed. 687, 694, 10 Sup. Ct. Rep. 341; United States v. Missouri, K. & T. R. Co. 141 U. S. 359, 374, 375, 35 L. ed. 766, 771, 12 Sup. Ct. Rep. 13; New Orleans P. R. Co. v. Parker, 143 U. S. 42, 57, 6 L. ed. 66, 70, 12 Sup. Ct. Rep. 364; Hewitt v. Schultz, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309.

railroad as the tract lost, and was not the nearest unappropriated land to it. These contentions were considered at much length by the Secretary of the Interior in the opinion, copied in the record, affirming the cancelation of the entry of Jones (34 Land Dec. 105),† and were found not to be meritorious. The reasons advanced by the Secretary in support of his rulings upon the legal propositions involved seem to us convincing, and we therefore hold the contentions untenable. Cognate to the contentions just disposed of is a claim made in argument that the filed list of selections was void for the reason that the joint resolution of May 31, 1870, establishing the second indemnity limits, required certain facts to appear in order to entitle the railway company to the land, and that in selecting the *land those requisites were[396 not complied with. The claim substantially embodies merely criticisms directed to the form or regularity of the selection list, and is not, in any view, of such a character as to render void the filed list. The matter being within the jurisdiction of the Secretary of the Interior, we must assume that the facts necessary to establish the right to approve the selections were shown to his satisfaction.

b. This contention asserts that complainant is entitled to the land by virtue of certain provisions relating to the Northern Pacific land grant contained in the subdivision entitled, "Surveying the Public Lands," embodied in the sundry civil appropriation

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†Richard B. Jones,
v.
Northern Pacific Railroad Co.

This is an appeal of Richard B. Jones from your office decision of December 2, 1901, holding for cancelation his cash entry allowed under act of June 3, 1878 (20 Stat. at L. 89, chap. 151), as amended by the act of August 4, 1892 (27 Stat. at L. 348, chap. 375, U. S. Comp. Stat. 1901, p. 1545), for the S. W. ¼ of the S. E. ¼ of Section 7, Township 54 N. R. 14 W., Duluth Land District.

The land in controversy lies within the second indemnity limits of the grant made in aid of the construction of the Northern Pacific Railroad, east of the city of Duluth, provision for which is found in the joint resolution of May 31, 1870 (16 Stat. at L. 378), and was selected by the Northern Pacific Railroad Co. October 17, 1883. This selection remained of record until march 22, 1897, when it was canceled pursuant to departmental decision in the case of the Northern Pacific Railroad Co. (23 Land Dec. 204), holding Duluth to be the eastern terminus of the company's grant, but was reinstated by your office letter of May 26, 1900, under the decision of the Supreme Court of the United States in the case of Doherty v. Northern P. R. Co. 177 U. S. 421, 44 L. ed. 830, 20 Sup. Ct. Rep. 677, holding the eastern terminus of the grant to be at Ashland, Wisconsin. Between the date of cancelation of the selection and before it had been reinstated, to wit, on December 17, 1897, the said Richard B. Jones applied to purchase the tract under the timber and stone acts, supra, and after due publication and proof made entry thereof, December 10, 1898. At the date of the purchase, but not at the date of the application, the tract in controversy, with others, was withdrawn from entry by virtue of the departmental order of February 28, 1898 (26 Land Dec. 265), but there was a provision in the order permitting the completion of all entries theretofore allowed.

It is contended upon the appeal, in substance:

1. That the Northern Pacific Railway Company has no legal or equitable claim upon the United States to be considered the successor in interest to the land-grant rights of the Northern Pacific Railroad Company, and that there is therefore no authority of law for the patenting of lands to the named company.

2. That the company's selection was and is void because no valid basis is assigned.

3. That the selection is irregular and void because the selected land was not, at date of selection, the nearest available public land to the section alleged to have been lost in place.

4. That the timber and stone application of Jones, having been presented at a time when the tract in controversy was unappropriated public domain, his application was the equivalent of an entry, and that he thereafter, in accordance with the terms of the order of suspension of February 28, 1898, supra, had the right to complete the same by making proof and payment thereon.

5. That such application having been presented, and such proof and payment having been made, he had, prior to January 1, 1898, in contemplation of law, and within the meaning of the act of July 1, 1898 (30 Stat. at L. 597, 620, chap. 546, U. S. Comp. Stat. Supp. 1909, p. 1503), purchased the land directly from the United States, that he had an entry prior to January 1, 1898, within the meaning of departmental instructions of February 14, 1899 (28 L. D. 103), and that therefore he is entitled to an adjustment of his claim under said act.

The question of the succcssorship of the Northern Pacific Railway Company to the land-grant rights of the Northern Pacific Railroad Company was considered by Attorney General Harmon, February 6, 1897 (21 Ops. Atty. Gen. 486), and referring to certain mortgage foreclosure proceedings this Department was then advised that it should act upon applications for patents by the railway company upon the same considerations which should govern it in case there had been no foreclosure and the applications had been made by the old company.

act of July 1, 1898. The provisions are copied in the opinion in Humbird v. Avery, 195 U. S. beginning at page 485, 49 L. ed. 292, 25 Sup. Ct. Rep. 123, and need not be here repeated. As there said, they "disclose a scheme or plan for the settlement of the disputes arising out of the conflicting rulings in the Land Department in reference to the eastern terminus of the railroad, and its action in reference to the public lands between Duluth and Ashland." It is argued that the Secretary of the Interior erroneously decided that the land could not be claimed under the act of 1898 by Jones or his grantee, because, prior to January 1, 1898, Jones had done nothing more than to file his application for the land, and was consequently not a purchaser entitled to the benefits of the statute. In our opinion no error was committed by the Secretary in so deciding. Because we reach this conclusion we must not be considered as intimating any opinion whatever regarding the soundness of the contention made on behalf of the appellants, to the effect that, in any event, the act of 1898 can have no application to one who purchased land under the timber and stone act.

c. It is contended that the Northen Pacific Railway Company, under its charter, had no power to purchase the tract of land here in controversy, and that for various reasons the legal proceedings under which the railway company *asserted it had[397 acquired the rights of the Northern Pacific

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It was but recently urged before this Department that said opinion was ill-advised and unsound, both in law and fact. The matter was again submitted to the Attorney General, and April 12, 1905, Attorney General Moody considered the question, concluding as follows:

"It seems to me that the decision of my predecessor was correct, and accordingly have to advise you, the Secretary of the Interior, that, in my opinion, you should continue to be governed by the rule there laid down."

This question is not, therefore, open for further consideration by this Department. Ferguson v. Northern P. R. Co. 33 Land Dec. 364.

Appellant's second contention, that the company's selection herein is void because of invalid basis, rests upon the allegation that the basis assigned lies within the overlapping limits of the grant to the state of Minnesota, to aid in the construction of a railroad from St. Paul to Lake Superior, made by the acts of May 5, 1864 (13 Stat. at L. 64, chap. 79), and July 13, 1866 (14 Stat. at L. 93, chap. 178), afterwards conferred by the state upon the Lake Superior & Mississippi Railroad Company, and the grant to the Northern Pacific Railroad Company, made by the act of July 2, 1864 (13 Stat. at L. 365, chap. 217); that Congress did not make a double grant within these overlapping limits, and the date of the grant to the Lake Superior & Mississippi Railroad Company being prior to the grant to the Northern Pacific Railroad Company's road opposite the tract, and the tract having been approved to the former company prior to the definite location of the last-named company's road, it was not granted to it, and therefore not lost to that company's grant.

This contention is unsound. This base land is not within the limits of the withdrawal of May 26, 1864, made on account of the grant of May 5, 1864, and the case does not, therefore, fall within the ruling of the Department in the case of Northern P. R. Co. v. Rooney, 30 Land Dec. 403. It is true the base land was certified under the grant of May 5, 1864, but it was because of the fact that it fell within the indemnity limits of that grant as adjusted to the line of definite location, and was selected after the date of the Northern Pacific land grant, but prior to the definite location of that line of road. No question arises, therefore, in this case, of the right of the Northern Pacific Company to satisfy its loss from its second indemnity belt where the base land was in law and fact lost prior to the grant of July 2, 1864. In the case of Re Northern P. R. Co. 23 Land Dec. 204, it was held that because of a proviso in the act of July 2, 1864, supra, said company would not be entitled to receive indemnity for any of the losses sustained on account of the grant to the Lake Superior & Mississippi Railroad Company, made by the act of May 5, 1864, between Thomson's junction and Duluth. This decision was fundamentally wrong. It held that, because of an agreement, amounting to a consolidation between the two companies, whereby the Northern Pacific Company was authorized to use the other company's tracks between Thomson's Junction and Duluth, it thereby adopted this as its line of road between these points; that Duluth, being on Lake Superior, the eastern point named in the company's charter, that point was therefore the eastern terminus of its grant, and that it therefore, between these points, being "upon the line of another railroad route, to aid in the construction of which lands" had been therefore granted by the United States, was, because of the proviso above referred to, not entitled to indemnity for lands lost because of the prior grant. This view was declared erroneous by the Supreme Court of the United States in the Doherty Case, supra, which recognized the extension of the road eastward from Thomson's Junction to Ashland, Wisconsin, as part of the land-grant road, and it follows that, as the route of the Northern Pacific Railroad is in no sense upon the same general line as that of the Lake Superior & Mississippi Railroad, the proviso in question is without application, and the contention that the Northern Pacific Company is not entitled to indemnity for this tract must fail.

Railroad Company in the land were ineffective to produce any such result. On this record, however, it is not necessary to pass upon these contentions. As the object of the bill is to seek to charge the defendants as trustees of the land for complainant, plainly, if a valid selection was made, proof that their grantor never acquired title to the land would not establish a right to it in the complainant.

It follows that the decree of the Court of Appeals must be reversed, and that of the Circuit Court affirmed. And it is so ordered.

Mr. Justice **Harlan**, with whom concurred Mr. Justice **Day**, dissenting:

This case is of sufficient importance to justify a full statement of the facts, as well as the grounds upon which we feel constrained to dissent from the opinion and judgment of the court.

By the final decree under review, the circuit court of appeals for the eighth circuit unanimously reversed the judgment of the circuit court, with directions to give the plaintiff Hoyt, now appellee, the relief asked in his bill.

The general object of the suit was to have it adjudged that the present defendants, Weyerhaeuser and Humbird, now appellants, should hold the legal title to certain lands in Minnesota in trust for the plaintiff, and be enjoined, during the pendency of the cause, from selling, disposing of, or removing, or from attempting to cre-

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With regard to the regularity of the indemnity selection of this land there can be no question but that, as originally presented, it was a proper selection under existing departmental regulations, the company at that time being relieved from the specification of a basis for its selections. It is claimed, however, that this selection should not receive departmental approval, because there are, or were, at the time said selection was perfected by the assigning of a basis in 1893, available lands nearer to the loss then specified, and the question is therefore presented, whether, admitting the same to be true, the selection is a proper one under the terms of the granting act.

The third, or granting section of the act of July 2, 1864, supra, grants to the Northern Pacific Railroad Company "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of the said railroad line, as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office, and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the directions of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

December 7, 1887, the question as to whether selections could be made within the first indemnity belt of the Northern Pacific land grant for losses outside of the particular state or territory in which the same occurred was submitted to the Attorney General for opinion, and in consideration thereof, Mr. Attorney General Garland, in his opinion dated January 17, 1888 (8 Land Dec. 14, 17), after referring to the clause of the section above quoted providing for indemnity, says:

"The conditions of this indemnity, set forth in detail, under which the right or privileges of selection rests in the company, are: lands shall have been lost out of the amount granted; selections must be made by the company of other lands in lieu of them; whose selections must be made under the directions of the Secretary of the Interior; selections shall only be of alternate odd-numbered sections, and they must not be more than 10 miles beyond the limits of the granted sections. These are all the limitations or conditions provided for by the act of 1864, subject to which the right to select is granted. Interpretation will not warrant the adding of another limitation, that the lieu lands must be selected in the same state or territory in which the lands were lost. To annex such an additional limitation to the words of the grant would be legislation, and not construction."

It is further provided by said § 3 of the act of 1864:

"That all mineral lands be, and the same are, hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections nearest to the line of said road, may be selected as above provided."

It will be noted that this provision limits the selection of indemnity for losses to the grant on account of mineral lands, to "odd-numbered sections, nearest to the line of said road," etc.

There could be no good reason for attaching an additional condition upon selections made in lieu lands lost to the grant because mineral in character, and it might therefore be urged that it was intended to enlarge the limits within which such selections could be made. Thus, for general indemnity, selections were to be made from "alternate sections, and designated by odd numbers, not more than 10 miles beyond

ate any charge upon the timber standing or lying upon the premises in question.

Many questions have been discussed by counsel. But there is one which seems to require special examination. The facts out of which that question arises may be thus stated:

The land in question is the southwest quarter of the southeast quarter of section 7, 398]township 54, of *range 14 west, principal meridian. It contains 40 acres, and is situated in St. Louis county, Minnesota. It is unfit for cultivation, is valuable chiefly for its timber, has no valuable deposit of gold, silver, cinnabar, copper, or coal upon it, was at the time mentioned in the record uninhabited, and contained no mining or other improvements.

For the purpose of availing himself of the act of Congress relating to the sale of timber land in California, Oregon, Nevada, and Washington territory, approved June 3d, 1878 (20 Stat. at L. 89, chap. 151, U. S. Comp. Stat. 1901, p. 1545),—which act was amended August 4th 1892, and its benefits extended to all the states (27 Stat. at L. 348, chap. 375, U. S. Comp. Stat. 1901, p. 1434),—one Richard B. Jones, a citizen of the United States, and admittedly, in all respects qualified under the laws of the United States to enter land, filed, December 17th, 1897, with the register and receiver in the land office at Duluth, a verified written duplicate statement, in due form, indicating his desire to purchase the land in dispute under the homestead laws of the United States. One of these statements was promptly transmitted by the receiver to the General Land Office at Washington.

The receiver, in conformity with law, at once posted in his office, for the required time, the fact of such application, describing the lands by legal subdivision, and furnishing Jones a copy of such notice. That notice was duly published in the newspaper

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the limits of said alternate sections," being the granted sections, and for losses on account of mineral lands, to "odd-numbered sections, nearest to the line of said road."

Be this as it may, the lands made the basis for the selection in question were not lost to the grant because mineral in character, and the limitation "nearest to the line of said road" differs widely from a requirement that the selection must be nearest the tract lost and made the basis for the selection.

In the case of United States v. Colton Marble & Lime Co. 146 U. S. 615, 618, 36 L. ed. 1104, 1105, 13 Sup. Ct. Rep. 163, it was said by the court:

"It might well be assumed that very likely the Atlantic & Pacific Company would be called upon to select from the indemnity lands a portion sufficient to make good the deficiency in the granted limits. That right of section was a prospective right, and if it was to be fully exercised, no adverse title could be created to any lands within the indemnity limits. Suppose, for instance, it should turn out that only half of the indemnity lands were necessary to make good the deficiency, and that one half of such lands were well watered and valuable, while the remainder were arid and comparatively valueless; obviously the right of selection would be seriously impaired if it were limited to only the arid and valueless tracts."

In that case the court had under consideration the prospective right of the Atlantic & Pacific Railroad Company to odd-numbered sections within the indemnity limits of its grant made by act of July 27, 1866 (14 Stat. at L. 292, chap. 278), which grant has the same indemnity provisions as the Northern Pacific act of 1864, with the exception that indemnity for losses to the grant on account of mineral lands is limited to "odd-numbered sections nearest to the line of said road and within 20 miles thereof." With regard to this latter provision it will be noticed that the selection is limited to odd-numbered sections within the primary limits of the grant, as those limits are 20 miles on each side of the road in territories, thus, in effect, nullifying the provision, because the sections from which selections are to be made were specifically granted in place.

The resolution of May 31, 1870, supra, providing for a second indemnity belt to the Northern Pacific grant, before quoted from, merely limits the place of selection to a belt "10 miles on each side of said road, beyond the limits prescribed in said charter," etc.

The act of 1864 and the resolution of 1870 each, therefore, establish a limit beyond which the company cannot go on making its general indemnity selections, but in neither is there any requirement limiting such selections to the lands nearest the sections in which the losses to the grant occur, and to so limit such selections would attach a condition or limitation upon the right of selection not found in the granting acts.

That the right of selection conferred by these acts cannot be restricted by the Secretary of the Interior seems clear. His duty in the premises is to supervise the administration of the grant, but this authority does not permit him to abridge or enlarge the laws of Congress. We should see that the selection made in satisfaction of the grant are confined to the lands described in the granting act; but, as between different sections, equally within the description contained therein, he cannot say which may or which may not be selected, for in so doing he would be denying the railroad company the right to make the selection. See Willamette Valley & Cascade Mt. Wagon Road Co. v. Bruner, 26 Land Dec. 357.

Attention has been called to the circular

nearest to the land. On the 27th day of March, 1898, no adverse claim to the land having been filed in the land office, the applicant, Jones, after furnishing to the local register satisfactory proofs of the preliminary facts required by law, *paid to the receiver the full purchase price of the land*, together with all fees legally due to those officers. Thereupon he was permitted, December 10th, 1898, to enter, and *did* enter the land, the receiver executing and delivering to him at the time an *official receipt and certificate of purchase*. In December, 1898, all the papers and testimony in the 399]matter *of Jones's application, including his certificate of purchase, were transmitted by the register and receiver to the General Land Office at Washington, *and by that office were received and filed*. On December 19th, 1898, Jones and wife sold and conveyed the land to Minnie Stewart, by deed properly recorded on October 3d, 1902. Stewart and wife conveyed to Hoyt, the present plaintiff, now appellee, and that deed was also duty recorded October 3d, 1902.

On the 2d day of December, 1901,—nearly *three* years *after Jones got his certificate of purchase, and after he had sold the land*,—the Commissioner of the General Land Office made a decision, holding for cancelation the entry made by Jones, as above stated, declaring it to be void on the ground that this land (using the words of the Commissioner) "was selected by the Northern Pacific Railroad (now Railway Company) October 17th, 1883, for the second indemnity, per list, rearranged list 15 B, in lieu of land in Section 11, T. 46 R. 16 W., in the primary limits disposed of between date of grant and definite location of the road, which selection has not since been abandoned or the basis otherwise used. The selection was canceled, however, by letter of March 22, 1897, because the land is east of Duluth, the then [supposed] east-

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of August 4, 1885 (4 Land Dec. 90), relating to railroad indemnity selections, and requiring a designation of a loss as a basis for all indemnity selections, in which circular it is said that "where deficiencies exist, for which indemnity is allowed by law, the lieu selections must be made from vacant, unappropriated land within the proper sections and limits nearest the granted section in which the loss occurred."

This circular was issued before the opinion of the Attorney General or the decision of the court referred to. Its main purpose was to require the specification of a loss as a basis for the selection, thereby aiding the adjustment of the grant; for it required the designation of a loss as a basis for all selections previously approved and certified as well as for those then pending or thereafter to be made.

In respect to the portion of the said circular above quoted, in the manner of proximity between loss and selected tract, in view of what has been said, it cannot be considered as a limitation upon the right of selection, but rather as suggesting a manner of designating the losses so as to aid in adjusting the grant. It might also be stated that it is learned upon inquiry at your office that, at least as to lands within the second indemnity belt, a strict adherence thereto has not been enforced.

In the case of Re Hickey, 26 Land Dec. 612, it was held (syllabus):

"Indemnity selections are made under the direction of the Secretary of the Interior, and the enforcement of any requirement in the matter of a specification of a loss is only for his information and as a bar to the enlargement of the grant, and may be waived whenever he deems such course advisable."

The conclusions hereinbefore reached answer appellant's fourth contention. The railway company's selection was improperly canceled; the application of Jones initiated no right as against the company, and his purchase no claim which can be recognized by the Land Department, unless it is protected by the provisions of the act of July 1, 1898, supra; and this question involves consideration of the fifth and last specification of error on appeal.

If Jones had purchased this land from the United States prior to January 1, 1898, or if he had, prior to that time made an entry thereof within the meaning of the act of July 1, 1898, he is entitled to an adjustment thereunder. It is believed that he had done neither of these things. While the application to purchase was presented prior to the date named, proof and payment were not made until after that date. There was no purchase prior to January 1, 1898. But it is contended that the application of Jones was the equivalent of an entry. No vested right is acquired by a timber and stone application. While such an application, if presented in accordance with the law and for land subject thereto, reserves the land from other disposition by the Land Department, no right is initiated as against the government, and prior to the submission and acceptance of final proof and the payment of the purchase price, the Secretary of the Interior may suspend the same from disposition and sale under the public land laws. Board of Control, Canal No. 3, State of Colorado v. Torrence, 32 Land Dec. 472.

This is precisely what was done in this case. The tract was withdrawn from entry by the order of February 28, 1898, and the purchase of Jones, allowed in violation of that order, initiated no right falling within the remedial provisions of the act of July 1, 1898. Eaton v. Northern P. R. Co. 33 Land Dec. 426.

The decision appealed from is affirmed.

ern terminal of the grant under departmental ruling; but said cancelation was rescinded and the selection restored by letter of May 26, 1900, under the decision of the U. S. Supreme Court (177 U. S. 435, 44 L. ed. 836, 20 Sup. Ct. Rep. 706), that the grant extends to Ashland, Wisconsin. December 17, 1897, Richard B. Jones applied to purchase said tract under the timber and stone law, and after due publication and proof made entry thereof December 10, 1898. Cash certificate No. 14,812. Under the decision of the court, the selection of the company is a valid selection, and the claim of Jones not having been perfected prior to January 1, 1898, his claim is not within the act of July 1, 1898 [30 Stat. at L. 597, chap. 546, U. S. Comp. Stat. Supp. 1909, p. 1503], (departmental decision of May 400]22, 1900, Salter v. *Company). Said entry is therefore hereby held for cancelation for conflict with the prior valid selection of the company subject to appeal. Notify him hereof; the company will be informed by this office."

It does not appear that Jones, or anyone claiming under him, had any previous notice of this order, or that there was any trial or regular hearing of the matter in the General Land Office.

Upon appeal to the Secretary of the Interior, the above order of December 2d, 1901, was affirmed, and subsequently, but not until October, 1905, a patent was issued to the Northern Pacific Railway Company. 34 Land Dec. 105.

When Jones entered and purchased the land, paying the government price for it, and receiving a certificate of his purchase, —*which purchase was made and which certificate was given nearly seven years before a patent was issued to the railroad company*,—there was in the Land Office a *list* of selections alleged to have been filed by the railroad company on October 17th, 1883. But the list did not assign each selection to specific land in the granted limits, which it was asserted had been lost by the company. That list was received at the local land office, and transmitted to the General Land Office. But on the 11th of April, 1893, the railroad company, acting under the direction or suggestion of the Secretary of the Interior, "rearranged" its list so as to specify the particular tract lost in the primary limits. In such list the lands in dispute here were set opposite to particular lands lost in those limits. The lands mentioned in the company's list, whether we take the original or rearranged list, were, it must be remembered, within the *indemnity* limits of the grant made by Congress in 1864, in aid of the construction of the Northern Pacific Railroad. That is not disputed.

The principal assignment of error is that the entry and purchase by Jones—under whom Hoyt claims—of the lands in question were *subordinate* to the rights acquired *by the mere *filing* of the *list* of se-[401 lections by the railroad company, followed as that was by the approval of the Secretary of the Interior and by a patent, although *such approval was not given, nor*, as we have seen, *the patent issued to the railroad company, until many years after Jones received his certificate of purchase from the government.*

Upon final hearing in the circuit court, the bill was dismissed. But upon appeal to the circuit court of appeals, all the judges concurring, that judgment was reversed, and the case sent back with directions to enter a decree for the relief asked in the bill. Rec. 214, 88 C. C. A. 404, 161 Fed. 324. The principles in the latter case were accepted and applied by the supreme court of Minnesota in Northern P. R. Co. v. Wass, 104 Minn. 411, 116 N. W. 937.

Section 3 of the charter of the Northern Pacific Railroad Company of July 2d, 1864 [13 Stat. at L. 369, chap. 217], provided: "And be it further enacted that there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or *parts[402 of sections shall have been granted, sold, reserved, *occupied by homestead settlers*, or pre-empted, or otherwise disposed of, *other lands* shall be selected by said company *in lieu thereof, under the direction of the Secretary of the Interior*, in alternate sections, and designated by odd numbers, not

more than 10 miles beyond the limits of said alternate section. . . ."

But Congress afterwards broadened or extended the limits into which the railroad company, under the direction of the Secretary, might go in order to supply deficiencies in the granted limits. By the joint resolution of May 31st, 1870 (16 Stat. at L. 378), amending the above act of 1864, "second indemnity limits" were created. The resolution provided: "And in the event of there not being in any state or territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within 10 miles on each side of said road beyond the limits prescribed in said charter, as will make up such deficiency on said main line or branch, except mineral and other lands, as excepted in the charter of said company of 1864, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. . . ."

The fundamental inquiry in the case is whether Jones's entry, occupancy, and purchase of the lands were subject or subordinate to the *previous filing* of the list of selections by the railroad company, the Secretary of the Interior not having approved such list until after such entry, occupancy, and purchase by Jones. The judgment be-[403]low *proceeded upon two principal grounds: 1. That the railroad company did not acquire *any right or interest* in the lands selected within indemnity limits by the *mere filing* of its *list of selections*. 2. That *after* such list was filed, and while it was *unapproved* by the Secretary, the lands remained fully *open to entry and purchase* by homesteaders and pre-emptors under the laws of the United States; that, in the absence of the approval of the Secretary of the Interior, the *mere filing* of the lists put *no obstacle whatever* in the way of homesteaders or pre-emptioners seeking to acquire public lands not already appropriated or sold under the laws of the United States; and that by an entry or purchase in conformity with the homestead or pre-emption laws a right *attached* to those lands in favor of the entryman which could not be destroyed or overridden by any *subsequent* approval by the Secretary of the Interior of the original or rearranged list of selections made by the railroad company.

These grounds were sustained by a well-reasoned opinion delivered by Judge Sanborn on behalf of the circuit court of appeals. In view of the elaborate discussion by counsel and by the majority of my brethren, it will be instructive to make a liberal extract from that opinion. After observing that lands within *indemnity* limits did not cease to be public lands open to settlement under the homestead laws, simply because of their having been embraced in a list of selections filed by the railroad company to supply losses within place limits, the circuit court of appeals (the italics being ours) said: " 'The company's unapproved selections did not, therefore, stand in the way of the lands being occupied and entered under the homestead laws. The mere filing of its lists of selections of indemnity lands *did not have the effect to exclude them from occupancy under the pre-emption or homestead laws.*' . . . The question here is not the jurisdiction but the legality of the decision of the Land Department, *and especially of the Sec-[404] retary [of the Interior], its head, whereby he awarded this land to the railway company. The facts and the law warranted and required its award and sale to Jones. When he presented his application to purchase it under the timber and stone act, the railway company's selection of it was *unapproved* by the Secretary, and that company was without equitable right to it. The Land Department had jurisdiction to accept the application of Jones and to sell the land to him, or to approve the selection of the company and to award the land to it. It exercised this jurisdiction, accepted the application of Jones, permitted him to enter the land, to prove up his claim to it, sold it to him, took his $100 in payment for it, and issued to him his receiver's receipt, *and it did all this before the selection of the company was approved, and before the company could acquire any right to the land.* Jones's equitable title to the tract *had then vested*, and, while the jurisdiction of the Land Department continued until the patent issued, its power was neither arbitrary, unlimited, nor discretionary, and its action was subject to judicial correction for error of law, fraud, or clear mistake. The jurisdiction and power of disposition which the Land Department has of the lands of the United States, like the power of every other department of the government is subject to the laws of the land, and the Land Department's violation or disregard of them is remediable in the courts. Its power 'cannot be exercised so as to deprive any person of land lawfully

entered and paid for. *By such entry and payment* the purchaser secures a *vested interest in the property and a right to a patent therefor,* and can no more be deprived of it by order of the Commissioner, than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way will be corrected whenevere the mater is presented so that the judiciary can act upon it." Cornelius v. Kessel, 128 U. S. 456, 461, 32 L. ed. 482, 483, 9 Sup. Ct. Rep. 122; Germania Iron Co. v. James, 32 C. C. A. 348, 354, 355, 405]61 U. S. App. 1, 89 *Fed. 811, 818; James v. Germania Iron Co. 46 C. C. A. 476, 481, 107 Fed. 597, 602; Black v. Jackson, 177 U. S. 349, 357, 44 L. ed. 801, 804, 20 Sup. Ct. Rep. 648; Orchard v. Alexander, 157 U. S. 372, 383, 39 L. ed. 737, 741, 15 Sup. Ct. Rep. 635; Brown v. Hitchcock, 173 U. S. 473, 478, 43 L. ed. 772, 774, 19 Sup. Ct. Rep. 485. . . . Finally counsel involved the familiar rule that the decisions of officers of other departments of the government upon questions within their jurisdiction are cogent and persuasive and should be followed by the courts unless they are clearly erroneous; and he reminds us that the Secretary of the Interior and the Commissioner of the General Land Office have carefully considered the questions in this case, and have decided that Jones was without legal or equitable claim to this land, and that the right of the railway company to it was superior. But Jones *was a qualified entryman.* The attempted withdrawals and selections of the land by the Secretary prior to his approval of the company's selection *were unauthorized by law and without legal effect.* The land was open to entry and purchase *until he approved the selection. Jones entered, brought, and paid for it before any such approval was made.* And the decisions of the Supreme Court which have been cited leave no doubt that the Secretary and the Commissioner fell into a plain error of law when they took the land which Jones had lawfully purchased from him or from his grantees and gave it to the railway company. Erroneous decisions of questions of law by the officers of the Land Department cannot be permitted to deprive the equitable owner of his vested right to lands which he has lawfully purchased from the United States. Johnson v. Towsley, 13 Wall. 72, 80, 20 L. ed. 485, 486; Gibson v. Choteau, 13 Wall. 92, 102, 20 L. ed. 534, 537; Shepley v. Cowan, 91 U. S. 330, 340, 23 L. ed. 424, 427; Moore v. Robbins, 96 U. S. 530, 536, 24 L. ed. 848, 851; St. Paul & S. C. R. Co. v. Winona & St. P. R. Co. 112 U. S. 720, 733, 28 L. ed. 872, 877, 5 Sup. Ct. Rep. 334. The conclusion is that by his entry and purchase, Jones acquired the entire beneficial ownership and the equitable right to the land in controversy, and that the railway *company and its successors in in-[406 terest obtained nothing under the patent but the naked legal title, which they held in trust for him and for his successors in interest. This conclusion renders the other questions presented in this case immaterial. The decree must accordingly be reversed, and the case must be remanded to the court below, with directions to enter a decree for the complainant for the relief prayed in the bill; and it is so ordered."

Many cases, among which was the recent case of Sjoli v. Dreschel, 199 U. S. 564, 50 L. ed. 311, 26 Sup. Ct. Rep. 154, were cited by the circuit court of appeals to sustain its conclusion. Attention is specially directed to that case because it was only recently decided, after full consideration. The facts in it differ, in some respects, from those in the case now before us, but the principles announced in the Sjoli Case were clearly the result of previous cases. They directly bear upon the question now under consideration.

It appears from the report of the Sjoli Case that he *settled* on the land there in dispute in 1884, and his original application was in 1889; whereas, the railroad company filed its list of selections of lands within indemnity limits to supply deficiencies in place limits in 1885, Sjoli then being in the actual occupancy of the land, and having the intention, by a formal application, to perfect his claim under the homestead laws. Dreschel claimed under the railroad company. Sjoli got a patent in 1901, based primarily on his prior occupancy. That was after the company filed its selections. The essential question in the case was as to the rights of the homestead settler as against the railroad company, which had filed its list of selections of the lands after the homesteader settled on the lands with the intention to acquire them, but before he made his formal application for them. Summing up the doctrines previously established, this court declared in the Sjoli Case that, from its previous cases, the following propositions were to be deduced: "That the railroad company *will[407 not acquire a vested interest in particular lands, within or without place limits, merely by filing a map of general route and having the same approved by the Secretary of the Interior, although, upon the definite *location* of its line of road, and the filing and acceptance of a map thereof in the office of the Commissioner of the General Land Office, the lands within *primary* or place limits, not theretofore reserved, sold, granted, or otherwise disposed of, and free

from pre-emption or other claims or rights, become segregated from the public domain, and no rights in such *place* lands will attach in favor of a settler or occupant who becomes such after definite location; that no rights to lands within *indemnity* limits will attach in favor of the railroad company until *after* selections made by it *with the approval of the Secretary of the Interior; that up to the time such approval is given*, lands within *indemnity* limits, *although embraced by the company's list of selections*, are subject to be disposed of by the United States, *or to be settled upon and occupied under the pre-emption and homestead laws of the United States;* and that the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected *with his approval*, to supply deficiencies within the place limits of the company's road." The words in the Sjoli Case, "that up to the time such approval [by the Secretary] is given, lands within indemnity limits, *although embraced by the company's list of selections*, are subject to be disposed of by the United States, *or to be settled upon and occupied under the pre-emption and homestead laws of the United States*," —were cited with approval in the very recent case of Osborn v. Froyseth, 216 U. S. 571, 578, 54 L. ed. 619, 623, 30 Sup. Ct. Rep. 420 and were really *the basis of the decision in that case.*

But the defendants insist that as Jones's occupancy of an application for the land were made while there was pending in the Land Office an unapproved *list* of selections 408]*of lands (including the land in question), which the railroad company desired to appropriate in order to supply deficiencies in its primary limits, the subsequent approval by the Secretary of the company's list—although such approval did not in fact occur until 1905—overrode and annulled any right previously acquired by the homesteader Jones, although he applied, paid for, and got his certificate of purchase *more than six years* prior to the *actual approval* by the Secretary of the Interior of the original or rearranged selection of these lands. We do not concur in this view. This view cannot be sustained without entirely disregarding the doctrines announced upon full consideration in many other cases, prior to the Sjoli Case.

As counsel have made an earnest and extended argument in support of the contrary view, it may be well to recall a few leading cases on the subject, and see just what has been adjudged.

In Ryan v. Central P. R. Co. 99 U. S. 382, 25 L. ed. 305, the court construed the 2d section of the act of July 25th, 1866 (14 Stat. at L. 239, chap. 242), granting to a company, for the purpose of aiding in the construction of a railroad and telegraph line, alternate odd sections of public land, for 10 miles on each side, subject, however, to the conditions that the railroad company might, *under the direction of the Secretary*, select alternate odd sections, within 10 miles on each side, nearest the place limits, to supply deficiencies in lands found to have been granted sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of. As to lands in the *place* limits, the court said that the right of the company to the odd sections became fixed and absolute when the road was located and the maps of such location were filed. But, said the court, speaking by Mr. Justice Swayne, "with respect to the 'lieu lands,' as they are called, the right was only a float, and attached to no specific tracts *until the selection was actually made*[409 in the manner prescribed." In that case the selection made by the company was approved by local land officers and confirmed by the Secretary of the Interior, *when there was no claim upon it.* The court further said, in reference to the land actually selected under the direction of the Secretary, that "the railroad company had not and *could not have any claim* to it until *specially selected*, as it was for that purpose. It was taken to help satisfy the grant to the extent that the odd sections originally given failed to meet its requirements. When so selected there was no Mexican *or other claim impending over it.*" In the same case, referring to the deficiency alleged to exist in the place limits, the court said: "It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was for that purpose." This language was quoted with approval in Osborn v. Froyseth, 216 U. S. 578, 54 L. ed. 624, 30 Sup. Ct. Rep. 420. So, in the present case, when Jones entered and purchased there was no claim upon these lands that gave the railroad company any *right* or *interest* whatever in them which could be asserted in opposition to the entryman, whose rights had *attached before any approval* of the selections.

A similar question under another land grant act arose in Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 112 U. S. 414, 28 L. ed. 794, 5 Sup. Ct. Rep. 208. The claim in that case was under an act of Congress of 1862 (12 Stat. at L. 489, chap. 120), which made a grant of lands designated by odd numbers on each side of the railroad, "which were not sold, reserved,

or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had not attached at the time the line was definitely fixed." This court, speaking by Mr. Justice Field, said: "A right to select them [lands] within certain limits, in case of deficiency within the 10 mile limit, was alone conferred, *not a right to any specific land or lands capable of identification by any principles of law or* 410]**rules of measurement. Neither locality nor quantity is given, from which such lands could be ascertained.*"

In Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629, 639, 641, 644, 28 L. ed. 1122, 1125, 1127, 5 Sup. Ct. Rep. 566, which involved rights under the act of July 2d, 1864, granting lands to a railroad company (13 Stat. at L. 365, chap. 217), the court, speaking by Mr. Justice Miller, said: "The reasonable purpose of the government undoubtedly is that which it expressed; namely, while we are giving liberally to the railroad company, we do not give any lands we have already sold, *or to which, according to our laws*, we have permitted *a pre-emption or homestead right to attach.* No right to *such* land passes by this grant. No interest in the railroad company attaches to *this* land or *is to be founded on this statute.*" This case was followed in Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 366, 33 L. ed. 363, 367, 10 Sup. Ct. Rep. 112; Whitney v. Taylor, 158 U. S. 85, 92, 93, 39 L. ed. 906, 908, 909, 15 Sup. Ct. Rep. 796, and Northern P. R. Co. v. Sanders, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671.

In Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 512, 33 L. ed. 687, 694, 10 Sup. Ct. Rep. 341, the court speaking by Justice Field, in determining the effect of the mere filing of the list of selections, said: *"Until the selections were approved,* there were *no selections in fact,* only preliminary proceedings taken for that purpose; and *the indemnity lands remained unaffected in their title. Until then* the lands which might be taken as indemnity were *incapable of identification; the proposed selections remained the property of the United States.* The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, *until it was executed, created no legal interest which could be enforced in the courts.*"

"The *mere filing of lists of* selections after the acceptance of the map of definite location of the railroad line between Duluth and Ashland *gave the company no such title as could be enforced by the courts in a suit between private parties.* It is true, the government was under a promise to give the railroad company lands *in[411 the indemnity limits to supply losses in place limits. But, as adjudged in the above cases, that promise *passed no title.*" Humbird v. Avery, 195 U. S. 480, 507, 49 L. ed. 286, 298, 25 Sup. Ct. Rep. 123, in which it was said that "no title to indemnity lands is vested until a selection be made by which they are definitely ascertained and the selection made approved by the Secretary of the Interior. This principle is firmly established,"—citing Wisconsin C. R. Co. v. Price County, and other cases.

In United States v. Missouri K. & T. R. Co. 141 U. S. 359, 374, 375, 35 L. ed. 766, 771, 12 Sup. Ct. Rep. 13, which case related to a railroad land grant, it was observed that certain *even* numbered sections within the indemnity limits of the particular railroad concerned could, under the statute there in question, have been legally selected as indemnity lands if no rights had attached to them before their selection, with the *approval of the Secretary of the Interior.* The court then proceeds: "We say, prior to such selection and approval, because as to lands which may legally be taken for purposes of indemnity, the principle is firmly established that title to them does not vest in the railroad company, for the benefit of which they are contingently granted, but, in the fullest legal sense, remains in the United States, *until* they are *actually* selected *and set apart, under the direction of the Secretary of the Interior, specifically for indemnity purposes,*"—citing, among other cases, Sioux City & St. P. R. Co. v. Chicago M. & St. P. R. Co. 117 U. S. 406, 408, 29 L. ed. 928, 929, 6 Sup. Ct. Rep. 790, in which the court, speaking by Mr. Justice Miller, said: "No title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, *and the selection made approved by the Secretary of the Interior.*"

In New Orleans P. R. Co. v. Parker, 143 U. S. 42, 57, 36 L. ed. 66, 70, 12 Sup. Ct. Rep. 364, the language of the court was: "As to lands within the indemnity limits, it has always been held that no title is acquired until the specific parcels have been selected by the grantee, *and approved by the Secretary of the Interior,*"—citing numerous cases.

*A full discussion of the rights of[412 parties in respect of lands in indemnity limits wil be found in Hewitt v. Schultz, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309, which was determined after great deliberation in 1901. In that case the question arose whether it was competent for the Secretary of the Interior, after receiving

from a railroad company its map of the definite location, to at once withhold or withdraw from sale or entry the odd-numbered sections within the *indemnity* limits, to which the company, with the assent of the Secretary, might be permitted to resort in order to supply deficiencies in place limits. Referring to the opinions of Secretaries Lamar, Vilas, and Smith, and approving their views, the court held such withdrawal to be unauthorized, indeed, *forbidden*, by the statute in respect to lands within the *indemnity* limits, *left open by Congress for homesteaders or pre-emptioners while the title remained in the United States.* The opinions of those Secretaries proceeded upon the ground taken in previous decisions of this court that a right to select lands within indemnity limits "was alone conferred, not a right to any specific land or lands capable of identification by any principle of law or rules of measurement;" but that until selection was made, "the right of selection became a barren right; for, *until selection* was made, the title remained in the government, subject to its disposal at its pleasure." In the opinion of Secretary Vilas, approved by this court in the Hewitt Case, it was said: "It [the act of Congress] gave to any person entitled under the pre-emption or homestead laws to take any such lands *the absolute right to acquire any proper quantity thereof, in accordance therewith; and this right an executive officer could not deprive the settler of.*"

In Oregon & C. R. Co. v. United States, 189 U. S. 103, 47 L. ed. 726, 25 Sup. Ct. Rep. 615, the court said: "Having regard to the adjudged cases, it is to be taken as established that, unless otherwise expressly declared by Congress, *no right* of the railroad company *attaches* or *can* attach to 413]specific lands within indemnity *limits *until there is a selection under the direction, or with the approval, of the Secretary.*"

Many other cases to the same effect might be cited.

It is, however, contended that the approval by the Secretary of the Interior of the selection of these lands to supply deficiencies in place limits had relation *back to the date* when the railroad *filed its original list of selections*, and had the effect to override any rights acquired by the homesteader *after* that list was filed, and *before such approval.* This view, if sustained, would practically destroy the rights given to homesteaders and pre-emptioners by the acts of Congress, as uniformly interpreted by this court. Even after the filing of a list of selection of lands by the beneficiary under the act of Congress, Jones was entitled, of right,—prior to the actual approval by the Secretary of the proposed selections,—to apply for the lands in dispute, pay for them, get a certificate of his purchase, and in that way acquire them. That right *attached* to the lands *when he entered upon and applied for them under the homestead laws*, and he could not be arbitrarily prevented from paying the government price, and obtaining a certificate of purchase and perfecting his claim under those laws.

Now, if it it be true, and all the cases so hold, that, *after* the filing of a list of selections by the railroad company of lands within indemnity limits, such lands nevertheless remained fully open to entry, occupancy, and purchase by homesteaders; if, as held in Hewitt v. Schultz, above cited, the Secretary of the Interior himself could not, immediately upon the filing of a list by the railroad company of selections of indemnity lands, withdraw such lands from entry or sale, and thus prevent their being entered, occupied, and purchased by homesteaders, *prior* to the Secretary's *actual approval* of *such* selections; and if the *mere filing* of the list did not, in itself, in advance of any approval by the Secretary, give the land-grant beneficiary any right or claim whatever, legal or equitable, in or to any *particular lands specified in the list,[414 —then there is no basis whatever for the contention that the Secretary's approval of the selection of indemnity lands, *after* the homesteader's claim *attached* to them, can be referred back *to the day* on which the railroad company *filed* its list of lands within indemnity limits, sought to be taken by it,—an act on his part which, *all the cases agree, did not give it any enforceable interest in particular lands.* That would be using the doctrine of relation, which is a mere fiction of law, to defeat the manifest will of Congress. To state the proposition in another way: If the lands embraced by the company's list of selections were, under the statute, fully open, *after* the filing of that list, to *entry, occupancy, and sale, for the benefit of homesteaders,*—and that cannot be disputed,—how is it possible upon any sound principle, or consistently with the policy adopted by the government to encourage settlements, that the right thus given to the homesteader could be annulled by any action of the Secretary occurring *after* that right accrued and *became attached* to the lands in behalf of the homesteader? A preference cannot be given in this way to the railroad company over the homesteader if regard be had to the purpose of Congress to keep the unappropriated public domain effectively, fully, and completely open to settlers so

long as the legal title remained in the United States, or until some right of the company *actually attached* to the lands settled upon. A different view cannot be sustained except upon the theory that the mere *application* of a railroad company to take particular lands to supply loses in place limits had the effect to take those lands out of the public domain and prevent their occupancy by homesteaders until it suited the Land Department—which might postpone its ruling for many years—to take up the application and pass upon it; and this, notwithstanding indemnity lands were fully open to be settled upon by homesteaders so long as the title remained in the United States.

415] *At a very early date in the administration of the public lands this court, speaking by Mr. Justice Campbell, in Clements v. Warner, 24 How. 394, 397, 16 L. ed. 695, 696, said: "The policy of the Federal government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land comprehending their improvements, over that of any other person. By the act of 1841 (5 Stat. at L. 453, chap. 16), the pre-emption privilege in favor of actual settlers was extended over all the public lands of the United States that were fitted for agricultural purposes and prepared for market. Later statutes enlarged the privilege, so as to embrace lands not subject to sale or entry, and clearly evince that the actual settler is the most favored of the entire class of purchasers." In the recent case of Ard v. Brandon, 156 U. S. 537, 543, 39 L. ed. 524, 526, 15 Sup. Ct. Rep. 406, the court, speaking by Mr. Justice Brewer (after referring to Shepley v. Cowan, 91 U. S. 330, 338, 23 L. ed. 424, 427), said that "the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon. *If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights*, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application." The court, in that case, then referred with approval to the observations above cited from Clements v. Warner, and proceeded: "There can be no question as to the good faith of the defendant. He went upon the land with the view of making it his home. He has occupied it ever since. He did all that was in his power in the first instance to secure the land as his homestead. That he failed was not his fault; it came through the wrongful action of one of the officers of the government." See also Northern P. R. Co. v. Amacker, 175 U. S. 567, 44 L. ed. 275, 20 Sup. Ct. Rep. 236.

In support of the contrary view much reliance is placed *upon the general rule[416 "that where there are divers acts concurrent to make a conveyance, estate, or other thing, the original act shall be preferred; and to this the other acts shall have relation." (Viner, Abr. title "Relation," 290); or, as stated by Cruise (5 Real Prop. 510, 511), that "all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation." This rule may well apply where the inquiry relates to rights asserted in lands expressly granted in the *place* limits of a road; for such grants are *in præsenti*. So, perhaps, it might be applied where the contest, under a railroad grant, is between *the government and its grantee*, who was authorized to make selections of lands within indemnity limits to supply loses in place limits occurring before a specified time. As in United States v. Anderson, 194 U. S. 394, 399, 48 L. ed. 1035, 1038, 24 Sup. Ct. Rep. 716, where the court said: "But even though it be conceded, *arguendo*, that the doctrine in question would allow rights to be acquired by third parties to the injury of the applicant after the making of the selections, and pending approval thereof by the government, it does not follow that it controls the controversy here presented. This results because on this record *the rights of third parties are not involved*, since the controversy concerns only the right of the United States to *retain, as against its grantees*, the proceeds recovered by it as the result of a trespass upon land after an application for the selection of such land, and pending action thereon by the proper officers of the government. Under these circumstances the case is one for the application of the fiction of relation by which, in the interest of justice, a legal title is held to relate back to the initiatory step for the acquisition of the land." But clearly the rule should not be applied in a land-grant case in which the mere filing by the railroad beneficiary at the outset of a *list* of selections of indemnity lands does not affect the title of the United States, and has not, in and of itself, any such efficacy as to *become the basis of a[417 right or interest *in the particular lands* mentioned in such list; especially when, as here, those lands, being within indemnity limits, remain open, according to all the authorities, to entry, occupancy, and even purchase by homesteaders to the same extent they would have

been had no list of selections ever been filed. In both a practical and legal sense the *filing* of such list was nothing more *than the expression of a desire or a request that the Secretary of the Interior permit the company* to *have certain indemnity lands to supply losses in the place limits.* The Secretary might unduly delay his decision, might never act on such request, and thereby, for an unreasonable time, delay settlement on the public lands by those who seek homes on them, and are always dealt tenderly with by the United States. Before such request was acted on in this case, rights of the homesteader intervened and became lawfully *attached* to the lands. If the homesteader acquired a *right* in these indemnity lands by entry, occupancy, and purchase under the homestead laws, as he undoubtedly did, it is inconceivable that such right could, under any proper application of the doctrine of relation, be affected or overthrown by referring to an antecedent act performed by a different person, but which, *at the time it was performed, did not give any right or interest whatever in the lands,* and interposed no legal obstacle that would prevent homesteaders from entering, occupying, or purchasing them. In support of the railroad company's position several cases are cited, to some of which we will refer.

The first of these cases, in point of time, is Campbell v. Doe, 13 How. 244, 14 L. ed. 130. But that case has no bearing on the precise point under consideration. That was the case of a contest under an act of Congress giving school lands to townships, the selection to be made by the Secretary of the Treasury. One Hamilton made, as he supposed, a selection of certain lands under that act, in conformity with regulations prescribed by the Secre-
418]tary. But his *selection was made while the lands were legally reserved from sale, and he had prior notice of that fact. The land was consequently *not then open to selection,* except pursuant to the act of Congress and the regulations of the Secretary. After alluding to some minor views advanced in the case, this court said: "But in whatever light this may be viewed, we are clear that the Secretary of the Treasury had the power, under the act of Congress, to make the selection; and his decision, declaring the entry of Hamilton invalid, was, under the circumstances, conclusive." Referring to the argument that what was done by Hamilton was with approval of the Land Office, through whom the Secretary executed the power conferred upon him, the court said: "Yet where the Secretary has interposed and decided the matter, as in the case under consideration, his decision must be considered as the only one under the law."

The opinion in Campbell v. Doe closes with the suggestion that "under the circumstances no right became vested in him [Hamilton] by reason of his entry of the land, which could be regarded or enforced by *a court of equity.*" The court did not refer, although counsel did, to the rule about the relation of time as between two acts, each of which is, in itself, efficacious to give *some substantial right,* and was performed by different persons, at different times. It was adjudged in that case—and it was the only point that need have been determined—that the court could not go behind the decision of the Secretary of the Treasury, and that in no view of the case presented could the relief asked be granted by *a court of equity;* whereas, in the case now before us it must be admitted, in view of the act of Congress and the cases determining its scope and effect, that when Jones occupied and entered, as well as when he purchased the land in dispute, it *was part of the public domain,* subject to the control of the United States, and *open to homesteaders and pre-emptioners,* under the *laws of the United States, although[419 there may have been at the time, on file, a list of unapproved selections by the railroad company.

Another case much relied on in this connection by the appellants is Shepley v. Cowan, 91 U. S. 330, 337, 23 L. ed. 424, 426. That case arose under the act of Congress of September 4th, 1841, granting lands to certain states, including Missouri, for purposes of internal improvement, saving such as were or might be reserved from sale by any act of Congress or the proclamation of the President. The plaintiffs claimed title under a patent issued to one McPherson by the state, and purporting to be for lands *selected by the state* under the above act of 1841. The defendants claimed title under a patent issued by the United States to the heirs of one Chartrand, based on an alleged pre-emption right acquired by a settlement of their ancestor. McPherson paid for the lands in dispute, and got a certificate showing such fact. The selections authorized to be made were subject to the approval of the Secretary of the Treasury. That officer gave such approval. This court, referring, however, to the facts and to certain acts of Congress, held that the state *could not legally select* the lands in dispute as part of those granted by act of 1841, because they were "*legally* reserved from sale," consequently nothing could be claimed under the selection of McPherson. This view was sufficient

to dispose of that case. Nevertheless, the court proceeds to consider another view which was held to be fatal to the claim made under the patent issued to McPherson. "If," the court said, "the land outside of the survey as retraced by Brown in 1834 could be deemed public land, open to selection by the state of Missouri from the time the survey was returned to the land office in St. Louis, it was equally open from that date to settlement, and consequent pre-emption by settlers. The same limitation which was imposed by law upon settlement was imposed by law upon the selection of 420]the state. In either *case the land must have been surveyed, and thus offered for sale or settlement. The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus, the patent upon a state selection takes effect as of the time when the selection is made and reported to the Land Office; and the patent upon a pre-emption settlement takes effect from the time of the settlement, as disclosed in the declaratory statement or proofs of the settler to the register of the local land office. The action of the state and of the settler must, of course, in some way be brought officially to the notice of the officers of the government having in their custody the records and other evidences of title to the property of the United States before their respective claims to priority of right can be recognized. But it was not inteuded by the 8th section of the act of 1841, in authorizing the state to make selections of land, to interfere with the operation of the other provisions of that act, regulating the system of settlement and pre-emption. The two modes of acquiring title to land from the United States were not in conflict with each other. *Both were to have full operation*, that one controlling in a particular case under which the first initiatory step was had. . . . But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, *as against each other*, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property. In all *such* cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right. So in this case, Chartrand, the ancestor, by his *previous settlement in 1835 upon the[421 premises in controversy, and residence with his family, and application to prove his settlement and enter the land, obtained a better right to the premises, under the law then existing than that acquired by McPherson by his subsequent state selection in 1849. His right, thus initiated, could not be prejudiced by the refusal of the local officers to receive his proofs upon the declaration that the land was then reserved, if in point of fact the reservation had then ceased." It thus appears that the general rule determining the rights of parties under two different acts, performed at different times, was referred to and applied in a case where *each* act was of such *a substantial* character as *in itself to give a right, enforceable by law.* In the case referred to, the selection by the state was wholly void, and could not be made the basis of *any* right acquired in opposition to the rights of the settler, although it was prior to the act performed by the settler. The "initiatory step" referred to in Shepley v. Cowan was necessarily a step which, *in itself*, gave *some interest* in the particular land involved. In the present case, the subsequent act of the homesteader was confessedly in accordance with law, gave him a substantial interest in the land, and was not defeated by reason of the prior act of the railroad company in merely filing its list of selections. We say this for the reason that such filing, according to the adjudged cases, *could not be made the basis of any right or interest in these particular lands.* Within the true meaning of the rule as to the relation of time between two acts of a substantial character, performed at different times, the initiatory step was that taken by Jones when he entered and purchased; for there was no previous step which had, in or of itself, any efficacy whatever to confer a right in the lands or prevent him from acquiring them.

Substantially the same comments may be made about the case of McCreery v. Haskell, 119 U. S. 327, 330, 30 L. ed. 408, 409, 7 Sup. Ct. Rep. 176, which *is also much[422 relied on by the appellants. The dispute in that case was about certain public lands which, from the date of the grants, were *equally* open to selection by the state and by homesteaders and pre-emptioners under an act of Congress relating to land titles in California. By its selection the state could acquire by the act of Congress a right or interest in the lands; by settlement, the pre-emptioner could also acquire a right in them. That being the case, this court said: "The land lying outside of this survey thus became, in the language of the act, 'subject to the general land laws of the

United States.' It was open to settlement with other public lands, and consequent pre-emption by settlers, and to selection by the state in lieu of the school sections within the confirmed Mexican grant. . . . As between the settler and the state, the party which first commenced the proceedings required to obtain the title, if followed up to the final act of the government for its transfer, is considered as being entitled to the property. In such cases, the rule prevails that the first in time is the first in right."

In the present case the railroad company, as we have seen, acquired no interest whatever by merely requesting that it have certain indemnity lands to supply losses in place limits; whereas, in the California case, the prior act to which the subsequent act was referred—the selection by the state—would have given to the state a substantial interest in the lands, provided the lands had been open to selection by it at all. Proceeding on the basis that the selection was valid, the state court held that such selection was a prior, substantial, effective act to which the subsequent act may be referred under the rule stated in former cases as to relation of time.

Further citation of authorities would seem to be unnecessary. In our opinion, the filing by the railroad company of a list of lands within indemnity limits, which it desired to obtain in order to supply defi-423]ciencies in place *limits, gave the company no interest in any particular lands, and Jones had the right, under the homestead laws of the United States, *after* that list was on file, and before it was *approved by the Secretary*, to enter upon and occupy the indemnity lands so specified, with the intention to acquire them under the laws of the United States; and by such entry and occupancy, with such intention, acquire a substantial interest or right in them which could not be affected or impaired by the subsequent approval of such list by the Secretary of the Interior; that the mere filing of the list did not and could not, in itself, be made the basis for any claim that would be inconsistent with Jones's legal rights as resulting from his entry and occupancy with the intention stated; consequently, the appellee, claiming under Jones, had the better right. To make the approval by the Secretary of the Interior relate back to a date when the railroad company confessedly did not have and could not have acquired any, even an inchoate, interest in these lands, and thus cut off and destroy the intervening rights acquired by the homesteader before the Secretary's approval, would be to make a new and dangerous application of the doctrine of relation discussed at the bar. A subsequent act cannot properly be used to give legal effect to a prior act, as of a time when such prior act was performed, if the prior act had no efficacy whatever to confer an interest in the lands to which the two acts related. No adjudged case really holds to the contrary. These views do no injury to the railroad company, for if the homesteader is adjudged to have the better right, the company can, under the direction of the Secretary, go into the whole body of indemnity lands and pick out other lands to supply any loss in place limits; whereas, if the homesteader loses the land he has settled upon and occupied, he will lose the benefit of his improvements, and must abandon the place he had fixed upon as his home.

One other matter should be referred to. Across the *certificate of purchase is-[424 sued to Jones these words were written: "This receipt is issued under the order of the Secretary of the Interior, dated February, 28th, 1898, subject to any claim the Northern Pacific Railroad Company may have to the lands herein described." Of course, the Secretary had no authority to do this, and his act had no legal efficacy. If the railroad company had rights superior to those acquired by Jones, those rights could have been protected despite the certificate issued to Jones. If it had none, then the indorsement across the face of the certificate is to be regarded simply as a warning to Jones that he might have in the future a contest with the railroad company. The indorsement that Jones's purchase was subject to any claim the company "may have" neither added nor took away rights that belonged at the time to either the company or to Jones.

In our opinion the judgment of the Circuit Court of Appeals should be affirmed.

CHARLES D. CAMPBELL, Appt.,
v.
FREDERICK WEYERHAEUSER and John A. Humbird.

(See S. C. Reporter's ed. 424, 425.)

This case is governed by the decision in Weyerhaeuser v. Hoyt, ante, 258.

[No. 12.]

Argued April 27, 28, 1910. Ordered for reargument December 19, 1910. Reargued January 19, 20, 1911. Decided February 20, 1911.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Minnesota, dismissing a bill in a suit to charge as trustees persons claiming title under a patent issued under a railroad land grant. Affirmed.

See same case below, 88 C. C. A. 412, 161 Fed. 332.

The facts are stated in the opinion.

Mr. **M. H. Stanford** argued the cause and filed a brief for appellant.

Mr. H. H. Hoyt also filed a brief for appellant.

Mr. **Frank B. Kellogg** argued the cause, and, with Mr. Stiles W. Burr, filed a brief for appellees.

Mr. **Charles W. Bunn** also argued the cause and filed a brief for appellees.

Mr. Chief Justice **White** delivered the opinion of the court:

This case and the Hoyt Case, just decided [219 U. S. 380, ante, 258, 31 Sup. Ct. Rep. 300], are of the same general character, and were consolidated and tried below as one case. In this case, however, the application of Campbell to purchase the tract by him claimed was rejected by the Land Department, and Campbell was not permitted to enter the land. The land furnishing the selection basis also lay further west in Minnesota than the lost tract in the Hoyt Case. The court of appeals held that Campbell acquired no equitable interest in the land by his application and the denial thereof, and consequently he could not maintain a bill in equity to charge the title under the patent issued to the railroad company upon a selection of a tract as lieu land, and affirmed the decree of the circuit court, dismissing the bill. As, in any event, the decision rendered in the Hoyt Case is decisive of this, we hold that the bill was rightly dismissed, and the decree of the Circuit Court of Appeals is therefore affirmed.

Mr. Justice **Harlan** and Mr. Justice **Day** dissent for the reasons set forth in the dissenting opinion in case of Weyerhaeuser v. Hoyt, No. 24.

*NORTHERN PACIFIC RAILWAY [426
COMPANY, Plff. in Err.,
v.
FRED WASS and Pauline Wass, His Wife.

(See S. C. Reporter's ed. 426–433.)

This case is governed by the decision in Weyerhaeuser v. Hoyt, ante, 258.

[No. 181.]

Argued April 27, 28, 1910. Ordered for reargument December 19, 1910. Reargued January 19, 20, 1911. Decided February 20, 1911.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which, on a second appeal, affirmed a judgment of the District Court of Todd County, in that state, in favor of defendants in an action in ejectment. Reversed and remanded for further proceedings.

See same case below, 105 Minn. 525, 117 N. W. 1126; on former appeal, 104 Minn. 411, 116 N. W. 937.

The facts are stated in the opinion.

Mr. **Charles W. Bunn** argued the cause and filed a brief for plaintiff in error.

Mr. **Patrick B. Gorman** argued the cause and filed a brief for defendants in error.

Mr. Chief Justice **White** delivered the opinion of the court:

In brief, the facts of this case are as follows: While a filed selection by the St. Paul & Northern Pacific Railway Company of land within the indemnity limits of a railroad grant was awaiting the action of the Secretary of *the Interior, Fred [427 Wass, in April, 1899, entered upon the land with the intention of making it a homestead, and continued in possession, making improvements, etc. In December following, Wass presented to the land office an application to enter the tract under the homestead laws. The register and receiver filed his application, but on the same day rejected it, and refused to receive the fees tendered, basing such refusal and rejection upon the ground that the lands filed for were embraced in the then pending selection. On appeal, the action of the local land office was affirmed by the Commissioner of the General Land Office and by the Secretary of the Interior, respectively. The selection was subsequently approved and a patent for the lands was issued by the governor of Minnesota, all rights under which became vested in the Northern Pacific Railway Company, the plaintiff in error. That company then commenced this

action against Wass and his wife in a court of the state of Minnesota to recover possession of the land and damages for the detention. In the answer, among other things, affirmative relief was prayed against the railway company for the conveyance of the legal title to Wass. A demurrer to the answer was overruled upon the authority of the decision in Sjoli v. Dreschel, 199 U. S. 564, 50 L. ed. 311, 26 Sup. Ct. Rep. 154, and a decree was entered in favor of Wass, granting the relief prayed by him. This decree was affirmed by the supreme court of Minnesota upon the authority of the Sjoli Case as well as the decision of the circuit court of appeals in Hoyt v. Weyerhaeuser, 88 C. C. A. 404, 161 Fed. 324. The opinion just announced, reviewing the action of the circuit court of appeals in the Hoyt Case, and reversing the decree entered in that case, conclusively establishes that error was committed by the court below, and therefore requires a reversal. The judgment of the Supreme Court of Minnesota is therefore reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

428] *Mr. Justice **Harlan**, with whom concurred Mr. Justice **Day**, dissenting:

This action was instituted in the district court of Todd county, Minnesota, by the Northern Pacific Railway Company, a Wisconsin corporation, to recover the possession and damages for the detention of the southeast quarter of section 13, township 129, north of range 32 west, situated in the above county.

The answer of the defendant Wass states certain facts both by way of defense and as the basis for an affirmative decree against the railway company, declaring that the legal title to the land is held in trust for his use and benefit, and should be conveyed to him. The company demurred to the answer as not stating facts sufficient to constitute either a defense or a counterclaim. The demurrer was overruled, and the case was determined on the facts stated in the answer, as well as on those set forth in a special finding. By the decree it was adjudged that the legal title was held in trust for the defendant, and the plaintiff was ordered to convey the title to him by sufficient deed. On the authority of Sjoli v. Dreschel, 199 U. S. 564, 50 L. ed. 311, 26 Sup. Ct. Rep. 154, and Hoyt v. Weyerhaeuser, 88 C. C. A. 404, 161 Fed. 324, the supreme court of Minnesota affirmed the decree. The case is here for review.

Upon the record before us the following facts must be taken as beyond question:

1. The lands in question were surveyed public lands of the United States within the 20 miles indemnity limits of what are known as the Northern Pacific Railroad land grants made by Congress to the territory of Minnesota by the act of March 3d, 1857 (11 Stat. at L. 195, chap. 99), and by the act of March 3d, 1865 (13 Stat. at L. 526, chap. 105), granting lands to that state, which last act was amended March 3d, 1871 (16 Stat. at L. 588, chap. 144).

*2. By an act of March 1st, 1877,[429 the legislature of Minnesota transferred all its rights in these lands to the Western Railway Company of that state. That company subsequently assigned its rights to the St. Paul & Northern Pacific Railway Company, the predecessor in interest of the present plaintiff.

3. On the 31st day of December, 1877, the Western Railway Company filed in the proper land office a list purporting to contain a selection of lands under the indemnity provisions of the grants in question; not, however, designating any particular lands within the primary or place limits of either grant as the basis for the selected tracts. But the lands here in question were among those embraced in the above general list of selections.

4. *Nearly twelve years after the filing of the list of selections* by the Western Railway Company, namely, on December 4th, 1889, the St. Paul & Northern Pacific Railway Company filed in the local land office an amended list of the selection of indemnity lands, which list included the land now in dispute. And on February 12th, 1892, it filed a rearranged list of indemnity selections, and, then, for the first time, indicated the tract alleged to have been lost in primary limits, which loss it requested to be supplied by a particular tract in indemnity limits. Up to that time the Secretary of the Interior had not acted on that request nor approved any of the selection lists filed.

5. The fact may be here stated, though it is not very important, that the lands above described are also within the indemnity limits of the Northern Pacific grant made by the act of July 2d, 1864 (13 Stat. at L. 365, chap. 217), and were included in a withdrawal of indemnity lands made by the Secretary of the Interior on December 26th, 1871. But that withdrawal was revoked by the General Land Office, September 6th, 1887, and no final or approved selection of any of the described tracts was ever made under the provisions of the Northern Pacific grant.

430] *6. In April, 1899,—the Secretary of the Interior not having, even at that date, approved either the original, amended, or rearranged selections of indemnity lands, as shown on the company's lists theretofore filed,—Wass "entered upon and took possession of and made a settlement" on the lands in question, and *thereafter maintained such possession and use of the lands as a homestead, residing continuously upon, cultivating, and using them as his only home.* He also put improvements on them of the reasonable value of $1,200. All this he did with the bona fide intention of entering the lands under the homestead laws. The lands in their improved state exceeded $2,500 in value. Wass was qualified in all respects to become a claimant under the homestead laws of the United States. No question was made at the hearing below either as to his qualifications as a homestead claimant, or as to the sufficiency of his residence on the land, or of the value of his improvements.

7. On the 4th of December, 1899, Wass filed with the register and receiver of the local land office an application—which was in due and legal form, and was accompanied by proofs of his qualifications and acts as a homestead claimant—to enter the said lands under the homestead laws, and tendered to the receiver the fees and commissions lawfully chargeable upon his application. The register and receiver who received and filed the application rejected it, refusing to take the fees and commissions tendered "upon the sole ground that the lands applied for were embraced in a then *pending though unapproved* indemnity selection of the St. Paul & Northern Pacific Railway." This action was approved by the Commissioner of the General Land Office on the 10th of July, 1903, on the ground that defendant's application "conflicted with the prior indemnity selection of the land made by the St. Paul & Northern Pacific Railway Company." The selection here referred to was manifestly 431]the amended or *the rearranged list of indemnity selections filed by that company on December 4th, 1889. Subsequently, on January 9th, 1904, the Secretary of the Interior affirmed the decision of the Commissioner of the General Land Office, "on the ground that the indemnity selections of said lands by the St. Paul & Northern Pacific Railway and its predecessor, the Western Railway Company of Minnesota, were valid and of record prior to the date of the alleged settlement and filing of homestead application" by the defendant Wass. But he made no reference to the entry and settlement of Wass on the land under the homestead laws, *prior to the approval* of the list of selections *by the Secretary of the Interior.*

8. On the 16th of February, 1905,—*nearly six years after Wass entered and settled upon and improved these lands as his home,* —the Secretary of the Interior, for the first time, approved the list of indemnity selections made by the St. Paul & Northern Pacific Railway Company.

9. On the 15th of March, 1905, a patent was issued by the United States to the state for the use and benefit of the railway company, the lands being described as indemnity lands under the above grants of March 3d, 1857, March 3d, 1865, and March 3d, 1871.

These undisputed facts present a question of law which the court may rightfully consider and determine. The doctrine is settled that facts, authoritatively found by the Land Department in the course of its administration of the public domain, cannot be collaterally questioned. But yet when the legal title to lands has passed from the United States to one party, when in equity and good conscience, according to the facts conceded, found, or established, and when, as a matter of *law,* in view of those facts, it ought to have gone to another, the former may be adjudged to hold the title in trust for the latter, true owner, and compelled to convey to him. Stark v. Starr, 6 Wall. 402, 419, 18 L. ed. 925, 930; Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 485; Moore v. Robbins, 96 *U. S. 530, 24 L. ed. 848; Rector v.[432 Gibbon, 111 U. S. 291, 28 L. ed. 432, 4 Sup. Ct. Rep. 605; Bernier v. Bernier, 147 U. S. 242, 247, 37 L. ed. 152, 154, 13 Sup. Ct. Rep. 244; Re Emblen, 161 U. S. 52, 40 L. ed. 613, 16 Sup. Ct. Rep. 487; Hedrick v. Atchison, T. & S. F. R. Co. 167 U. S. 673, 42 L. ed. 320, 17 Sup. Ct. Rep. 922.

The contention is that, under the patent issued by the United States to the state for the use and benefit of the railway company, all the original rights of the state passed to the Northern Pacific Railway Company; whereas, the defendant claims that the land officers and the Secretary of the Interior illegally interfered with his purpose to perfect his lawful claim originating under the homestead laws of the United States, the right to do which, he insists, belonged to him under the provisions of § 2289 and other sections of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1388), as amended by the acts of Congress.

Upon the undisputed facts, we hold that Wass's entry and settlement upon these lands, and his application for them, with the bona fide intention to complete his title under the homestead laws, all occurring be-

fore the Secretary's approval of the company's list, gave him an interest and right in the particular lands in question which could not be impaired or defeated by the *subsequent* approval of the Secretary of the Interior of the list of selected lands filed by the beneficiary of the land grant, although such list was filed prior to Wass's entry, settlement, and application. The pendency of the list in the Land Office was not decisive, for the reason that it had not been approved by the Secretary at the time Wass's claim was made and *attached to* the lands. The lands in question, being within indemnity limits, were open to entry, settlement, and acquisition by qualified claimants under the homestead laws, after and notwithstanding the mere filing of the list of selected lands; and the rights acquired by the homesteader in the manner stated were not impaired or overridden by the Secretary's subsequent approval of such list.

For the reasons stated in the dissenting 433]opinion in *Weyerhaeuser v. Hoyt, just decided [219 U. S. 380, ante, 258, 31 Sup. Ct. Rep. 300], the judgment should be affirmed. We dissent from the opinion and judgment of the majority.

SOUTHERN PACIFIC COMPANY and Oregon & California Railroad Company, Appts.,

v.

INTERSTATE COMMERCE COMMISSION.

(See S. C. Reporter's ed. 433–452.)

Interstate Commerce Commission — powers — restoring old rates when new rates are reasonable.

1. An order of the Interstate Commerce Commission setting aside new rates on lumber from Willamette valley points to San Francisco and bay points, and restoring substantially the old rates, is void as beyond its powers, where, from the record and the opinion of the Commission, and from the express exclusion of Portland from the benefit of the reduced rate, and the reasons assigned for such exclusion, it is clear that the Commission was not exercising its authority to condemn unjust and unreasonable rates and fix reasonable ones, but was acting upon the assumption that it had the right to protect the lumber interests from the consequences of a change in rates, even if the change was from a rate which had been fixed unreasonably low, for the purpose of encouraging the industry, to a higher rate which is not in itself unjust or unreasonable.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Appeal — moot case.

2. The lapse of more than two years since an order of the Interstate Commerce Commission setting aside new rates and restoring old ones on the theory of a supposed equitable estoppel became effective does not require that an appeal from a decree of a Federal circuit court, refusing to enjoin the enforcement of such order, be dismissed as presenting a moot controversy,—especially in view of the possible liability for reparation to which the carriers may be subjected if the legality of the order is not determined, and the influence and effect which the existence of the rate fixed for two years, if legal, will have upon the exercise by the carriers of their authority to fix just and reasonable rates in the future.

[For other cases, see Appeal and Error, VII. i, 3, in Digest Sup. Ct. 1908.]

[No. 527.]

Argued December 13, 1910. Decided February 20, 1911.

APPEAL from the Circuit Court of the United States for the Northern District of California to review a decree refusing to enjoin the enforcement of an order of the Interstate Commerce Commission, setting aside new rates and restoring the old ones. Reversed and remanded for the entry of a decree avoiding the order and granting the relief prayed for.

See same case below, 177 Fed. 963.

The facts are stated in the opinion.

Mr. **Maxwell Evarts** argued the cause, and, with Mr. F. C. Dillard, filed a brief for appellants.

Messrs. **Wade H. Ellis** and **Luther M. Walter** argued the cause and filed a brief for appellee:

There being no order of the Commission now in force, and nothing upon which the judgment of this court could operate, this appeal presents merely a moot question, and should be dismissed.

Mills v. Green, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; California v. San Pablo & T. R. Co. 149 U. S. 308, 37 L. ed. 747, 13 Sup. Ct. Rep. 876; San Mateo County v. Southern P. R. Co. 116 U. S. 138, 29 L. ed. 589, 6 Sup. Ct. Rep. 317; Little v. Bowers, 134 U. S. 547, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620; Flour Inspectors v. Glover, 160 U. S. 170, 40 L. ed. 382, 16 Sup. Ct. Rep. 321; Pennsylvania v. Wheeling & B. Bridge Co. 18 How. 421, 15 L. ed. 435; Dinsmore v. Southern Exp. Co. 183 U. S. 115, 46 L. ed. 111, 22 Sup. Ct. Rep. 45; Jones v. Montague, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611; Richardson v. McChesney, 218 U. S. 487, 54 L. ed. 1121, 31 Sup. Ct. Rep. 43.

No expressions in the opinion of the Commission can be used to defeat its order if the order is otherwise lawful.

Southern P. Co. v. Interstate Commerce Commission, 200 U. S. 536, 556, 557, 50 L. ed. 585, 594, 26 Sup. Ct. Rep. 330.

It must be remembered that the Interstate Commerce Commission is not a court. It is not governed by technical rules of law with respect to the admission of evidence.

Interstate Commerce Commission v. Baird, 194 U. S. 25, 44, 48 L. ed. 860, 869, 24 Sup. Ct. Rep. 563.

The function of rate-making is legislative in character. When a rate is fixed by the Commission it becomes, as Mr. Justice Miller said in Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 702, "the law of the land" with the same force and efficacy as if the very figures in the Commission's order were written into the statute.

The chief function of the court, therefore, is to consider not the method by which the result was reached, but whether or not the rate prescribed is so low as to contravene the constitutional provisions for the protection of property.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup Ct. Rep. 192, 15 A. & E. Ann. Cas. 1034.

The Commission had a right, in determining the reasonableness of rates involved, to consider the effect of the advance by the railroads from $3.10 to $5 per ton upon the transportation of lumber.

Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398.

In determining what was a reasonable rate, the Commission was right in considering, as an item of evidence, the fact that the railroads had voluntarily established and long maintained a rate of $3.10 for the service.

Frye & Bruhn v. Northern P. R. Co. 13 Inters. Com. Rep. 507; Holmes v. Southern R. Co. 8 Inters. Com. Rep. 561, 568; Covington Stock Yards v. Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 469; Interstate Com. Commission v. Chicago, B. & Q. R. Co. 186 U. S. 320, 40 L. ed. 1182, 22 Sup. Ct. Rep. 824.

Mr. Chief Justice White delivered the opinion of the court:

Whether the court below was right in refusing to enjoin, at the suit of the railway companies who are appellants, the enforcement of an order of the Interstate Commerce Commission, is the general subject for consideration on this record.

When that which is superfluous is put out of view, it will come to pass that every substantial controversy which the case presents will be disposed of by determining what was the character of the order made by the Commission; that is to say, what was the power which that body exerted in making the order in question. We state at once the pertinent facts.

The Willamette valley, about 150 miles long, lies in the western part of the state of Oregon, south of the Columbia river, and through it there flows in a northerly direction the Willamette river, which empties into the Columbia river. Portland is on the Willamette river, at or near where that river empties into the Columbia river. From *Cornwallis, on the Willamette river, [438 a point about 97 miles south of Portland, that is, about that distance from where the Willamette empties into the Columbia, the Willamette is navigable, and there is navigation from Portland to the sea by means of the Willamette and the Columbia rivers. The rails of the Oregon & California Railroad from Portland pass through the Willamette valley, paralleling the Willamette river at various distances, and extend to the Oregon and California state line, where that road connects with the Southern Pacific Company. The latter has for a number of years operated the Oregon & California as part of its system.

In November, 1907, a complaint was filed with the Interstate Commerce Commission on behalf of the Western Oregon Lumber Manufacturers' Association and others, concerning a rate of $5 per ton, in car-load lots, on "green common rough fir lath and lumber and forest products" from Willamette valley points to San Francisco and bay points, fixed in a tariff filed by the Southern Pacific Company with the Commission, and which became operative in April, 1907. It was charged that the rate complained of was unreasonable in and of itself and discriminatory. It was averred that from about 1898 there had existed a rate of $3.10 for carrying the same character of lumber between the points named; that, upon the faith of this rate, and the belief that it would not be changed, large amounts of capital had been invested in lumber mills in the Willamette valley; that the people in that valley were dependent upon the lumber industry, and that such in-

dustry would be destroyed and the population be detrimentally affected if the new rate of $5 per ton was continued to be charged. It was alleged that the $3.10 rate was reasonable in and of itself, and that the rate had been increased without just cause, upon the theory that the lumber interest in the Willamette valley was prosperous, and that hence the traffic could 439]stand the increase. The *railroad companies answered, setting up the reasonableness of the $5 rate. They in effect averred that the $3.10 rate, which had previously prevailed, was unreasonably low, and that it had been fixed solely for the purpose of enabling lumber from the Willamette valley to reach a market in San Francisco and bay points, which it could not have done if a just and reasonable rate had been exacted. This condition, it was alleged, had arisen from the fact that from Portland and other points on the Columbia river and Puget sound there was a highly developed lumber industry accessible to San Francisco and bay points by water at rates so low as to have absolutely excluded the shipping of any lumber from the Willamette valley by rail to such points, unless a very low rate had been fixed by the railroad companies to meet the water-borne lumber traffic, and that there was no market which was commercially available for the Willamette valley lumber other than that of San Francisco and bay points when the $3.10 rate was fixed. The complaint and the answer which we thus state are not in the record, but we have summarized their contents from a statement made concerning the same by the Interstate Commerce Commission in its answer in this suit, filed in the circuit court.

It is certain that for a number of years the $3.10 rate was applied both to shipments of lumber not only from the Willamette valley, but also from Portland. Several years, however, before the going into effect of the $5 rate fixed in the tariff of April, 1907, a tariff fixing that rate had been made applicable to Portland. During the hearing before the Commission the Portland lumber interests intervened and asked that if the $3.10 rate was restored to Willamette valley, it should also be restored to Portland, so as to prevent discrimination against Portland.

After a hearing, the Commission, in June, 1908, filed its report and made an order adverse to the railway companies, Commissioners Knapp and Harlan dissenting. 440]14 *Inters. Com. Rep. 61. It suffices to say that the order entered directed the railroad to cease from charging the $5 rate complained of from Willamette valley points, and fixed as a proper rate from certain points in the valley the sum of $3.40 a ton, and from the remaining points in the valley the sum of $3.65. Although some of the points embraced by the order were within a few miles of Portland, that city was not given the benefit of the reduction, and therefore remained subject to the $5 rate.

The railroad companies, refusing to yield obedience to the order, commenced this suit in equity in the circuit court of the United States for the northern district of California to have the order set aside and to enjoin its enforcement. After a demurrer was sustained, an amended bill was filed. By this bill it was averred that the rate of $5, fixed by the tariff which the Commission had set aside, was a just and reasonable rate *per se*, and that the rate fixed by the Commission was so unreasonably low as to be unjust and unreasonable. This was alleged to be the case not only in view of the great increase in the cost of the operation of the road since the time when the $3.10 rate was put in force, but also because of the normally excessive cost of maintenance and operation resulting from the mountainous country which the road traversed, subjecting to an unusual expense for repairing damage done by floods and freshets, the high grades requiring the application of increased motive power, and permitting even with such power the movement of only unusually short trains, thereby causing a much greater average expense. Referring to the rate of $3.10 which had previously prevailed, the circumstances connected with its establishment were detailed. It was alleged that the rate was unreasonably low when fixed, and was so fixed by the railroad solely with the object of encouraging the lumber industry in the Willamette valley, and to enable it to reach a market,—a result which otherwise could not have been attained. *The,[441 averments on this subject reiterated the statements made in the answer before the Commission. It was alleged that having maintained the unreasonably low rate for the reasons stated, the railroad companies had finally changed the same, and fixed a just and reasonable rate for the services rendered, because of changes in the situation of the lumber interest in the Willamette valley. Those changes, it was said, arose from the opening of markets for lumber from the Willamette valley by means of new railroad routes *via* Portland as a gateway to the East, by means of which a large percentage of lumber produced in the Willamette valley was moved to other markets. It was alleged that the Commission, in setting aside the increased tariff rate of $5, and fixing substantially the old rate, had

exceeded the powers conferred upon it by law, because it did not act in the exercise of the authority conferred upon it to determine whether a rate was just and reasonable in and of itself with regard to the service rendered, but had proceeded upon the assumption that power was conferred upon it to fix an unreasonable rate because of its belief as to the equities of the situation, or upon the basis of principles of estoppel, or upon its conception of public policy and its right to enforce what was deemed best, under the circumstances, for the interest of shippers.

There was a demurrer to the amended bill, and the court certified the case to this court. The certificate was dismissed. 215 U. S. 226, 54 L. ed. 169, 30 Sup. Ct. Rep. 89. On the receipt of the mandate, the demurrer was withdrawn and a new demurrer, as also an answer to the bill, were filed. In the answer the lumber conditions in the Willamette valley were recited, as also what were alleged to be the circumstances connected with the establishment of the $3.10 rate, and the proceedings had before the Commission in the controversy referred to were detailed. The regularity of the proceedings before the commission was averred, and the legality and finality of the findings and conclusions of that body were asserted. 442]*It was declared that the rates fixed from the points in the Willamette valley, excluding Portland, were just and reasonable in and of themselves. Traversing the allegations of the complaint, it was averred that the Commission found the $5 rate to be unreasonable and unjust, admitted that it found the $3.10 rate to be a low rate, but denied that it found such rate to be unreasonably low, and denied that the $3.40 and $3.65 rates were substantially the same as the $3.10 rate.

The cause was heard upon the amended bill, the answer, the replication of the plaintiffs, and the evidence introduced before the Commission. The circuit court, as we have said, entered a decree dismissing the bill. This was done upon the theory that, as the Commission found that the rate fixed by it gave some remuneration above the cost of operation, and was not therefore confiscatory, there was no power to interfere. This appeal was then taken.

In the argument at bar, the railroad companies do not question that if a complaint is made to the Interstate Commerce Commission concerning the unreasonableness of a rate, that body has the authority to examine the subject, and, if it finds the rate complained of is, in and of itself, unreasonable, having regard to the service rendered, to order the desisting from charging such rate, ad to fix a new and reasonable rate, to be operative for a period of two years. The companies further do not deny that where the Commission exercises such authority, its finding is not subject to be reviewed by the court. Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155. In other words, the argument on behalf of the railroads fully concedes that an order of the Commission is not open to attack in the courts so long as that body has kept within the powers conferred by the statute. Making these concessions, the proposition relied upon to secure reversal is that the court below should have set aside the order of the Commission because that order was in excess of the *power con-[443 ferred upon the Commission; and this, it is insisted, is to be determined by substance, and not mere form. In other words, the contention is, that although the order made by the Commission may have been couched in a form which would cause it, superficially considered, to appear to be but the exercise of an authority to correct an unreasonable rate, yet if it plainly results from the record that the order of the Commission was not the exercise of such an authority, but was based upon the assumption by that body of the possession of a power not conferred by law, the mere form given by the Commission to its action does not relieve the courts from the duty of reviewing and correcting an abuse of power. Applying these propositions, the insistence is that, both in form and in substance, the order of the Commission is void, because it manifests that that body did not merely exert the power conferred by law to correct an unjust and unreasonable rate, but that it made the order which is complained of upon the theory that the power was possessed to set aside a just and reasonable rate lawfully fixed by a railroad whenever the Commission deemed that it would be equitable to shippers in a particular district to put in force a reduced rate. That is to say, the contention is that the order entered by the Commission shows on its face that that body assumed that it had power not merely to prevent the charging of unjust and unreasonable rates, but also to regulate and control the general policy of the owners of railroads as to fixing rates, and consequently that there was authority to substitute for a just and reasonable rate one which, in and of itself, in a legal sense, might be unjust and unreasonable, if the Commission was satisfied that it was a wise policy to do so, or because a railroad had so conducted itself as to be estopped in the future from being entitled to receive a just and reasonable compensation for the service rendered. On the other hand, the

Commission, in the argument at bar, does not contend that it possessed the indeed 444]*abnormal and extraordinary power which the railroads thus say was exerted in rendering the order complained of,—a power which, if it obtained, would open a vast field for the exercise of discretion, to the destruction of rights of private property in railroads, and would in effect assert public ownership without any of the responsibilities which ownership would imply. While it is not denied on behalf of the Commission that that body may have considered the prior rate prevailing in the Willamette valley, the period during which it had been in force, and the effect upon the business situation in the valley of a change to a higher charge, all these things, it is insisted, were not made the basis of the power exerted, but were simply taken into consideration as some of the elements proper to be considered in the ultimate exertion of the lawful power to forbid an unjust and unreasonable rate and fix a reasonable one.

It is clear, therefore, as we have said at the outset, that the result of the contentions and concessions of the respective parties is to reduce the controversy to a single issue, which is: What was the nature and character of the order made by the Commission? That is, What, in substance, was the power which the Commission exerted in making the order?

Coming to the consideration of that subject, we are of opinion that the court below erred in not restraining the enforcement of the order complained of, because we see no escape from the conclusion that the order was void because it was made in consequence of the assumption by the Commission that it possessed the extreme powers which the railroad companies insist the order plainly manifests. We proceed very briefly to state the reasons which compel us to this conclusion. In the first place, when the complaint which was made to the Commission and the answer of the railroad companies to that complaint are considered, they give rise to the inference that, 445]in substance, *the subject complained of was not the intrinsic unreasonableness of the new rate which the railroad companies substituted for the former rate, but the injury it was thought would be suffered from not continuing the old rate in force,—an injury arising from circumstances extrinsic to the new rate; that is, a loss which would be suffered by substituting the higher rate, even if that rate was, in and of itself, reasonable and just. That such was the view entertained by the complainants when the hearing began before the Commission is too clear to require anything but statement. Thus, during the opening made on behalf of the complainants by their counsel, Mr. Teal, after he had made statements concerning the origin of the $3.10 rate, the following took place:

Commissioner Cockrell: How much was that, $3.10 a ton?

Mr. Teal: $3.10 a ton; yes, 15½ cents a hundred; and I will state that we do not claim that that is not a low rate. It is a low rate. In fact, I may say that it is one of the lowest rates on lumber in the United States, and it is a rate put in, as I state, maintained for the purposes I state, and the railroad company is entitled to full credit for having done it.

Commissioner Prouty: Let me ask you, Mr. Teal, this question. Suppose that rate had never been lower than 25 cents a hundred pounds, which is $5 a ton, would you claim that this Commission to-day ought to reduce that rate?

Mr. Teal: No; I don't think I would.

Commissioner Prouty: That is to say, you do not claim the rate is unreasonable in itself?

Mr. Teal: No; I do not.

Commissioner Prouty: You put your case entirely on the ground that these people represented to your clients and to other mill men in the Willamette valley that they would establish this lower rate for the purpose of building up the industry in that valley, and that the industry cannot *exist there[446 in compctition with other sections unless that rate is maintained in effect?

Mr. Teal: Yes, sir.

Commissioner Prouty: And therefore the railroad is obliged to maintain it in effect?

Mr. Teal: It has been maintained for eight or nine years. You have my position exactly, Mr. Commissioner.

Commissioner Prouty: That simply shows that it has been maintained and industries have grown up; that the railroad company has, during that period, elected to maintain it, and found it profitable, probably?

Mr. Teal: You have stated my position exactly. I am not here complaining about the rates being high or low, because it is a low rate.

Thereafter, as Mr. Teal concluded his opening statement, the following occurred:

Commissioner Prouty: That seems to be your case, Mr. Teal. If they can, there is no reason from your statement why the rates should be reduced, because you say the rate is low enough, unless those men have been induced to build their mills there, and ought to be protected.

Mr. Teal: That is correct. I want you to understand, Mr. Commissioner, that I do not claim the Commission has a right to compel the railroad, under ordinary circumstances, to meet water rates or any other competition.

It is true that subsequently, when counsel for the railroad companies was about to make his opening statement, Mr. Teal, after reiterating "that the $3.10 rate is a low rate," observed: "I do not say it should necessarily pay a $5 rate. That is, I do not want to be understood as saying that this rate of $5, in and of itself, would be reasonable." Answering the query of one of the commissioners as to whether, if the railroads had maintained in effect for the last ten years "this rate of 25 cents a hundred pounds," it would be claimed "that that was so unreasonable that the Commis-[447]sion ought to reduce it." Mr. *Teal answered: "Yes; I would claim that that would not be a reasonable rate to all these points." These remarks, however, can properly only be regarded as a declaration of an unwillingness to concede more than that the $3.10 rate was a low rate, and the attempt to engraft a qualification or limitation upon the prior declarations of counsel cannot be treated as having any efficacy, since no proof whatever bearing upon an issue as to the reasonableness of the $5 rate for the service to be rendered was introduced by the complainants. In fact, no attempt was even made to cross-examine Mr. Miller, the general traffic manager of the defendant, who testified on that subject. That the complainants intended to confine their evidence to the issue of whether the $3.10 rate should be maintained in order to enable the lumber mills to continue to prosper is evidenced by the following:

Commissioner Prouty: . . . Mr. Teal, there does not seem to be much dispute about the questions in this case. The mills have a rate to the South, and one question is to what extent they are dependent upon that rate for their continued existence. They have a rate to the East. For what reason is not that rate as valuable to them as it is to Portland and other mills, and to what extent is it necessary that this rate should be maintained to San Francisco in order to fairly continue the prosperity of these establishments?

Mr. Teal: That is where I intend to confine my testimony.

The order of the Commission, as we have said, applied the rate which it fixed substantially to the very doors of Portland, but did not make the reduction applicable to that city. While we shall have occasion in a moment to refer to this aspect of the order as conclusively showing on its face that the power exerted in making it was not the power to condemn an unreasonable and fix a reasonable rate, an excerpt from the examination by Mr. Cotton for *the railroad companies and Mr. Abel[448 for the intervenérs, of two witnesses,—J. Poulsen for the Portland interests and Dixon for the Willamette valley interests,—will make perfectly clear how really immaterial the question of the reasonableness of the $5 rate was considered to be.

On cross-examination of Mr. Poulsen the following transpired:

Mr. Cotton: In saying that you think Portland ought to have a lower rate, do you mean they should have a lower rate than a $3.10 rate?

Mr. Poulsen: I mean they should have a lower rate than the inland people, on account of having water competition.

Mr. Cotton: But you do not express your opinion about the reasonableness of the rate?

Mr. Poulsen: No, sir.

Mr. Abel: He was not asked that.

Mr. Cotton: That is what I understood, but I just wanted to make it clear.

Mr. Poulsen: No.

On the examination of Mr. Dixon the following ensued:

Mr. Cotton: It would follow, as a matter of fact, that if the $3.10 rate, or any lower rate than the barge rate, was established, that it ought to be extended all the way up to Portland; would it not?

Mr. Dixon: Personally I have no objection to that; but I do not see that it would necessarily follow.

Mr. Cotton: I am not considering your standpoint. I merely want your best opinion with reference to the industry in western Oregon.

Mr. Dixon: I think, Mr. Cotton, that the arrangement in effect prior to April 18th was, from the standpoint of the lumber shippers, a fair arrangement.

Commissioner Prouty: How can you justify leaving Portland out of the San Francisco rate and taking you into the Eastern rate?

Mr. Dixon: The Portland mills have so much the advantage *of us in almost[449 every other branch of the business that I do not see how it is unfair to them to give us what might appear to be a slight advantage in one particular. In other words, they have a better grade of logs, they have a bet-

ter market and more markets, they have a place to dispose of their refuse, and, what counts for more than anything else, and is absolutely necessary to the successful conduct of the lumber business, they can get rid of their output, while we cannot, up to date.

Although we find the record replete with statements made during the course of the hearing by counsel for both parties, and certainly by one or more of the commissioners who were present at the hearing, which we think leave no doubt as to the nature and character of the power exerted, we do not pursue the subject further, since we are of opinion that the face of the opinion and the order so additionally serve to make manifest the situation as to render it unnecessary to do more than briefly advert to those subjects. While it is true that the opinion of the Commission may contain some sentences which, when segregated from their context, may give some support to the contention that the order was based upon a consideration merely of the intrinsic unreasonableness of the rate which was condemned, we think when the opinion is considered as a whole, in the light of the condition of the record to which we have referred, it clearly results that it was based upon the belief by the Commission that it had the right, under the law, to protect the lumber interests of the Willamette valley from the consequences which it was deemed would arise from a change of the rate, even if that change was from an unreasonably low rate, which had prevailed for some time, to a just and reasonable charge for the service rendered for the future. Manifestly, this was deemed by the Commission to be the power which was being exerted, since Mr. Commissioner Harlan, joined by the Chairman of the Commission, dissented on the ground that 450]the order *was an exertion of a power not possessed, to give effect to a supposed equitable estoppel, and no language was inserted in the opinion to indicate to the contrary. The obvious impression as to the nature and character of the power exerted, given by the very face of the opinion of the Commission, is shown by the syllabi to the official report of the opinion, which we copy in the margin.†

Finally, the express exclusion of Portland from the benefit of the reduced rate, and the reasons given for the exclusion, indubitably establish the character of the power exerted so as to exclude the possibility of holding that it was merely the exercise of the right to correct an unjust and unreasonable rate. We say this because, if the assumption be indulged in that the order was but the manifestation of the authority to correct an unreasonable rate, the traffic of Portland, in the absence of some lawful reason for excluding it, would be discriminated against by the order excluding Portland from the benefit of the reduced rate. We cannot, therefore, assume that the order was legal because it rests upon the power to correct an unreasonable rate and to substitute a reasonable rate, since to indulge in that assumption would at once beget the inevitable inference that the order was repugnant to the statute because of its discriminatory *character. And the rea-[451 sons given for the exclusion of Portland from the benefit of the reduction which the order made likewise leave no room for the conclusion that the reduction was based merely upon the finding that the tariff rate which was reduced was, considering the service rendered, in and of itself unreasonable. The reasons for not applying the reduced rate to Portland were thus explained in the report of the Commission:

"The considerations which induce us to apply this lower rate to mills in the Willamette valley do not obtain in case of Portland. These manufacturers have the benefit of the water rate, and are not, therefore, dependent at all upon the defendants for reaching the San Francisco market. The low rate was only applied to Portland for a comparatively short time, and has not been in force there for the last four years. It is of no special importance to the manufacturer at that point, and no injustice is done by withdrawing it. The distance from Portland is considerably greater than the average distance from Williamette valley mills, and, on the whole, we think the defendants should be left to their option in meeting or declining to meet water rates at Portland. The claim of the interveners is therefore denied."

Treating the order as having been based

†1. Where a rate has been established and maintained for a considerable period, for the purpose of developing a particular industry, and with full knowledge that the industry could not be developed without it, and where, under the influence of such rate, large amounts of money have been invested in property the value of which must be seriously impaired by an advance of the rate, that fact is an important consideration in passing upon the reasonableness of such advance.

2. The Southern Pacific Company established a rate of $3.10 per ton upon rough green fir lumber and lath from points in the Willamette valley to San Francisco for the

upon the assumed possession of the extraordinary power which it is insisted was exercised in making the order, the force of the reasoning thus advanced to sustain the order cannot be successfully gainsaid. But upon the theory that the order was made merely as the result of the exercise of the statutory power to prevent the charging of an unreasonable and unjust rate, having regard to the service rendered, the inconsequence of the reasoning stated becomes at once patent. This must be the case; because Portland had been deprived by the railroads of a just and reasonable rate for a longer time than the Willamette valley points certainly afforded no ground for concluding that Port-
452]land was not *entitled to relief, and it is equally certain that the fact that there was competition by water from Portland can in no way justify the permitting the railroads to continue to charge against traffic from Portland a high and unreasonable rate. Indeed, if the order be assumed to have been made merely as the result of the power to correct an unjust and unreasonable rate, then the reasoning by which the order, in so far as it dealt with Portland was concerned, was sustained, comes to this: that the greater the wrong, the lesser the right to redress; and the greater the reason for the low and competitive rate, the stronger the reason for refusing to fix such a rate.

The considerations just stated dispose of the entire controversy except in one particular. It is claimed at bar that the questions arising for decision are moot, since in consequence of the lapse of more than two years since the order of Commission became effective, by operation, of law the order of the Commission has spent its force, and therefore the question for decision is moot. The contention is disposed of by Southern Pacific Terminal Co. v. Interstate Commerce Commission (this day decided) 219 U. S. 498, post, 310, 31 Sup. Ct. Rep. 279. In addition to the considerations expressed in that case, it is to be observed that clearly the suggestion is without merit, in view of the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined; and the influence and effect which the exsistence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future, clearly causes the case to involve not merely a moot controversy.

The decree of the Circuit Court is reversed, and the case remanded to that court, with directions to enter a decree declaring the order of the Interstate Commerce Commission to be void, and otherwise granting the relief prayed in the bill.

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*CHICAGO, ROCK ISLAND, & PA-[453
CIFIC RAILWAY COMPANY, Plff. in Err.,
v.
STATE OF ARKANSAS.

(See S. C. Reporter's ed. 453-467.)

Commerce — state regulation — full train crew.

1. Prescribing a minimum of three brakemen for freight trains of more than twenty-five cars, operated in the state, as is done by Ark. Laws 1907, No. 116, does not amount to an unconstitutional regulation of interstate commerce when applied to a foreign railway company engaged in such commerce.

[For other cases, see Commerce, III., in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — requiring full train crew.

2. The exclusion of railroads less than 50 miles in length from the operation of Ark. Laws 1907, No. 116, prescribing a minimum of three brakemen for freight trains of more than twenty-five cars, does not deny

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purpose of developing the lumber industry in that section, and maintained the rate in effect, with a brief interval, for six years: and on the strength of this rate that industry attained considerable proportions. In April, 1907, this rate was advanced to $5 per ton: Held, That the advance was unreasonable, and that the rate ought not for the future to exceed $3.40 per ton.

NOTE.—On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13, and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

On state regulation between railroad companies engaged in interstate commerce and their employees, see notes to State v. Northern P. R. Co. 15 L.R.A.(N.S.) 134, and People v. Erie R. Co. 29 L.R.A.(N.S.) 240.

As to the validity of class legislation—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436, and Wilson v. North Carolina, 42 L. ed. U. S. 865.

to other railroads the equal protection of the laws.

[For other cases, see Constitutional Law, 266–268, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — requiring full train crew.

3. A railway company is not deprived of its property without due process of law by Ark. Laws 1907, No. 116, penalizing the operation of freight trains of more than twenty-five cars with less than three brakemen, regardless of any equipment with automatic couplers and air brakes.

[For other cases, see Constitutional Law, 516, 517, in Digest Sup. Ct. 1908.]

[No. 50.]

Argued November 11, 1910. Decided February 20, 1911.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which affirmed judgments of the Pulaski Circuit Court of that state, penalizing the operation of a freight train with less than three brakemen. Affirmed.

See same case below, 86 Ark. 412, 111 S. W. 456.

The facts are stated in the opinion.

Mr. Thomas S. Buzbee argued the cause, and, with Messrs. Edward B. Peirce and Erasmus C. Lindley, filed a brief for plaintiff in error:

The full-crew act of Arkansas is unconstitutional because it undertakes to regulate interstate commerce.

Sherlock v. Alling, 93 U. S. 102, 23 L. ed. 820; Hall v. DeCuir, 95 U. S. 487, 24 L. ed. 547; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121, Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; Interstate Commerce Commission Reports, 1905, p. 78; Sinnot v. Davenport, 22 How. 227, 16 L. ed. 243; Henderson v. New York (Henderson v. Wickham) 92 U. S. 274, 23 L. ed. 549; Inman S. S. Co. v. Tinker, 94 U. S. 238, 24 L. ed. 118; Pound v. Turck, 95 U. S. 463, 24 L. ed. 526; Wisconsin v. Duluth, 96 U. S. 387, 24 L. ed. 671; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Stoutenburgh v. Hennick, 129 U. S. 148, 32 L. ed. 639, 9 Sup. Ct. Rep. 256; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Interstate Commerce Commission v. Detroit, G. H. & M. R. Co. 167 U. S. 633, 42 L. ed. 306, 17 Sup. Ct. Rep. 986; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 A. & E. Ann. Cas. 1101; State v. Chicago, M. & St. P. R. Co. 136 Wis. 407, 19 L.R.A.(N.S.) 326, 117 N. W. 686; State v. Missouri P. R. Co. 213 Mo. 658, 111 S. W. 500.

The full-crew act as applied to interstate commerce is arbitrary, unreasonable, and contrary to the commerce and due process clauses of the Constitution of the United States.

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722.

The full-crew act is repugnant to the equal protection clause of the Constitution.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

Mr. Lawrence Maxwell also argued the cause for plaintiff in error.

Mr. Hal L. Norwood, Attorney General of Arkansas, argued the cause and filed a brief for defendant in error:

The "full-crew act" of Arkansas is in no just sense a regulation of interstate commerce, but is purely a police regulation.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Western U. Teleg. Co. v. James, 162 U. S. 656, 40 L. ed. 1107, 16 Sup. Ct. Rep. 934; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418;

Erb v. Morasch, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 286, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Henning-ton v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Peirce v. Van Dusen, 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693; Southern R. Co. v. King, 217 U. S. 524, 54 L. ed. 868, 30 Sup. Ct. Rep. 594; Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Sinnot v. Davenport, 22 How. 227, 16 L. ed. 243; Western U. Teleg. Co. v. Kansas, 216 U. S. 27, 54 L. ed. 366, 30 Sup. Ct. Rep. 190; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; Wisconsin v. Duluth, 96 U. S. 387, 24 L. ed. 671; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 A. & E. Ann. Cas. 1101; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Schlemmer v. Buffalo R. & P. R. Co. 205 U. S. 10, 51 L. ed. 685, 27 Sup. Ct. Rep. 407.

The "full-crew act" as applied to interstate commerce is a rightful exercise of the police power inherent in the state; is neither arbitrary, unreasonable, nor contrary to the commerce or due process clauses of the Constitution of the United States.

Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398; 2 Tiedeman, State & Federal Control of Persons & Property, 987; Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Freund, Pol. Power, §§ 63, 549, 550; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; Cooley, Const. Lim. 831; License Cases, 5 How. 579, 12 L. ed. 290; Louisville & N. R. Co. v. Kentucky, 183 U. S. 518, 46 L. ed. 306, 22 Sup. Ct. Rep. 95; Austin v. Tennessee, 179 U. S. 349, 45 L. ed. 228, 21 Sup. Ct. Rep. 132; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Chicago & N. W. R. Co. v. Fuller, 17 Wall. 560, 21 L. ed. 710; Lake Shore & M. S. R. Co. v. Ohio, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357; Illinois C. R Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; State v. Indiana & I. S. R. Co. 133 Ind. 69, 18 L.R.A. 502, 32 N. E. 817; Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; Cushing v. The John Fraser (The James Gray v. The John Fraser) 21 How. 184, 16 L. ed. 106; Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450, 17 L. ed. 805; Olsen v. Smith, 195 U. S. 332, 49 L. ed. 224, 25 Sup. Ct. Rep. 52; The William Law, 14 Fed. 792.

The "full-crew act" of Arkansas, as construed by the supreme court of Arkansas, is not repugnant to the equal protection clause of the Constitution of the United States.

Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 370, 15 A. & E. Ann. Cas. 645; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Peik v. Chicago & N. W. R. Co. 94 U. S. 164, 24 L. ed. 97; People v. Smith, 108 Mich. 527, 32 L.R.A. 857, 62 Am. St. Rep. 715, 66 N. W. 382; State v. Gerhardt, 145 Ind. 439, 33 L.R.A. 319, 44 N. E. 469; Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 88, 52 L. ed. 116, 28 Sup. Ct. Rep. 26, 12 A. & E. Ann. Cas. 555; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Holden v. Hardy, 169 U. S. 385, 42 L. ed. 788, 18 Sup. Ct. Rep. 383; Orient Ins. Co. v. Daggs, 172 U. S. 561, 43 L. ed. 554, 19 Sup. Ct. Rep. 281; Western Turf Asso. v. Greenberg, 204 U. S. 362, 51 L. ed. 522, 27 Sup. Ct. Rep. 384; Hayes v. Missouri, 120 U. S. 71, 30 L. ed. 580, 7 Sup. Ct. Rep. 350;

Jones v. Brim, 165 U. S. 182, 41 L. ed. 678, 17 Sup. Ct. Rep. 282; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 294, 42 L. ed. 1043, 18 Sup. Ct. Rep. 594; Heath & M. Mfg. Co. v. Worst, 207 U. S. 354, 52 L. ed. 243, 28 Sup. Ct. Rep. 114; Welch v. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616.

Mr. **W. L. Terry** also argued the cause for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

Two actions were instituted by the state of Arkansas in one of its courts against the Chicago, Rock Island, & Pacific Railway Company, a corporation of Illinois engaged in railroad business in several states. The company it was agreed, entered Arkansas for purposes of railroad business, complying with all conditions of the laws of that state authorizing foreign railroad corporations to do such business within its limits.

The complaint alleged that the defendant company on a named day, and in violation of the law of Arkansas, operated and ran in that state a freight train of more than twenty-five cars without having equipped such train with as many as three brakemen; and that the railroad over which the train was operated was more than 50 miles in length. The state asked a judgment in each case against the railway company for $500. The company filed in each case both an answer and a general demurrer.

The suits were based on an Arkansas statute (Ark. Laws 1907, No. 116) prescribing the minimum number of employees to be used in the operation of freight trains, and providing a penalty for violating its provisions.

The statute is in these words: "§ 1. No railroad company or officer of court, owning or operating any line or lines of railroad in this state, and engaged in the transportation of freight over its line or lines, shall equip any of its said freight trains with a crew consisting of less than an engineer, a fireman, a conductor, and three brakemen, regardless of any modern equipment of automatic couplers and air brakes, except as hereinafter provided. 458]§ 2. This *act shall not apply to any railroad company or officer of court whose line or lines are less than 50 miles in length, nor to any railroad in this state, regardless of the length of the said lines, where said freight trains so operated shall consist of less than twenty-five cars, it being the purpose of this act to require all railroads in this state whose line or lines are over 50 miles in length, engaged in hauling a freight train consisting of twenty-five cars or more, to equip the same with a crew consisting of not less than an engineer, a fireman, a conductor, and three brakemen; but nothing in this act shall be construed so as to prevent any railroad company or officer of court from adding to or increasing its crew beyond the number set out in this act. § 3. Any railroad company or officer of court violating any of the provisions of this act shall be fined for each offense not less than $100 nor more than $500, and each freight train so illegally run shall constitute a separate offense. Provided, the penalties of this act shall not apply during strikes of men in train service of lines involved." Ark. Laws 1907, No. 116.

The railway company's answer in each case contained six paragraphs. The court sustained the demurrer to paragraphs 1, 2, 3, 4, and 6 (the defendant excepting), and thereupon, by stipulation, the two actions were consolidated for the purpose of a trial on paragraph 5, which was as follows: "Defendant states that its said train was equipped with automatic couplers and air brakes, so that the cars thereof could be coupled and uncoupled without the necessity of brakemen going between the cars, and could be stopped by the application of the air brakes by the engineer of said train without the intervention or assistance of the conductor or brakeman, as required by the act of Congress and the order of the Interstate Commerce Commission, made thereunder; that it had employed on said train a conductor and two brakemen, and that the employment of another brakeman on said train was unnecessary, *because there were no[459 duties connected with the running and operating of said train to be performed by a third brakeman, and said act, in attempting to require the defendant to employ three brakemen on said train, attempted to require the defendant to expend a large amount of money for a useless and unnecessary purpose, and to deprive the defendant of its property without due process of law, and is therefore in violation of and in conflict with § 1 of the 14th Amendment of the Constitution of the United States."

The consolidated causes were, by agreement of the parties, tried by the court. The result in each case was a judgment against the railway company for $100. Upon appeal by the company to the supreme court of Arkansas overruled these

trial court was affirmed. 86 Ark. 412, 111 S. W. 456.

In the state court the railway company assailed the act in question as being in conflict with the 14th Amendment, as well as of the commerce clause, of the Constitution of the United States. But the supreme court of Arkansas, the action of the objections, holding that the act was not to be taken as inconsistent with the Constitution of the United States. The case is here for review on the question whether the statute is in violation of the Constitution.

In our judgment, these questions are concluded by former decisions, and no extended discussion of them is now required. Yet, an examination of some of the decisions will be proper in order to show the precise grounds on which this court has determined whether state enactments of a particular kind were regulations of interstate commerce or in violation of the 14th Amendment.

A leading case on the general subject is Smith v. Alabama, 124 U. S. 465, 474, 482, 31 L. ed. 508, 510, 513, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564, which involved the validity under the Constitution of the United States of a statute of Alabama making it a misdemeanor for an 460]engineer to *operate, *in that state*, a train of cars used for transportation of persons or freight without first undergoing an examination before and obtaining a license from a board appointed by the governor. The statute provided that before issuing a license, the board should inquire into the character and habits of the applicant; that no license should be granted if he was found to be of reckless or intemperate habits; that any license granted should be forfeited if, upon notice, the engineer was found to have been intoxicated within six hours before or during the time he was engaged in running a railroad engine; and that the license should be revoked or canceled if the engineer was ascertained from any cause to be unfit or incompetent. That case related to an engineer whose ordinary run was over the Mobile & Ohio Railroad Company, between Mobile, Alabama, and Corinth, Mississippi. He never handled the engine of any train between points wholly within Alabama. As an employee of the company he also operated an engine drawing a passenger train between St. Louis and Mobile. It was contended that the statute was repugnant to the commerce clause of the Constitution of the United States. This court referred to the decision in Sherlock v. Alling, 93 U. S. 99, 102, 23 L. ed. 819, 820, which involved the question whether an Indiana statute authorizing a suit by the personal representative of a deceased person whose death was caused by the wrongful act or omission of another could be applied where the death was the result of a collision between steamboats *navigating the Ohio river*. And, speaking by Mr. Justice Matthews, it said: "Legislation, in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. . . . And it may be said generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of *commerce, is of obliga-[461 tory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit." The court proceeded: "In conclusion, we find, therefore, first, that the statute of Alabama, the validity of which is under consideration, is not, considered in its own nature, a regulation of interstate commerce, even when applied as in the case under consideration; secondly, that it is properly an act of the legislation within the scope of the admitted power reserved to the state to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public, safety of person and property; and, thirdly, that, so far as it affects transactions of commerce among the states, it does so only indirectly, incidentally, and remotely, and not so as to burden or impede them, and, in the particulars in which it touches those transactions at all, it is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress, to be presumed from its silence."

In Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 101, 32 L. ed. 352, 354, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28, the question was as to the validity, so far as interstate commerce was concerned, of a statute of Alabama, enacted for the protection of the traveling public against accidents caused by color blindness and defective vision on the part of railroad employees, and which provided for an examination before a state board of any person seeking a position that involved the running or management of a railroad train. In that case the railway company operated its lines through several states, and employed as a train conductor one who had not obtained a

certificate of his fitness so far as color blindness and visual powers were concerned. After referring to Smith v. Alabama, above cited as holding that the statute of Alabama, involved in that case, was 462]not displaced by any express *enactment of Congress in the exercise of its power over commerce, and that, until so displaced, it remained "as the law governing carriers in the discharge of their obligations, whether engaged in purely internal commerce of the state, or in commerce among the states," this court, speaking by Mr. Justice Field, said: "The same observations may be made with respect to the provisions of the state law for the examination of parties to be employed on railways, with respect to their powers of vision. Such legislation is not directed against commerce, and only affects it incidentally, and therefore cannot be called, within the meaning of the Constitution, a regulation of commerce."

But the case more nearly analogous to the present one is that of New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 631–633, 41 L. ed. 853–855, 17 Sup. Ct. Rep. 418, where the court was required to determine the validity, under the Constitution of the United States, of a statute of New York regulating the heating of steam passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto. The statute provided that no steam railroad doing business in New York after a named day should heat its passenger cars on other than mixed trains by any stove or furnace kept inside of the car or suspended therefrom, except that, in case of accident or other emergency, such stove or furnace, with necessary fuel, could be temporarily used; that where any cars had been equipped with apparatus to heat by steam, hot water, or hot air from the locomotive or from a special car, the stove then in use could be retained and used when the car was standing still; and that the statute should not apply to railroads less than 50 miles in length, nor to the use of stoves of a pattern and kind to be approved by the state railroad commissioners for cooking purposes in dining cars. The New York, New Haven & Hartford Railroad Company, a Connecticut corporation, during 463]a certain *period named, ran trains of passenger cars over its route from the city of New York to Hartford, and from Hartford to New York, and on through trains as well as on its road in New York other than on mixed trains, the company heated its cars by stoves and furnaces kept within the cars. An action was brought against the railway company for violation of the above statute, and there was a verdict in favor of the state for the penalties imposed. That judgment was affirmed by the court of appeals of New York. 142 N. Y. 646, 37 N. E. 568.

It was contended in that case that the New York statute was repugnant both to the commerce clause of the Constitution and to the 14th Amendment. In the opinion of this court, the principle announced in Gibbons v. Ogden, 9 Wheat. 1, 211, 6 L. ed. 23, 73, that the mere grant to Congress of the power to regulate commerce did not, of its own force, and without legislation by Congress, impair the authority of the states to establish reasonable regulations for the protection of the health, the lives, or the safety of their people, was reaffirmed, and it was said: "The statute in question had for its object to protect all persons traveling in the state of New York on passenger cars moved by the agency of steam against the perils attending a particular mode of heating such cars. There may be reason to doubt the efficacy of regulations of that kind. But that was a matter for the state to determine. We know from the face of the statute that it has a real, substantial relation to an object as to which the state is competent to legislate; namely, the personal security of those who are passengers on cars used *within its limits*. Why may not regulations to that end be made applicable, within a state, to the cars of railroad companies engaged in interstate commerce as well as to cars used wholly within such state? Persons traveling on interstate trains are as much entitled, while within the state, to the protection of that state, as those who travel on domestic trains. The *stat-[464 ute in question is not directed against interstate commerce. Nor is it, within the meaning of the Constitution, a regulation of commerce, although it controls, in some degree, the conduct of those engaged in such commerce. So far as it may affect interstate commerce, it is to be regarded as legislation in aid of commerce, and enacted under the power remaining with the state to regulate the relative rights and duties of all persons and corporations within its limits. Until displaced by such national legislation as Congress may rightfully establish under its power to regulate commerce with foreign nations and among the several states, the validity of the statute, so far as the commerce clause of the Constitution of the United States is concerned, cannot be questioned."

It was also contended that the statute, if enforced according to its terms, would

make rapid transportation difficult, if not impossible, and that to compel an interstate train to conform to its provisions would be a wholly unnecessary burden on interstate passengers. After observing that possible inconveniences could not affect the question of the power in each state to make such regulations for the safety of passengers on interstate trains as, in the the judgment of the state, all things considered, were reasonable, appropriate, or necessary, this court said: "Inconvenience of this character cannot be avoided so long as each state has plenary authority within its territorial limits to provide for the safety of the public, according to its own views of necessity and public policy, and so long as Congress deems it wise not to establish regulations on the subject that would displace any inconsistent regulations of the states, covering the same ground." In reference to the contention that the statute denied the equal protection of the laws, as prescribed by the 14th Amendment, the court said: "This contention is based upon that clause of the statute declaring that it shall not 465]apply to railroads less than 50 *miles in length. No doubt the main object of the statute was to provide for the safety of passengers traveling on what are commonly called trunk or through lines, connecting distant or populous parts of the country, and on which the perils incident to traveling are greater than on short, local lines. But, as suggested in argument, a road only 50 miles in length would seldom have a sleeping car attached to its trains; and passengers traveling on roads of that kind do not have the apprehension ordinarily felt by passengers on trains regularly carrying sleeping cars or having many passenger caches, on account of the burning of cars in case of their derailment or in case of collision. In any event, there is no such discrimination against companies having more than 50 miles of road as to justify the contention that there has been a denial to the companies named in the act of the equal protection of the laws. The statute is uniform in its operation upon all railroad companies doing business in the state of the class to which it is made applicable."

The principles announced in the above cases require an affirmance of the judgment of the supreme court of Arkansas. It is not too much to say that the state was under an obligation to establish such regulations as were necessary or reasonable for the *safety* of *all* engaged in business or domiciled within its limits Beyond doubt, passengers on interstate carriers while within Arkansas are as fully entitled to the benefits of valid local laws enacted for the public safety as are citizens of the state. Local statutes directed to such an end have their source in the power of the state, never surrendered, of caring for the public safety of all within its jurisdiction; and the validity under the Constitution of the United States of such statutes is not to be questioned in a Federal court unless they are clearly inconsistent with some power granted to the general government, or with some right secured by that instrument, or unless they are purely arbitrary in their *nature. The statute here involved is[466 not in any proper sense a regulation of interstate commerce, nor does it deny the equal protection of the laws. Upon its face, it must be taken as not directed against interstate commerce, but as having been enacted in aid, not in obstruction, of such commerce, and for the protection of those egaged in such commerce. Under the evidence, there is admittedly some room for controversy as to whether the statute is or was necessary; but it cannot be said that it is so unreasonable as to justify the court in adjudging that it is merely an arbitrary exercise of power, and not germane to the objects which evidently the state legislature had in view. It is a means employed by the state to accomplish an object which it is entitled to accomplish, and such means, even if deemed unwise, are not to be condemned or disregarded by the courts, if they have a real relation to that object. And the statute being applicable alike to all belonging to the same class, there is no basis for the contention that there has been a denial of the equal protection of the laws. Undoubtedly, Congress, in its discretion, may take entire charge of the whole subject of the equipment of interstate cars, and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce. But it has not done so in respect to the number of employees to whom may be committed the actual management of interstate trains of any kind. It has not established any regulations on that subject, and until it does, the statutes of the state, not in their nature arbitrary, and which really relate to the rights and duties of all within the jurisdiction, must control. This principle has been firmly established, and is a most wholesome one under our systems of government, Federal and state. In addition to the cases above cited, Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802;

Western U. Teleg. Co. v. James, 162 U. S. 656, 40 L. ed. 1107, 16 Sup. Ct. Rep. 934; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 467]289; Western U. Teleg. Co. v. *Kansas, 216 U. S. 27, 54 L. ed. 366, 30 Sup. Ct. Rep. 190; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; and Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488, may be consulted.

Judgment affirmed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plff. in Err.,
v.
ERASMUS L. MOTTLEY and Annie E. Mottley, His Wife.

(See S. C. Reporter's ed. 467–486.)

Carriers — compensation for transportation.

1. A carrier engaged in interstate commerce cannot lawfully charge, collect, or receive anything but money for transportation on its road since the enactment of the act of June 29, 1906 (34 Stat. at. L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1149), § 6, prohibiting any carrier from demanding, collecting, or receiving "a greater or less or different compensation" for the transportation of persons or property, or for any service in connection therewith, than that specified in its published schedule of rates.

[For other cases, see Carriers, III., in Digest Sup. Ct. 1908.]

Carriers — Federal regulation — invalidating contract for free transportation.

2. An interstate carrier cannot make a valid contract to issue annual passes for life in consideration of a release of a claim for damages since the enactment of the act of June 29, 1906, § 6, expressly prohibiting any carrier from demanding, collecting, or receiving "a greater or less or different compensation" for the transportation of persons or property, or for any service in connection therewith, than that specified in its published schedule of rates.

[For other cases, see Carriers, III., in Digest Sup. Ct. 1908.]

Statutes — retrospective effect — invalidating contracts for free transportation.

3. An agreement by an interstate carrier to issue annual passes for life in consideration of a release of a claim for damages, though entered into prior to the act of June 29, 1906, was made unenforceable by the prohibition of § 6 of that act, against demanding, collecting, or receiving "a greater or less or different compensation" for the transportation of persons or property, or for any service in connection therewith, than that specified in the carrier's published schedule of rates.

[For other cases, see Statutes, II. v, in Digest Sup. Ct. 1908.]

Commerce — Federal regulation — invalidating existing contracts for free transportation.

4. Congress, in the exercise of its power over commerce, could enact the provisions of the act of June 26, 1906, § 6, which rendered unenforceable a prior contract, valid when made, by which an interstate carrier agreed to issue annual passes for life in consideration of a release of a claim for damages.

[For other cases, see Commerce, III. c, in Digest Sup. Ct. 1908.]

Constitutional law — freedom to contract — Federal regulation of interstate carrier — prohibiting free transportation.

5. The constitutional liberty of the citizen to make contracts was not infringed by the enactment by Congress, in the exercise of its power over commerce, of the provisions of the act of June 29, 1906, § 6, which rendered unenforceable a prior contract, valid when made, by which an interstate carrier agreed to issue annual passes for life in consideration of a release of a claim for damages.

[For other cases, see Constitutional Law, IV. b, 7, in Digest Sup. Ct. 1908.]

[No. 246.]

Submitted January 9, 1911. Decided February 20, 1911.

NOTE.—As to whether pass issued as part of consideration for contract is within statute prohibiting free transportation of passengers, or discrimination in passenger rates—see notes to State v. Martyn, 23 L.R.A.(N.S.) 217, and State v. Union P. R. Co. 31 L.R.A.(N.S.) 657.

As to what constitutes an unlawful preference or discrimination by a carrier under interstate commerce regulations—see note to Gamble-Robinson Commission Co. v. Chicago & N. W. R. Co. 94 C. C. A. 230.

On effect of statutory provisions against rebates upon contracts for transportation at less than the regular rate—see note to Armour Packing Co. v. United States, 52 L. ed. U. S. 681.

On retrospective effect of statutes—see Notes to Otœ County v. Baldwin, 28 L. ed. U. S. 331, and Barnitz v. Beverly, 41 L. ed. U. S. 94.

On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216, and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

On the constitutionality of statutes restricting contracts and business—see note to State v. Loomis, 21 L.R.A. 789.

IN ERROR to the Court of Appeals of the State of Kentucky to review a decree which affirmed a decree of the Warren Circuit Court, in that state, for the specific performance of an agreement by an interstate carrier to issue life annual passes. Reversed and remanded for further proceedings.

See same case below, 133 Ky. 652, 118 S. W. 982.

The facts are stated in the opinion.

Mr. **Henry L. Stone** submitted the cause for plaintiff in error:

While Congress may not pass an act for the purpose of impairing the obligation of specific contracts, it may, in the due exercise of the powers expressly conferred upon it, incidentally do so.

Legal Tender Cases, 12 Wall. 550, 551, 20 L. ed. 311, 312; Bullard v. Northern P. R. Co. 10 Mont. 168, 11 L.R.A. 246, 3 Inters. Com. Rep. 536, 25 Pac. 120; 8 Cyc. Law & Proc. p. 997; Newport News & M. Valley Co. v. McDonald Brick Co. 109 Ky. 408, 59 S. W. 332; Fitzgerald v. Fitzgerald & M. Constr. Co. 41 Neb. 374, 59 N. W. 862; Southern Wire Co. v. St. Louis Bridge & Tunnel R. Co. 38 Mo. App. 191; Fitzgerald v. Grand Trunk R. Co. 63 Vt. 169, 13 L.R.A. 70, 3 Inters. Com. Rep. 633, 22 Atl. 77; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 Inters. Com. Rep. 102.

The power of Congress to regulate commerce is paramount and is unrestrained, except by the limitations upon its authority by the Constitution. This power is "complete in itself, and acknowledges no limitations other than those prescribed by the Constitution."

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Addyston Pipe & Steel Co. v. United States, 175 U. S. 228, 44 L. ed. 142, 20 Sup. Ct. Rep. 96; Scranton v. Wheeler, 179 U. S. 162, 45 L. ed. 137, 21 Sup. Ct. Rep. 48.

Many rights, privileges, and exemptions which usually pertain to ownership under a particular state of the law, and many reasonable expectations, cannot be regarded as vested rights in any legal sense.

Cooley, Const. Lim. 7th ed. pp. 509, 510.

A contract to do a thing, lawful when made, is avoided by subsequent legislation making it unlawful. Every owner of property holds the same subject to such action as the sovereign power of the state may, in the exercise of its legitimate sovereignty, adopt in relation to it.

Bradford v. Jenkins, 41 Miss. 335.

The court cannot make an exception not plainly suggested by or to be implied from the language actually used in the statute. For the court to go beyond that limitation is not to construe, but to legislate.

Rhode Island v. Massachusetts, 12 Pet. 692, 9 L. ed. 1247; Dartmouth College v. Woodward, 4 Wheat. 594, 4 L. ed. 648; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; Endlich, Interpretation of Statutes, §§ 4, 8; United States v. Dickson, 15 Pet. 141–163, 10 L. ed. 689–698; United States v. Wells-Fargo Exp. Co. 161 Fed. 606; American Exp. Co. v. United States, 212 U. S. 532, 53 L. ed. 640, 29 Sup. Ct. Rep. 315.

There can be no lawful departure by a carrier subject to the act to regulate commerce, from its published rates for interstate transportation, on file with the Commission, upon any consideration, or in any sense, or to any extent, without subjecting such carrier to the penalties of the act.

Union P. R. Co. v. Goodridge, 149 U. S. 690, 691, 37 L. ed. 902, 903, 13 Sup. Ct. Rep. 970; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Interstate Commerce Commission v. Chesapeake & O. R. Co. 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 439, 51 L. ed. 558, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075; Poor v. Chicago, B. & Q. R. Co. 12 Inters. Com. Rep. 469.

Interstate passenger transportation must be paid for in money.

United States v. Chicago, I. & L. R. Co. 163 Fed. 114; United States v. Atchison, T. & S. F. R. Co. 163 Fed. 111; Atchison, T. & S. F. R. Co. v. United States, 95 C. C. A. 446, 170 Fed. 250; State v. Martyn, 82 Neb. 225, 23 L.R.A.(N.S.) 217, 117 N. W. 719, 17 A. & E. Ann. Cas. 659; M'Neill v. Durham & C. R. Co. 132 N. C. 510, 67 L.R.A. 227, 95 Am. St. Rep. 641, 44 S. E. 34.

Mr. **Lewis McQuown** submitted the cause for defendants in error. Messrs. Clarence U. McElroy and G. D. Milliken were on the brief:

All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will also, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of that character. The reason of the law in such cases should prevail over the letter.

United States v. Kirby, 7 Wall. 486, 487, 19 L. ed. 280.

All general terms in the statutes should be limited in their application, so as not

to lead to injustice, oppression, or unconstitutional operation, if that be possible. It will be presumed that the exceptions were intended which would avoid results of that character.

Carlisle v. United States, 16 Wall. 153, 21 L. ed. 429; Chew Heong v. United States, 112 U. S. 555, 28 L. ed. 776, 5 Sup. Ct. Rep. 255; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 37, 39 L. ed. 611, 15 Sup. Ct. Rep. 508.

It is the undoubted duty of the court to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it related, and to restrain its operation within narrower limits than its words import, if the court is satisfied that the literal meaning of the language would extend to cases which the legislature never designed to include in it.

Washington Market Co. v. Hoffman, 101 U. S. 116, 25 L. ed. 783.

No law will be construed to act retrospectively unless its language imperatively requires such a construction.

Auffmordt v. Rasin, 102 U. S. 620-623, 26 L. ed. 262, 263.

Even though the act of 1906 was intended to cover a case like this, it is not enforceable, because repugnant to, and violative of, both the letter and the spirit of the Federal Constitution.

Wilkinson v. Leland, 2 Pet. 657, 7 L. ed. 553; Osborn v. Nicholson, 13 Wall. 654, 20 L. ed. 689; Dubuque & S. C. R. Co. v. Richmond, 19 Wall. 584, 22 L. ed. 173.

Mr. Justice **Harlan**, delivered the opinion of the court:

As the result of a collision in Kentucky of railroad trains belonging to the Louisville & Nashville Railroad Company, which operated various lines extending through that commonwealth as well as into Tennessee and other states, the plaintiffs Mottley and wife received serious personal injuries. The collision, it is alleged, was caused by the gross carelessness and negligence of the agents and servants of the railroad company.

After the collision, the plaintiffs and the company, on the 2d of October, 1871, entered into a written agreement of which the following is a copy:

"The Louisville & Nashville Railroad Company, in consideration that E. L. Mott-
472]ley and wife, Annie E. Mottley, *have this day released said company from all damages or claims for damages for injuries received by them on the 7th day of September, 1871, in consequence of a collision of trains on the railroad of said company at Randolph's station, Jefferson county, Kentucky, hereby agrees to issue free passes on said railroad and branches now existing or to exist, to said E. L. Mottley and Annie E. Mottley, for the remainder of the present year, and thereafter to renew said passes annually during the lives of said Mottley and wife or either of them."

The railroad company adhered strictly to this agreement for many years, but finally refused further to perform it, on the ground that the act of Congress of June 29th, 1906, amendatory of the act regulating commerce, approved February 4th, 1887, made its enforcement illegal. Thereupon Mottley and wife brought suit in the circuit court of the United States for the western district of Kentucky, to enforce the agreement, and obtained a decree in their favor. 150 Fed. 406. But upon a direct appeal to this court, that decree was reversed, and the case was remanded, with directions to dismiss the suit for want of jurisdiction. Louisville & N. R. Co. v. Mottley, 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. Rep. 42; Metcalf v. Watertown, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; Tennessee v. Union Planters' Bank, 152 U. S. 454, 459, 38 L. ed. 511, 513, 14 Sup. Ct. Rep. 654. The grounds upon which the Federal court was held to be without jurisdiction are not important here.

The present action was brought in the circuit court of Warren county, Kentucky. The relief sought was that the defendant company be required specifically to execute the above agreement by issuing passes to the plaintiffs for the year 1909, and for every year thereafter, so long as the plaintiffs should each live, over all its roads in and out of Kentucky.

The railroad company resists any judgment that would compel it further to perform the agreement sued on. It bases its defense mainly on the commerce act of Congress *of June 29th, 1906, which[473 became effective August 28th, 1906 (34 Stat. at L. 838, Res. No. 47, U. S. Comp. Stat. Supp. 1909, p. 1169). By that statute, Congress, among other things, provided:

"Sec. 1. . . . No common carrier subject to the provisions of this act shall, after January first, ninteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers," except to certain specified persons, the plaintiffs not being within any of the expected classes.

"Sec. 6. . . . No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon

which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs, than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit, in any manner, or by any device, any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." 24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154; 34 Stat. at L. 584, 586, chap. 3591, U. S. Comp. Stat. Supp. 1909, pp. 1149, 1153.

The act of June 29th, 1906, regulating commerce and enlarging the powers of the Interstate Commerce Commission, made its provisions applicable to "any common carrier or carriers engaged in the transportation of passengers or property . . . by railroad . . . from one state or territory of the United States or the District of Columbia, to any other state or territory of the United States or the District of Columbia, etc.;" and in this respect it has not 474]*been amended. It also provides that a common carrier violating the clause forbidding it after January 1st, 1907, directly or indirectly to issue or to give any interstate free ticket, free pass, or free transportation for passengers, should pay to the United States a penalty of not less than $100 nor more than $2,000. Any person (other than those of the excepted classes) who used any such interstate free ticket, free pass, or free transportation, became subject to a like penalty. Id. 585, § 1.

The state circuit court, giving the relief asked, by its judgment required the railroad company to issue to the plaintiffs and to each of them a pass over its lines and branches for the year 1909, and thereafter to renew such passes annually during their respective lives.

Upon appeal to the court of appeals of Kentucky, that judgment was affirmed. 133 Ky. 652, 118 S. W. 982.

It may be, as suggested, that a refusal to enforce the agreement of 1871 will operate as a great hardship upon the defendants in error. But that consideration cannot control the determination of this controversy. Our duty is to ascertain the intention of Congress in passing the statute upon which the railroad company relies as prohibitive of the further enforcement of the agreement in suit. That intention is to be gathered from the words of the act, interpreted according to their ordinary acceptation, and, when it becomes necessary to do so, in the light of the circumstances as they existed when the statute was passed. Platt v. Union P. R. Co. 99 U. S. 48, 64, 25 L. ed. 424, 429. The court cannot mold a statute simply to meet its views of justice in a particular case. Having, in the mode indicated, ascertained the will of the legislative department, the statute as enacted must be executed, unless found to be inconsistent with the supreme law of the land.

In our consideration of the case it will be assumed—indeed, the parties themselves assume—that the agreement *of 1871 [475 was not, when made, in conflict with the Constitution or laws of the United States. But we must first inquire whether such an agreement, if made after the passage of the original and amendatory commerce acts, would have been valid under those acts. If those acts forbid agreements of that character, we must then inquire whether the one in suit can be now enforced simply because it was valid when made.

The act of February 4th, 1887, regulating commerce, declared it to be an unjust and unlawful discrimination for any carrier subject to the provisions of that act, directly or indirectly, by any special rate, rebate, drawback, or other device, to charge, demand, collect, or receive from any person or persons "a greater or less compensation" for any service rendered or to be rendered in the transportation of passengers or property than was charged, demanded, collected, or received from any other person or persons for doing him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. 24 Stat. at L. 379, chap. 104, § 2, U. S. Comp. Stat. 1901, p. 3154. But the act of June 29th, 1906, made a material addition to the words of the act of 1887; for it expressly prohibited any carrier, unless otherwise provided, to demand, collect, or receive "a greater or less *or different* compensation" for the transportation of persons or property, or for any service in connection therewith, than the rates, fares, and charges specified in the tariff filed and in effect at the time. We cannot suppose that this change was without a distinct purpose on the part of Congress. The words "or different," looking at the context, cannot be regarded as superfluous or meaningless. We must have regard to all the words used by Congress, and, as far as possible, give effect to them. Washington Market v. Hoffman, 101 U. S. 112, 115, 25 L. ed. 782, 783. The history of the acts relating to com-

merce shows that Congress, when introducing into the act of 1906 the word "differ-
476]ent," had in mind the purpose *of curing a defect in the law, and of suppressing evil practices under it by prohibiting the carrier from charging or receiving compensation except as indicated *in its published tariff*. 11th Ann. Rep. Interstate Com. Com. 141; 19th Id. 78, 15; 40 Cong. Rec. Pt. 7, p. 6608; Id. 6617; Id. 7428, 7434; Rept. of Confer. Com., 40 Cong. Rec. 9522, 42 Cong. Rec. Pt. 2, p. 1746.

In our opinion, after the passage of the commerce act, the railroad company could not lawfully accept from Mottley and wife any compensation "different" *in kind* from that mentioned in its published schedule of rates. And it cannot be doubted that the rates or charges specified in such schedule were payable only in money. They could not be paid in any other way, without producing the utmost confusion, and defeating the policy established by the acts regulating commerce. The evident purpose of Congress was to establish uniform rates for transportation, to give all the same opportunity to know what the rates were, as well as to have the equal benefit of them. To that end the carrier was required to print, post, and file its schedules and to keep them open to public inspection. No change could be made in the rates embraced by the schedules except upon notice to the Commission and to the public. But an examination of the schedules would be of no avail and would not ordinarily be of any practical value if the published rates could be disregarded in special or particular cases by the acceptance of property of various kinds, and of such value as the parties immediately concerned chose to put upon it, in place of money for the services performed by the carrier.

That money only was receivable for transportation is the basis upon which the Interstate Commerce Commission has proceeded; for, in one of its Conference Rulings (207) issued in 1909, the Commission held that nothing but money could be lawfully received or accepted in payment for transportation, whether of passengers or
477]*property, for any service connected therewith, "it being the opinion of the commission that the prohibition against the charging or collecting a greater or less or *different* compensation than the established rates or fares in effect at the time precludes the acceptance of service, property, or other payment in lieu of the amount specified in the published schedules." It is now the established rule that a carrier cannot depart to any extent from its published schedule of rates for interstate transportation on file without incurring the penalties of the statute. Union P. R. Co. v. Goodridge, 149 U. S. 690, 691, 37 L. ed. 902, 903, 13 Sup. Ct. Rep. 970; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 102, 39 L. ed. 910, 912, 15 Sup. Ct. Rep. 802; Interstate Commerce Commission v. Chesapeake O. R. Co. 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; Texas & P. R. Co v. Abilene Cotton Oil Co. 204 U. S. 426, 439, 51 L. ed. 553, 558, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075. That rule was established in execution of a public policy which, it seems, Congress deliberately adopted as applicable to the interstate transportation of persons or property. The passenger has no right to buy tickets with services, advertising, releases, or property, nor can the railroad company buy services, advertising, releases, or property with transportation. The statute manifestly means that the purchase of a transportation ticket by a passenger, and its sale by the company, shall be consummated only by the former paying cash and by the latter receiving cash of the amount specified in the published tariffs. In the first of the cases last above cited (the Goodridge Case) the court, referring to the practice of allowing rebates, said: "So opposed is the policy of the act to secret rebates of this description that it requires a printed copy of the classification and schedule of rates to be posted conspicuously in each passenger station for the use of the patrons of the road, that everyone may be apprised not only of what the company will exact of him for a particular service, but what it exacts of everyone else for the same service, so that in fixing his own prices he may know precisely with what he has to compete. To hold a defense thus pleaded to be *valid[478 would open the door to the grossest frauds upon the law, and practically enable the railroad company to avail itself of any consideration for a rebate which it considers sufficient, and to agree with the favored customer upon some fabricated claim for damages which it would be difficult, if not impossible, to disprove. For instance, under the defense made by this company, there is nothing to prevent a customer of the road, who has received a personal injury, from making a claim against the road for any amount he chooses, and in consideration thereof, and of shipping all his goods by that road, receiving a rebate for all goods he may ship over the road for an indefinite time in the future. It is almost needless to say that such a contract could not be supported. There is no doubt of the general proposition that the release of an unliquidated claim for damages is a good consideration for a promise, as between the parties, and if no one else

were interested in the transaction, that rule might apply here; but the legislature, upon grounds of public policy, and for the protection of third parties, has made certain requirements with regard to equality of rates, which, in their practical application, would be rendered nugatory if this rule were given full effect." That Congress had the constitutional power to adopt such a policy and to prescribe appropriate means to give it effect, we do not doubt.

It is said, however, that, as the contract of Mottley and wife with the railroad company was originally valid, it cannot be supposed that Congress intended by the act of 1906 to annul or prevent its enforcement. But the purpose of Congress was to cut up by the roots every form of discrimination, favoritism, and inequality, except in the cases of certain excepted classes to which Mottley and his wife did not belong, and which exceptions rested upon peculiar grounds. Manifestly, from the face of the commerce act itself, Congress, before taking final action, considered the question as to 479]what exceptions, if any, should *be made in respect of the prohibition of free tickets, free passes, and free transportation. It solved the question when, without making any exceptions of *existing contracts*, it forbade by broad, explicit words *any* carrier to charge, demand, collect, or receive a "greater or less *or different* compensation" for *any* services in connection with the transportation of passengers or property than was specified in its published schedules of rates. The court cannot add an exception based on equitable grounds when Congress forbore to make such an exception. Yturbide v. United States, 22 How. 290, 293, 16 L. ed. 342, 343. The words of the act, therefore, must be taken to mean that a carrier engaged in interstate commerce cannot charge, collect, or receive for transportation on its road anything but money. In Armour Packing Co. v. United States, 209 U. S. 56, 81, 52 L. ed. 681, 694, 28 Sup. Ct. Rep. 428, this court said: "There is no provision excepting special contracts from the operation of the law. One rate is to be charged, and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of contracts with shippers, and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart." So, in Adams Exp. Co. v. United States, 212 U. S. 522, 532, 533, 53 L. ed. 635, 640, 29 Sup. Ct. Rep. 315: "But the power of Congress over interstate transportation embraces all manner of carriage of that character, whether gratuitous or otherwise; and, in the absence of express exceptions, we think it was the intention of Congress to prevent a departure from the published rates and schedules in any manner whatsoever. If this be not so, a wide door is opened to favoritism in the carriage of property in the instances mentioned, free of charge. If it is lawful, in view of the provisions of the interstate commerce act, to *issue[480 franks of the character under consideration in this case, then this right must be founded upon some exception incorporated in the act."

It is further said that the passes contemplated by the parties were not strictly free passes; for, it is argued, the railroad company would receive a valuable consideration for each one issued by it. This view is more plausible than sound, and does not meet the difficulty. Suffice it to say, in this case, that such passes, when issued, would be illegal under the act of Congress, by reason of their not being paid for in money, according to the company's schedule of rates, but in consideration only of the release by Mottley and wife of their claim for damages on account of the collision in question.

We now come to the question whether, assuming that the agreement of 1871 was valid when made, could Congress, by any statute subsequently enacted, make its enforcement by suit impossible. There are certain propositions at the base of this inquiry which we need not discuss at large, because they have become thoroughly established in our constitutional jurisprudence. One is, that the power granted to Congress to regulate commerce among the states and with foreign nations is complete in itself, and is unrestricted except by the limitations upon its authority to be found in the Constitution. Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 229, 44 L. ed. 136, 143, 20 Sup. Ct. Rep. 96; Scranton v. Wheeler, 179 U. S. 141, 162, 163, 45 L. ed. 126, 137, 21 Sup. Ct. Rep. 48; Chicago B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; Union Bridge Co. v. United States, 204 U. S. 364, 400, 51 L. ed. 523, 539, 27 Sup. Ct. Rep. 367; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 202, ante, 167, 31 Sup. Ct. Rep. 164.

In the Addyston Pipe Case, this court said that, under its power to regulate commerce, Congress "may enact such legislation as shall declare void and prohibit the

*performance of any contract between in-
481]dividuals or corporations *where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce."

In the Scranton Case, where a riparian owner sought compensation from the government because his access to navigability had been materially obstructed by a pier constructed by the government on the submerged grounds in front of his land, this court said: "The riparian owner acquired the right of access to navigability *subject to the contingency* that such right might become valueless in consequence of the erection under competent authority of structures on the submerged lands in front of his property, for the purpose of improving navigation. When erecting the pier in question, the government had no object in view except, in the interest of the public, to improve navigation. It was not designed arbitrarily or capriciously to destroy rights belonging to any riparian owner. What was done was manifestly necessary to meet the demands of international and interstate commerce."

In the Union Bridge Co. the question was as to the constitutional authority of the government to require the bridge company to make certain changes or alterations in a bridge across a navigable river of the United States, in Pennsylvania, and which bridge the company owned and constantly used. It was admitted that the bridge had been lawfully erected. But ulimately, in view of the necessities of interstate commerce, it had become an unreasonable obstruction to free, open navigation by vessels and boats then in use, and, for that reason alone, the government, by its constituted authorities, proceeding under an act of Congress, ordered the bridge company, *at its own cost*, to make certain changes and alterations in the structure. This court held that there was no taking of property for public use in the constitutional sense, and that although the bridge, when erected un-
482]der the authority of *Pennsylvania, may have been a lawful structure, and although it may not have been an unreasonable obstruction to commerce, *as then* carried on, "it must be taken, under the cases cited and upon principle, not only that the company, when exerting the power conferred upon it by the state, did so with knowledge of the paramount authority of Congress to regulate commerce among the states, but that it erected the bridge *subject to the possibility that Congress might, at some future time, when the public interest demanded*, exert its power by appropriate legislation to protect navigation against unreasonable obstructions."

Long before the above cases were decided it was said in Legal Tender Cases, 12 Wall. 550, 551, 20 L. ed. 311, 312, that "as, in a state of civil society, property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority."

These principles control the decision of the present question. The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable, or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations is inconceivable. The framers of the Constitution never intended any such state of things to exist.

It is said that if Congress intended by the commerce act to embrace such a case as this, then the act is repugnant to the Constitution. Does the act infringe upon the constitutional liberty of the citizen to make contracts? Manifestly not. In the Addyston Pipe Case (p. 228), above cited, the court said: "We do not assent to the *correctness of the proposition that[483
the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress, and prevents it from legislating upon the subject of contracts" relating to interstate commerce. Again: "But it has never been, and in our opinion ought not to be, held that the word [liberty] included the right of an individual to enter into private contracts upon all subjects, no matter what their nature, and wholly irrespective (among other things) of the fact that they would, if performed, result in the regulation of interstate commerce, and in the violation of an act of Congress upon that subject. The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature, *while in the exercise of its constitutional right to regulate commerce among the states.* . . . Anything which directly obstructs and thus regulates that commerce which is carried on among the states, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce."

These authorities and principles condemn the proposition that the defendants in error had the constitutional right, pursuant to or because of the agreement of 1871, and during their respective lives, to accept and use free transportation for themselves, as passengers, on an interstate train, after Congress forbade, under penalty, any interstate carrier to demand, collect, or receive compensation for transportation, or any interstate passenger not within the classes excepted by the act, to use transportation tickets, except upon the basis fixed by the carrier's published schedule of rates. After the commerce act came into effect, no contract that was inconsistent with the regulations established by the act of Congress could be enforced in any court. The rule upon this subject is thoroughly established. 484] *It is not determinative of the present question that the commerce act, as now construed, will render the contract of no value for the purposes for which it was made. In Legal Tender Cases, above cited, the court, referring to the 5th Amendment, which forbids the taking of private property for public use without just compensation or due process of law, said: "That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war, may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts."

In Fitzgerald v. Grand Trunk R. Co., which was the case of a contract for the transportation of lumber through several states, the supreme court of Vermont said: "Such commerce is solely regulated by Congress, and when parties make contracts to engage in interstate commerce, they are held to do so upon the basis and with the understanding that changes in the law applicable to their contracts may be made. There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal, nor vested right in the omission to legislate upon a particular subject which exempts a contract from the effect of subsequent legislation upon its subject-matter by competent legislative authority." 63 Vt. 169, 173, 13 L.R.A. 70, 3 Inters. Com. Rep. 633, 22 Atl. 76.

In Pomeroy on Contracts, § 280 (Specific Performance), after observing that an illegal contract cannot be made the basis of any judicial proceeding, and that no action in law or equity could be maintained upon it, it was said: "This impossibility of enforcement exists, whether the agreement is illegal in its inception, or whether, being valid when *made, the illegalityf[485 has been created by a subsequent statute." Among the cases cited by the author in support of that view was Atkinson v. Ritchie, 10 East, 530, 534, in which the Chief Justice, Lord Ellenborough, delivering the opinion of the court, said: "That no contract can properly be carried into effect, which was originally made contrary to the provisions of law, or which, being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law, are propositions which admit of no doubt." In Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 Inters. Com. Rep. 102, 34 Am. & Eng. R. Cas. 630, Judge Cooley said: "But the act to regulate commerce is a general law, and contracts are always liable to be more or less affected by general laws, even when in no way referred to. . . . But this incidental effect of the general law is not understood to make it a law imparing the obligation of contracts. It is a necessary effect of any considerable change in the public laws. If the legislature had no power to alter its police laws when contracts would be affected, then the most important and valuable reforms might be precluded by the simple device of entering into contracts for the purpose. No doctrine to that effect would be even plausible, much less sound and tenable." "If one agrees," said Mr. Parsons, "to do a thing which it is lawful for him to do, and it becomes unlawful by an act of the legislature, the act avoids the promise." Parsons, Contr. 6th ed. 675.

We forbear any further citation of authorities. They are numerous and are all one way. They support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made. If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation *of[486 legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted. The mischiefs that would result from a different interpretation of the Constitution will be readily perceived.

In our opinion, the relief asked by the plaintiffs must, upon principle and authority, be denied; that the railroad company rightly refused, after the passage of the commerce act, further to comply with the agreement of 1871; and, that the decree

requiring performance of its provisions by issuing annual passes was erroneous.

Whether, without enforcing the contract in suit, the defendants in error may, by some form of proceeding against the railroad company, recover or restore the rights they had when the railroad collision occurred, is a question not before us, and we express no opinion on it.

The judgment is reversed, and the cause is remanded for such further proceedings as may be deemed proper, not inconsistent with the views herein expressed.

Reversed.

CHICAGO, INDIANAPOLIS, & LOUISVILLE RAILWAY COMPANY, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 486–497.)

Carriers — Federal regulation — accepting advertising in payment of transportation.

1. The acceptance of advertising by a carrier in lieu of money in payment of interstate transportation furnished to the publisher, his employees, and the immediate members of his and their families, violates the provisions of the act to regulate commerce of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), and the acts amendatory thereof, prohibiting the furnishing of interstate transportation for a less or different compensation than that specified in the carrier's published rates.

[For other cases, see Carriers, III., in Digest Sup. Ct. 1908.]

Commerce — exclusiveness of Federal power — fixing compensation — transportation.

2. A state statute authorizing a railway company incorporated under the laws of the state to issue transportation in payment for printing and advertising must give way, so far as interstate transportation is concerned, before the provisions of the act to regulate commerce of February 4, 1887, and the acts amendatory thereof, under which a carrier can accept nothing but money in exchange for interstate transportation.

[For other cases, see Commerce, 65–67, in Digest Sup. Ct. 1908.]

[No. 74.]

Submitted December 16, 1910. Decided February 20, 1911.

NOTE.—On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

Exchange of transportation for advertising, as within statute prohibiting discrimination in rates.

The cases on this question are few, but in each the contract to pay for transportation with advertising has been condemned.

A contract by a railroad company to furnish to the proprietors of a newspaper, as requested, transportation at the statutory rate, under certain limitations and restrictions not required in ordinary tickets, in payment for advertising to be furnished "at agreed rates," which are not specified in the contract, but are to be settled by the parties themselves by another agreement, violates the provision of the Nebraska railway commission act which prohibits common carriers from charging one person a greater or less compensation than another, and forbids charging "other than the rates fixed and established." State v. Union P. R. Co. 87 Neb. 29, 31 L.R.A.(N.S.) 657, 126 N. W. 859.

It was urged in this case that the statute does not, as does the Hepburn act, use the word "different" in connection with the words "greater or less compensation," but the court said: "The difference between the meaning of a statute which prohibits a 'different' compensation and one which prohibits a charge 'other than the fixed and established rates' is to the writer imperceptible; and the reasoning applicable to one statute seems to apply with equal force to the provisions of the other."

An annual pass issued in consideration of the insertion of a schedule of a railway company in a newspaper for the current year violates a state statute providing that a common carrier shall not, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person a greater or less compensation for the transportation of passengers than it charges, demands, or receives from other persons for similar services. M'Neill v. Durham & C. R. Co. 132 N. C. 510, 67 L.R.A. 227, 95 Am. St. Rep. 641, 43 S. E. 34, second appeal 135 N. C. 682, 67 L.R.A. 230, 47 S. E. 765.

A contract for the exchange of transportation for advertising, under which the publisher was required to pay four times as much for the transportation used by him as the public generally was called upon to pay, was condemned in Hicks Printing Co. v. Wisconsin C. R. Co. 138 Wis. 584, 120 N.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois to review a decree enjoining a carrier from issuing interstate transportation in exchange for advertising. Affirmed.

See same case below, 163 Fed. 114.

The facts are stated in the opinion.

Messrs. **E. C. Field** and **H. R. Kurrie** submitted the cause for appellant:

The statute indicating what shall be stated in the tariffs, that alone need be; and when it is required that the rate and character of the service to be given shall be stated, it does not follow that either the time when, or the manner in which, payment shall be made, need be given.

Southern P. Co. v. Interstate Commerce Commission, 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. Rep. 330; Little Rock & M. R. Co. v. St. Louis Southwestern R. Co. 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 777.

The interpretation of the original act during a term of nineteen years is of great weight in the decision of the question of whether, before 1906, charges were required by law to be paid in cash.

United States v. Alabama G. S. R. Co. 142 U. S. 615, 619, 35 L. ed. 1134, 1136, 12 Sup. Ct. Rep. 306; United States v. Union P. R. Co. 148 U. S. 562, 37 L. ed. 560, 13 Sup. Ct. Rep. 724; United States v. Hill, 120 U. S. 169, 30 L. ed. 627, 7 Sup. Ct. Rep. 510.

When we consider the meaning of the word "different," and those with which it is associated, the legislative intent is made manifest.

James River & K. Co. v. Turner, 9 Leigh, 340; Long v. Harrisburg & P. R. Co. 126 Pa. 143, 19 Atl. 39; Winona & St. P. R. Co. v. Denman, 10 Minn. 280, Gil. 208; Bouvier's Law Dict. "Compensation: In Spanish Law: In Chancery Practice: In Civil Law;" Webster's Dict. "Compensate."

It is generally held to be the law that a consignee may set off against a claim for freight charges any damage to his shipment against which the charges are assessed; and if the claim is equal to, or greater than, the freight charges, delivery may be required without the payment of any part of the charges.

Marsh v. Union P. R. Co. 3 McCrary, 236, 9 Fed. 873; Miami Powder Co. v. Port Royal & W. C. R. Co. 47 S. C. 324, 58 Am. St. Rep. 880, 25 S. E. 153; Gleadell v. Thomson, 56 N. Y. 194; Bearse v. Ropes, 1 Sprague, 331, Fed. Cas. No. 1,192; Snow v. Carruth, 1 Sprague, 324, Fed. Cas. No. 13,144; Bancroft v. Peters, 4 Mich. 619; Relyea v. New Haven Rolling Mill Co. 42 Conn. 579; Boggs v. Martin, 13 B. Mon. 239; Page v. Munro, Holmes, 232, Fed. Cas. No. 10,665; Jones v. Hoyt, 25 Conn. 374; Aldrich v. 246$\frac{5}{20}$ Tons of Egg Coal, 117 Fed. 757; The Success, 7 Blatchf. 551, Fed. Cas. No. 13,586; Woodward v. Illinois C. R. Co. 1 Biss. 403, Fed. Cas. No. 18,006; Elliott, Railroads, 2d ed. 1558; Missouri P. R. Co. v. Peru-Van Zandt Implement Co. 73 Kan. 295, 6 L.R.A.(N.S.) 1058, 117 Am. St. Rep. 468, 85 Pac. 408, 87 Pac. 80, 9 A. & E. Ann. Cas. 790.

It cannot be that, in litigation, a rule of law will be applied compelling the carrier to accept satisfaction of a claim for damages in payment of charges, while before litigation, the parties are denied the capacity by contract to accomplish the same end.

Furthermore, it is held by the court of appeals of this circuit in the case of United States v. Chicago & N. W. R. Co. 62 C. C. A. 465, 127 Fed. 785, that the law before amendment did not require cash payment.

Transportation may be paid for in money or "other valuable considerations."

Curry v. Kansas & C. P. R. Co. 58 Kan. 6, 48 Pac. 579.

Transportation may lawfully be paid for "in services."

Dempsey v. New York C. & H. R. R. Co. 146 N. Y. 290, 40 N. E. 867.

Chicago & A. R. Co. v. United States, 26 L.R.A.(N.S.) 551, 84 C. C. A. 324, 156 Fed. 558, involved the precise question here presented.

The commerce law does not take away the right to make a contract, because such a contract might be used as a device to give a preference. It only takes away the right to make contracts which are intended to, and do, give a preference.

Interstate Commerce Commission v. Chesapeake & O. R. Co. 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272.

The court will look to the evils existing and the remedies needed, to ascertain the legislative intent.

Church of the Holy Trinity v. United

W. 512, under a statute making it unlawful for a railway company to charge, demand, collect, or receive a greater or less compensation for the transportation of passengers than that specified in its published tariffs. The court, however, seemed to be of the opinion that as there was no positive prohibition against the exchange of transportation for advertising, a contract to that effect might be made if the transportation was of equal value to the advertising furnished. And this view is not necessarily inconsistent with that adopted in the principal case, and in State v. Union P. R. Co. supra, since the Wisconsin statute neither contains the word "different," nor the phrase which the Nebraska court regarded as equivalent.

States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511.

It is absolutely no answer to say that these contracts may be used as devices. When they are used as mere devices, the court will assess the penalty prescribed by the act.

Dempsey v. New York C. & H. R. R. Co. and Chicago & A. R. Co. v. United States, supra.

The intent by legislation to deny capacity to make a fair contract must be not only within the power, but clearly within the terms of the enactment.

Endlich, Interpretation of Statutes, §§ 340, 341; Shaw v. Pennsylvania R. Co. (Shaw v. Merchants' Nat. Bank) 101 U. S. 557, 25 L. ed. 892; Douglass v. Lewis, 131 U. S. 75, 33 L. ed. 53, 9 Sup. Ct. Rep. 634; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896.

Silence is exclusion.

Bates v. Brown, 5 Wall. 717, 18 L. ed. 539.

The insertion of the word "different" does not change the legal effect of § 6.

Endlich, Interpretation of Statutes, § 378; McDonald v. Hovey, 110 U. S. 619, 28 L. ed. 269, 4 Sup. Ct. Rep. 142.

Absurd consequences would follow from a decision that cash alone may be received. In that event, neither checks, drafts, nor other evidences of credit, could be received.

Wells v. Morrison, 91 Ind. 51; Harrison v. Wright, 100 Ind. 519, 50 Am. Rep. 805; United States Health & Acci. Ins. Co. v. Clark, 41 Ind. App. 345, 83 N. E. 760.

Attorney General **Wickersham** and Mr. **Barton Corneau** submitted the cause for appellee:

Every word in a statute is to be given its proper significance.

Washington Market Co. v. Hoffman, 101 U. S. 112, 115, 25 L. ed. 782, 783.

When two words or expressions are coupled together, one of which generically includes the other, it is obvious that the more general term is used in a meaning excluding the specific one.

Endlich, Interpretation of Statutes, § 396.

The rule that when statutes are revised, an intent to change their meaning cannot be presumed, has no application, even in the case of a revision, when a word is inserted in a statute which would become superfluous if the rule were applied.

United States v. Bowen, 100 U. S. 508, 25 L. ed. 631.

A similar phrase in a state statute much less explicit in its language than is § 6 of the interstate commerce law forbids the acceptance of compensation different in kind.

State v. Union P. R. Co. 87 Neb. 29, 31 L.R.A.(N.S.) 657, 126 N. W. 859.

This court should not depart from a literal interpretation of that section.

Union P. R. Co. v. Goodridge, 149 U. S. 680, 690, 37 L. ed. 896, 902, 13 Sup. Ct. Rep. 970; United States v. Atchison, T. & S. F. R. Co. 163 Fed. 113; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272.

The reasonableness or unreasonableness of the departure from the tariff rate cannot be the test of the violation of § 6.

Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; American Exp. Co. v. United States, 212 U. S. 522, 53 L. ed. 635, 29 Sup. Ct. Rep. 315.

Mr. Justice **Harlan** delivered the opinion of the court:

By the act of Congress of February 19th, 1903, further regulating commerce with foreign nations and among the states, as amended by the act of June 29th, 1906, it was provided that whenever the Interstate Commerce Commission had reasonable ground to believe that a common carrier was engaged in carrying passengers or freight between *given points at less than the [491 published rates on file, or was committing any discrimination forbidden by law, the facts could be set forth in a petition in equity to the proper circuit court of the United States, whose duty it was made summarily to inquire into the circumstances, without formal pleadings and proceedings applicable to ordinary suits in equity. If the court became satisfied upon investigation that the facts existed as alleged, it was then by proper orders to enforce the observance of the published tariffs, or direct a discontinuance of the alleged discrimination, with such right of appeal as was then provided by law to the parties interested in the traffic or to the carrier. 32 Stat. at L. 847, 848, chap. 708, U. S. Comp. Stat. Supp. 1909, p. 1138; 34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1149.

The present suit was brought by the United States under that statute against the Chicago, Indianapolis, & Louisville Railway Company, a corporation of Indiana which operated the lines of railroad known as the Monon Route, and extending from Chicago through Indiana to Cincinnati, and from Michigan City, Indiana, to Louisville, Kentucky. The railway company was engaged in the business of carrying passengers over the above lines.

The petition alleged that on the 24th day of January, 1907, the defendant made

a written contract with the Frank A. Munsey Company, publisher, at New York, of Munsey's Magazine, which contained, among other provisions, the following:

"Agreement between the Monon Route (Chicago, Indianapolis, & Louisville Railway Company) and..... Frank A Munsey Company.....publisher. Entered into this.....24 day of January, 1907.

"Whereas, the said publisher issues.... Munsey's Magazine..... a .....publication, published at New York City, New York, Chicago office 423 Marquette Building, and which has a regular circulation of.....643,000.....each issue.

492] *"And whereas, the said Monon Route desires to advertise in said publication, which advertising the said publisher agrees to do upon the following terms and conditions, which are mutually agreed upon:

"1st. The said publisher agrees to publish in said publication an advertisement of the Monon Route as follows:.....One page 'ad' (divided as desired) ..... said advertisement to appear.....Favorably.....and occupy a space of not less than.....one page.....and to be published as desired issues of said publication.

"2d. In full consideration of the foregoing advertising, the Monon Route agrees to issue the following nontransferable transportation based on regular published rate:

.....Trip tickets or mileage..... To the value of.....Five hundred..... Dollars ($500....) for the personal use of the publisher, his employees or immediate members of his or their families, which said transportation shall be limited for use not later than December 31, 1907.

"3d. Under no circumstances must the transportation issued under this contract be sold or transferred to or used by any other than the person to whom issued, as such sale, transfer, or use would be a misdemeanor under the law.

"4th. It is understood and agreed that the transportation issued under this contract shall be read to points on the Monon Route, and not to points on any other road. . . . Further, should said publisher or any person named on said tickets allow any other person to use same, or offer to sell, sell or transfer the same, then said publisher agrees to pay the said Monon Route as a penalty the full rate of fare 493]which would have been paid *for regular tickets. . . . This contract expires December 31, 1907, unless otherwise stipulated."

The petition also alleged that after that contract was entered into, and previous to April 3d, 1907, the defendant railway company, pursuant to the above contract, transported over its railway from points in one state to points in other states, the employees of the Munsey Company upon trip and mileage tickets issued for their benefit.

That such interstate transportation, paid for according to the company's published rates, amounted to $145.10, while the only compensation received by it for transportation previous to May 10th, 1907, was the publication in the March issue of the Munsey Magazine of one fourth of a page advertisement of the Monon Route, which the parties valued at $125;

That while the railroad company was thus transporting the Munsey employees, it contemporaneously transported over its lines between the same points other persons, and exacted and received in money from them, in each instance, the full amount of its published rates and fares, the conditions and circumstances of the transportation being the same in the cases of employees and others;

That in accordance with the contract in question the railway company was, at the date of this suit, still furnishing interstate transportation to the publisher of Munsey's Magazine and the members of his family, and to his employees and the members of their families;

That the railway company had entered into like contracts with other publishers of magazines, newspapers, and similar periodicals to the number of 251, under the terms of which latter contracts the company, at the date this suit was commenced, was furnishing interstate transportation over its lines to such persons as were from time to time designated by the publishers last above mentioned, but not receiving compensation in money in any instance when furnishing transportation *under those con-[494 tracts for the services rendered by it; and

That the above contracts between the railway company and the publishers of magazines and newspapers are in violation of the act of Congress regulating commerce, particularly §§ 2 and 6, and also § 3 of the above act, approved February 19th, 1903, in this: that those contracts require the furnishing of interstate transportation at rates which, in each instance, "are less than and different" from the rates contemporaneously exacted from the general public under substantially similar circumstances and conditions.

The company, in its answer, averred that the money value of the space purchased from the Munsey Company under the contract was $500, as determined and fixed by the rate to the public, and that it was to pay therefor $500 in value of passenger transportation issued and based on

regularly published rates, so that the money value of the advertising space purchased and the money value of the transportation furnished was the same; and that its arrangements for advertising space with other publications were based on the "regular published rate." The answer contains this paragraph: "Defendant admits that it has entered into a large number of other contracts for advertising space by written contracts providing substantially the same as the contract with the Munsey Company, as aforesaid, and that in each case, pursuant to the terms and conditions of each of said contracts, the publishers named in said contracts and in each of them sell to this defendant advertising space in the par money value at the usual market rate therefor, and that this defendant issues and pays therefor in transportation 'based on the regular published rates' in money value equal to the money value of said advertising space."

The answer further avers that all the company's corporate powers as a common carrier 495]are derived from an *Indiana statute which prohibits the railway company from giving free tickets, free passes, or free transportation, but which, in express words, authorizes the company to issue transportation in payment *for printing and advertising*. It denied that the purchase of advertising space by a common carrier constituted any part of interstate commerce, or that Congress has any constitutional power to prohibit it from doing so.

It was admitted at the hearing "that said defendant had, subsequent to the filing of said petition, executed contracts similar in terms to the ones set forth in said petition, expiring December 31, 1908, for the exchange of interstate transportation for advertising, under the same conditions as those set forth in the contracts described in said petition, and that said case should be heard and determined precisely as if it were alleged in the pleading that said defendant had made said contracts expiring December 31, 1908."

The circuit court heard the case upon the pleadings and proofs, and adjudged that the acts of the railway company, as alleged in the petition, were sustained by the evidence (as they undoubtedly were), and were in violation of the commerce act of February 4th, 1887 [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154], of the act further to regulate commerce approved February 19th, 1903, and of the acts amendatory thereof.

It was further adjudged, in accordance with the petition of the government, "that the defendant, its officers and agents, and any and all persons whomsoever, acting on its behalf, be, and they are hereby, enjoined from further executing each and every one of said contracts now pending for the exchange of transportation for advertising space; and that they be, and they are hereby, enjoined from issuing transportation in exchange for advertising space pursuant to the terms of contracts providing that said transportation shall be paid for by the furnishing of advertising space in newspapers or periodicals, *that[496 they be, and they are hereby, enjoined from accepting advertisements in lieu of money in payment for interstate transportation, pursuant to agreements or contracts providing that said advertising space shall be paid for by issuing transportation; and that they be, and they are hereby, enjoined from committing any of the acts with reference to the exchange of interstate transportation for advertising space, as charged in said petition."

1. The decisive question in this case is whether the contract between the railway company and the Munsey Company is repugnant to the acts of Congress regulating commerce. In other words, could the company, in return for the transportation which it agreed to furnish and did furnish to the Munsey publisher over its interstate lines, and to his employees and to the immediate members of his and their families, accept as compensation for such service anything else than money, the amount to be determined by its published schedule of rates and charges? Upon the authority of Louisville & N. R. Co. v. Mottley (just decided) 219 U. S. 467, ante, 297, 31 Sup. Ct. Rep. 265, and according to the principles announced in the opinion in that case, the answer to the above question must be in the negative. The acceptance by the railway company of advertising, not of money, in payment of the interstate transportation furnished to the publisher of the Munsey magazine, his employees and the immediate members of his and their families, was, for the reasons given in the Mottley Case, in violation of the commerce act. The facts in the present case show how easily, under any other rule, the act can be evaded and the object of Congress entirely defeated. The legislative department intended that all who obtained transportation on interstate lines should be treated alike in the matter of rates, and that all who availed themselves of the services of the railway company (with certain specified exceptions) should be on a plane of equality. Those ends cannot be met otherwise than by requiring transportation to be *paid for in money,[497 which has a certain value, known to all, and

not in commodities or services, or otherwise than in money.

2. We need say but little about the Indiana statute upon which the defense is in part based. The transactions in respect of which the government seeks relief, being interstate in their character, the acts of Congress as to such transactions are paramount. No state enactment can be of any avail when the subject of such transactions has been covered by an act of Congress, acting within the limits of its constitutional powers. It has long been settled that when an "act of the legislature of a state prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the state law must give way, and this without regard to the source of power whence the state legislature derived its enactment." Sinnot v. Davenport, 22 How. 227, 243, 16 L. ed. 243, 247; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 626, 42 L. ed. 878, 882, 18 Sup. Ct. Rep. 488; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506. This results, Chief Justice Marshall said in Gibbons v. Ogden, 9 Wheat, 1, 6 L. ed. 23, as well from the nature of the government as from the words of the Constitution.

Judgment affirmed.

498]*SOUTHERN PACIFIC TERMINAL COMPANY, Southern Pacific Company, and Galveston, Harrisburg, & San Antonio Railway Company, Appts.,

v.

INTERSTATE COMMERCE COMMISSION and E. H. Young. (No. 459.)

E. H. YOUNG, Appt.,

v.

INTERSTATE COMMERCE COMMISSION et al. (No. 460.)

(See S. C. Reporter's ed. 498–527.)

Appeal — moot case.

1. An appeal from a decree dismissing a suit to enjoin the enforcement of an order of the Interstate Commerce Commission requiring a carrier to desist from granting a shipper an alleged undue preference over his competitors will not be dismissed as presenting merely a moot case because the time during which such order was by its express terms to continue in force has expired.

[For other cases, see Appeal and Error, VII. i, 3, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — jurisdiction — terminal company as carrier — undue preference.

2. A corporation created to carry on, conformably to a municipal ordinance and a confirmatory statute intended to secure public shipping facilities, a wharfage business at a seaport, and to furnish terminal facilities for a railway and steamship system of which it forms a part and by which it is controlled through a holding company, is a common carrier, and as such is subject to the jurisdiction of the Interstate Commerce Commission acting in the exercise of its authority, under the act to regulate commerce, to prohibit undue preferences.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Carriers — undue preferences — lease of pier.

3. A lease to a shipper of one of the piers and improvements thereon, belonging to a terminal company, which relieves him from the payment of all wharfage and storage charges other than as the same may be included in the yearly rental, and has enabled him to acquire practically a monopoly of the export of cotton-seed products, constitutes an unlawful or undue preference under the act to regulate commerce, where other shippers are not and cannot be afforded the same facilities on the same conditions.

[For other cases, see Carriers, III. e, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — jurisdiction — undue preference to exporter.

4. An order of the Interstate Commerce Commission forbidding a carrier to give an undue preference in the use of its wharves at a seaport to an exporter of cotton-seed products is not a regulation of purely intrastate or purely foreign commerce, which would be beyond the power of the Commission, where the cotton-seed products purchased by him, whether at points within or without the state, are all destined for export, and the concentration and manufacture of cotton-seed cake into meal on the wharves are but incidents in the transhipment of the products in export trade.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

[Nos. 459, 460.]

Argued December 9, 1910. Decided February 20, 1911.

APPEALS from the Circuit Court of the United States for the Southern District of Texas to review a decree dismissing both bill and cross bill in a suit to enjoin the enforcement of an order of the Interstate Commerce Commission requiring carriers to desist from giving an undue preference to a shipper. Affirmed.

Note.—As to what constitutes an unlawful preference or discrimination by a carrier under interstate regulations—see note to Gamble-Robinson Commission Co. v. Chicago & N. W. R. Co. 94 C. C. A. 230.

Statement by Mr. Justice McKenna:

This is a bill in equity to enjoin an order of the Interstate Commerce Commission requiring appellants to cease and desist, on or before the 1st day of September, 1908 (subsequently postponed to November 15, 1908), and for a period of not less than two years thereafter, from granting and giving undue preferences and advantages to one E. H. Young, a shipper of cotton seed products at the port of Galveston, Texas, through failure to exact from him payment of wharfage charges for handling cotton seed cake and meal over the wharves, docks, and piers of appellants, while at the same time exacting such charges from other shippers of cotton-seed cake and meal, and from giving and allowing him or any other person whomsoever, for his exclusive use, space on the wharves of appellants at Galveston for use in the storage and handling of cotton-seed cake and meal, while contemporaneously refusing and denying similar privileges to other shippers under substantially similar circumstances and conditions.

Young was not a formal party before the Interstate Commerce Commission. However, he was made a respondent in this suit, and filed an answer and cross bill. The Commission demurred to both bill and cross bill, and, the demurrer being overruled, answered.

On final hearing the case was submitted upon an agreed statement of facts, and both bills were dismissed.

500] *The most important facts we set out below and in the opinion. We refer to the report of the Interstate Commerce Commission for further details.

The Republic of Texas conveyed to one Menard the property upon which the wharves of the terminal company are situated. Menard conveyed the property to the president and directors of the Galveston City Company, who conveyed it to Collis P. Huntington, for the sum of $200,000; and it is recited in the deed to him that it "is made upon the further Express Covenant and condition as follows: . . . when through and by means of such acts of Congress, act of the legislature, and ordinance and conveyance from the city of Galveston, if any, as may be required for the purpose, . . . the right has been secured to the said Collis P. Huntington, or his heirs or assigns, to construct piers, as he or they may from time to time determine, . . . then and in that event the said Collis P. Huntington, his heirs or assigns, will within six months thereof commence the construction of terminal facilities upon the property, . . . for the use of what are commonly called the Southern Pacific Railroad & Steamship Systems."

The city of Galveston, on the 4th of February, 1899, passed an ordinance which recited the conditions of Huntington's purchase to be as above stated, and that it was greatly to the interest of the city that the work contemplated by him should be performed, and that for the proper utility of the property no streets should be opened through or across it, and it was ordained that streets, avenues, or alleys, if any, theretofore opened, laid out, or in any manner designated upon the property be perpetually abandoned, discontinued, and closed. And Huntington, his heirs and assigns, were granted the right perpetually to construct and maintain piers as he or they might from time to time determine, "and to maintain upon the property terminal facilities for the use of what are commonly *called the [501 Southern Pacific Railroad & Steamship Systems, their successors or assigns." It was provided that if Huntington should "charge wharfage for the use of such piers and other facilities upon said property, except so far as wharf service" might be covered by the freight rate, all such wharfage should be subject to the regulation of the railroad commission of Texas. And it was recited that it was greatly for the public interest that the property "should be developed for shipping and transportation purposes, and that the shipping facilities of the port of Galveston should be thereby improved and enlarged in order to better accommodate the commerce of the port and State. . . ."

The ordinance was ratified by an act of the legislature approved May 1, 1899. The act set out the ordinance in full, and relinquished to Huntington the title and claim of the state to the property upon the conditions expressed in the ordinance, and, in addition to subjecting the wharfage charges to regulation by the railroad commission, required an annual report to that body. And it was provided "that the system of railroad tracks" which might be constructed by Huntington on the property should connect with the track of any railroad company which might be built to the property, at a place designated; and, further, that there should be no consolidation of the property, or the stock or franchise of any corporation which might own or control the same, with the Galveston Wharf Company, or any other wharf company, by which the "wharf or other terminal charges should be fixed," and that "no charter formed for the use, operation, and management of the property" should be granted without containing the section providing as above.

Huntington performed the conditions ex-

pressed in the conveyance and in the ordinance and the act of the legislature.

The Southern Pacific Terminal Company 502]is a Texas *corporation, organized in 1901, to construct and maintain wharves and docks for the accommodation of all kinds of vessels, "and to avail of, use, and enjoy the properties, rights, privileges, and franchises granted and described and referred to in the act of the legislature of the state of Texas of May 1, 1899, ratifying the ordinance of the city of Galveston, and to construct and maintain upon the property terminal facilities for the use of what are commonly called the Southern Pacific Railroad & Steamship Systems."

At the time of the incorporation of the terminal company the following were commonly referred to as the Southern Pacific Railroad & Steamship Systems: The line of steamships owned by the Southern Pacific Company, running from New York to Galveston and New Orleans, and also running from and between the latter city and Havana; Morgan's Louisiana & Texas Railroad and Steamship Company; the Louisiana Western Railroad, which leads from New Orleans to the Sabine river; the Texas & New Orleans Railroad, leading from that river to the city of Houston; the Galveston, Harrisburg & San Antonio Railway; and the railroads in which the Southern Pacific Company owns stock, extending from the connection of the latter in El Paso, at the Rio Grande River, to San Francisco. Each of the railways was incorporated as a separate and distinct railway, and has its own officers and board of directors, but the Southern Pacific Company owns 99 per cent of their stock, and the same per cent of the stock of the terminal company. The two latter companies have the same president, and the Galveston, Harrisburg, & San Antonio Railway Company and the terminal company have the same general manager.

Import and export traffic passing through Galveston passes over the wharves of the terminal company, and the only track facilities for such traffic are those owned by the 503]*terminal company on its own lands. And the Galveston, Harrisburg, & San Antonio railway is the only railway having physical connection with the tracks of the terminal company, and it does all of the switching to and from the tracks of the terminal company, charging $1.75 per car. The latter company receives a trackage charge of 50 cents per car.

The terminal company owns no cars or locomotives, and issues no bills of lading. It owns no stock in any of the railroads or corporations in which the Southern Pacific owns stock. It carries on a wharfage business and publishes a schedule of charges for such business, which, however, is not filed with the Interstate Commerce Commission, its charge being 20 cents per ton on cotton-seed meal and cake passing over its docks, and is shown as wharfage charge in the tariffs of the Galveston, Harrisburg, & San Antonio Railway Company and all other railways entering Galveston. Such tariffs do not show that any exception is made as to the docks occupied by E. H. Young, as hereinafter shown, but as a fact the wharfage charge is not imposed by the terminal company on the cotton-seed meal and cake handled over the dock of E. H. Young, other than as the same may be included in the general lease or contract price fixed as hereinafter indicated.

The terminal company was a party to numerous circulars issued by the Southern Pacific Companies, known as the "Sunset Route," so termed, principally for advertising purposes. The circular of May 24, 1907, shows terminal charges (other than storage and switching). At the port of Galveston the circulars show a charge of one cent per 100 pounds on cotton-seed cake and meal.

The terminal company has on its property two piers, known as pier A and pier B, and has erected on them all facilities for handling imported and exported freight, and all freight which may come to or pass over its *wharves, and it has abundant land[504 under water upon which to erect other piers if they should become necessary.

It charges a fixed wharfage for all freight passing over its piers to or from vessels berthed thereat. The Galveston Wharf Company affords similar public wharfage facilities at the port of Galveston, having a number of piers. If the facilities of the Galveston Wharf Company should be destroyed, those of the terminal company would become inadequate for handling the import and export and coastwise business. Ships to and from foreign ports, and coastwise ships other than those of the Southern Pacific Company, berth at piers A and B, and there receive and deliver freight, and at these piers the terminal company carries on its general wharfage business.

In the building of pier B it was necessary to dredge a slip west of it, where ships could berth, and in order that the soil, through the action of storm and wave, should not drift into the slip, a bulkhead was built. To the westward of the slip the lands of the terminal company were lying idle and useless, they not being needed by it; and in pursuance of negotiations with Young the company proceeded to construct a pier, known as pier C, for the use of Young, and

to erect thereon a warehouse, shed, and platform for his use, the original construction and subsequent enlargement of which cost the company about $65,000. At this time the pier is 300 feet wide at its widest part, and about 1,400 feet in length.

The negotiations terminated in a lease under which Young is to pay the terminal company a yearly rental of $15,000, payable monthly from the 1st day of November, 1906. And he agrees that he will route all shipments of cotton seed and cotton-seed products purchased or shipped by him "over the lines of said terminal company and its connections, according to the instructions of said terminal company from time to time," and that he will insist upon and enforce such routing, except where the 505]*enforcement will prevent him from purchasing such products or from obtaining shipments which will be ready to move immediately and for which cars cannot be procured for the routing required. It is provided, however, that Young shall not be bound by these provisions if the rates be not equal to or lower than those of other competing lines, or the service be not as adequate, but notice is to be given of such lower rates and service, and an option to meet them.

The business of Young is that of a merchant and manufacturer, engaged in buying, selling, and converting cotton-seed cake and meal for his own account. He took possession of pier C and the improvements erected thereon by the terminal company under his contract with the latter company, paying the price stipulated in the contract, and has placed thereon cake, sacking and grinding machines, representing an investment of $50,000. Young's business consists in buying cotton-seed cake in the interior, shipping it to himself by carloads at pier C, there grinding it into meal, sacking it, and loading it into steamships berthed at pier C for export.

All cotton-seed-meal cake passing over piers A and B pays a wharfage of 20 cents per short ton. Young pays no wharfage or storage charge other than as the same may be included in the rental of $15,000 per year. If any exporter handles cotton-seed meal or cake over pier C, the wharfage of 20 cents per ton is paid by him to Young.

Young has certain advantages by reason of his contract with the terminal company, which are enumerated in the agreed statement of facts, and the result of which is stated as follows: "He makes a sum equal to 30 or 40 cents per ton more than he would receive if he handled his export product under methods in existence before he established his plant on pier C and adopted the method of business he follows. This 30 to 40 cents per ton is in addition to the ordinary buying and selling profit." He *at times pays more for cotton-seed[506 cake than his competitors can afford to pay, and at times he can undersell them in European markets; and since he commenced business some of the exporters who were engaged in business when he commenced have ceased exporting. A comparison of his business with that of all other exporters of cotton-seed cake shows that from September 1, 1906, to September 1, 1907, he exported 105,000 tons of cotton-seed cake and about the same amount of cotton seed-meal; they, 50,000 tons of both products.

"Some of the cotton-seed-cake producers at interior mills in the state complain that Young is able to dominate the Texas market, and that his method of conducting business at Galveston enables him to command the foreign trade, and may become a detriment to the cotton-seed-cake-and-meal industry, in that Young might acquire a monopoly. Others entertain a contrary opinion. They all agree that if there was a general establishment of plants in Galveston, so that a monopoly could not be acquired, it would be of great benefit to the cotton-seed industry.

* * * * * *

"On the present constructed docks of the Galveston Wharf Company and the terminal company, with the structures as now located thereon, there is not space enough to furnish all exporters doing business at Galveston with space for erecting machinery and handling export business in the same manner as is done by Young."

This proceeding was instituted September 11, 1907, by Carl Eichenberg, an exporter of cotton seed and its products from the port of Galveston, by filing his complaint or petition before the Interstate Commerce Commission against the Southern Pacific Company and the terminal company, complaining that the companies, by the arrangement with Young, were violating § 3 of the act to regulate commerce, by giving him an undue and unreasonable *preference and[507 advantage over his competitors.

By order of the Commission the Galveston, Harrisburg & San Antonio Railway Company and other railroad companies entering Galveston were made parties defendant.

Answers were filed and full hearing was had by the Commission, which on June 24, 1908, made its report and order.

No rehearing was asked by defendant before the Interstate Commerce Commission. Young was not made a party to the proceedings before the Commission, but he appeared and testified as a witness for the terminal company, and his counsel was

present at the hearing when the testimony was taken, and engaged in the examination of witnesses. Young was also present when the case was argued and submitted.

Messrs. **Maxwell Evarts** and **F. C. Dillard** argued the cause, and, with Mr. H. M. Garwood, filed a brief for appellants:

The construction of a wharf on property abutting upon navigable water does not *per se* affect the wharf constructed with a public use.

Louisville & N. R. Co. v. West Coast Naval Stores Co. 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. Rep. 745.

The right to erect a landing on a navigable stream has its foundation in the ownership of the land; and when erected by an individual or corporation at its own expense, it is private property.

Leverich v. Mobile, 110 Fed. 170; Compton v. Hankins, 90 Ala. 414, 9 L.R.A. 387, 24 Am. St. Rep. 823, 8 So. 75; O'Neill v. Annett, 27 N. J. L. 290, 72 Am. Dec. 364; Woodruff v. Havemeyer, 106 N. Y. 129, 12 N. E. 628; Weems S. B. Co. v. People's S. B. Co. 214 U. S. 345, 53 L. ed. 1024, 29 Sup. Ct. Rep. 661, 16 A. & E. Ann. Cas. 1222.

If the terminal company were a common carrier, and if the jurisdiction of the Interstate Commerce Commission were unquestioned, it, nevertheless, has the right to sell or convey unused portions of its property which it owns in fee simple.

Calcasieu Lumber Co. v. Harris, 77 Tex. 18, 13 S. W. 453; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 682, 28 L. ed. 291, 297, 4 Sup. Ct. Rep. 185; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; United States ex rel. Northwestern Warehouse Co. v. Oregon R. & Nav. Co. 159 Fed. 975.

The ownership of the stock of the Galveston, Harrisburg, & San Antonio Railway Company and the Terminal Company does not in any manner whatsoever effect an amalgamation of these companies in any legal sense.

Pullman's Palace Car Co. v. Missouri P. R. Co. 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. Rep. 194; Peterson v. Chicago, R. I. & P. R. Co. 205 U. S. 364, 51 L. ed. 841, 27 Sup. Ct. Rep. 513; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; White v. Pecos Land & Water Co. 18 Tex. Civ. App. 634, 45 S. W. 207; Exchange Bank v. Macon Constr. Co. (McTighe v. Macon Constr. Co.) 97 Ga. 1, 33 L.R.A. 800, 25 S. E. 326; Atchison, T. & S. F. R. Co. v. Cochran, 43 Kan. 225, 7 L.R.A. 414, 19 Am. St. Rep. 129, 23 Pac. 151.

A wharf company is not subject to the jurisdiction of the Interstate Commerce Commission.

Cattle Raisers' Asso. v. Ft. Worth & D. C. R. Co. 7 Inters. Com. Rep. 513; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567; Cotting v. Kansas City Stock-Yards Co. 82 Fed. 839.

The lease contract held to be unlawful does not, under the facts proven, constitute an unlawful or undue preference under the interstate commerce act.

Butchers' & D. Stock-Yards Co. v. Louisville & N. R. Co. 14 C. C. A. 290, 31 U. S. App. 252, 67 Fed. 35; Ilwaco R. & Nav. Co. v. Oregon Short Line & U. N. R. Co. 5 Inters. Com. Rep. 627, 6 C. C. A. 495, 15 U. S. App. 173, 57 Fed. 673.

As to the far greater part of this business, the same originating in Texas, and which is shipped from a point wholly within the state of Texas to another point wholly within the state of Texas, it is intrastate business, and cannot be subject to the jurisdiction of the Interstate Commerce Commission.

Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Texas & N. O. R. Co. v. Sabine Tram Co. — Tex. Civ. App. —, 121 S. W. 256; Augusta Brokerage Co. v. Central R. Co. 5 Ga. App. 187, 62 S .E. 996.

The intention of Young ultimately to sell in Europe does not make the traffic foreign. When the transit begins at the intrastate point, and when it ends at Galveston, it has not even been sold in Europe. Young, as any other manufacturer or owner, buys his stock in the interior of Texas, warehouses it at his depot on the leased premises, and there manufactures it, changing its form. Up to this time, therefore, it is certainly state commerce, over which the Interstate Commerce Commission has no jurisdiction. It is then delivered by Young from his warehouse into ships-hold for transport direct to Europe. Certainly, over this part of the transit, the Interstate Commerce Commission has no jurisdiction.

Cosmopolitan Shipping Co. v. Hamburg-American Packet Co. 13 Inters. Com. Rep. 266.

Mr. Maxwell Evarts also filed a separate brief for appellants:

The expiration of the order of the Commission before the argument of this case does not require the dismissal of this case upon the ground that it has become a moot question.

Kindel v. LeBert, 23 Colo. 385, 58 Am. St. Rep. 234, 48 Pac. 641; Re Cuddeback, 3 App. Div. 108, 39 N. Y. Supp. 388; People ex rel. Borgia v. Doe, 109 App. Div. 671, 96 N. Y. Supp. 389; Re Madden, 148 N. Y. 139, 42 N. E. 534; Re Fairchild, 151 N Y. 361, 45 N. E. 943; Boise City Irrig. & Land Co. v. Clark County, 65 C. C. A. 399, 131 Fed. 415; Flour Inspectors v. Glover, 161 U. S. 101, 40 L. ed. 632, 16 Sup. Ct. Rep. 492; Click v. Sample, 73 Ark. 194, 83 S. W. 932; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

Messrs. **Wade H. Ellis** and **Luther M. Walter** argued the cause and filed a brief for appellees:

These appeals should be dismissed because the Commission's order has expired.

Mills v. Green, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; Pennsylvania v. Wheeling & B. Bridge Co. 18 How. 421, 15 L. ed. 435; San Mateo County v. Southern P. R. Co. 116 U. S. 138, 29 L. ed. 589, 6 Sup. Ct. Rep. 317; Little v. Bowers, 134 U. S. 547, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620; California v. San Pablo & T. R. Co. 149 U. S. 308, 37 L. ed. 747, 13 Sup. Ct. Rep. 876; Flour Inspectors v. Glover, 160 U. S. 170, 40 L. ed. 382, 16 Sup. Ct. Rep. 321; Dinsmore v. Southern Exp. Co. 183 U. S. 115, 46 L. ed. 111, 22 Sup. Ct. Rep. 45.

The Southern Pacific Terminal Company's business was affected with a public interest.

Barrington v. Commercial Dock Co. 15 Wash. 175, 33 L.R.A. 116, 45 Pac. 748; Indian River S. B. Co. v. East Coast Transp. Co. 28 Fla. 387, 29 Am. St. Rep. 258, 10 So. 480.

The terminal company was and is holding itself out to the public as furnishing general terminal facilities in connection with certain railroads, and as such is subject to governmental supervision.

Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 619, 53 L. ed. 352, 359, 29 Sup. Ct. Rep. 214; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 418, 53 L. ed. 836, 853, 29 Sup. Ct. Rep. 521.

Nor does the fact that the terminal company confines its operations to one state affect the question. It is an agency in interstate commerce.

The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; People ex rel. Connecting Terminal R. Co. v. Miller, 178 N. Y. 196, 70 N. E. 472.

It is apparent that the various railroads and steamship lines and the terminal company making up the constituent parts of the Southern Pacific system are practically one consolidated corporation, of which the terminal company is the terminal for the delivery and transfer of freight in Galveston.

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436.

The order of the Commission is a regulation of interstate commerce.

Chicago & N. W. R. Co. v. Fuller, 17 Wall. 560, 568, 21 L. ed. 710, 714; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 204, 29 L. ed. 158, 162, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; St. Louis Southwestern R. Co. v. Arkansas, 217 U. S. 136, 54 L. ed. 698, 29 L.R.A.(N.S.) 802, 30 Sup. Ct. Rep. 476; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; United States v. Colorado & N. W. R. Co. 15 L.R.A.(N.S.) 167, 85 C. C. A. 27, 157 Fed. 330, 13 A. & E. Ann. Cas. 893; Houston Direct Nav. Co. v. Insurance Co. of N. A. 89 Tex. 1, 30 L.R.A. 713, 59 Am. St. Rep. 17, 32 S. W. 889.

The contract with Young constitutes an undue preference.

Hurley v. Big Sandy & C. R. Co. — Ky. —, 125 S. W. 302; Chesapeake & O. R. Co. v. Standard Lumber Co. 98 C. C. A. 81, 174 Fed. 107; Hobart-Lee Tie Co. v. Stone, 135 Mo. App. 438, 117 S. W. 604; Chicago & A. R. Co. v. United States, 26 L.R.A.(N.S.) 551, 84 C. C. A. 324, 156 Fed. 558; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; Union P. R. Co. v. Goodridge, 149 U. S. 680, 37 L. ed. 896, 13 Sup. Ct. Rep. 970; Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822.

Mr. Justice **McKenna**, after stating the facts as above, delivered the opinion of the court:

It will be observed that the order of the Commission required appellants to cease and desist from granting Young the alleged undue preference for a period of not less than two years from September 1, 1908 (subsequently extended to November 15). It is hence contended that the order of the Commission has expired, and that, the case having thereby become moot, the appeal should be dismissed.

This court has said a number of times that it will only decide actual controversies, and if, pending an appeal, something occurs, without any fault of the defendant, which renders it impossible, if our decision should be in favor of the plaintiff, to grant him effectual relief, the appeal will be dismissed. Jones v. Montague, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611, and

Richardson v. McChesney, decided November 28 of this term, 218 U. S. 487, 54 L. ed. 1121, 31 Sup. Ct. Rep. 43. But in those cases the acts sought to be enjoined had been 515]completely executed, and *there was nothing that the judgment of the court, if the suits had been entertained, could have affected. The case at bar comes within the rule announced in United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 308, 41 L. ed. 1007, 1016, 17 Sup. Ct. Rep. 540, and Boise City Irrig. & Land Co. v. Clark (C. C. App. 9th C.) 65 C. C. A. 399, 131 Fed. 415.

In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The question involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and these considerations ought not to be, as they might be, defeated, by short-terms orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers, have their rights determined by the Commission without a chance of redress.

In United States v. Trans-Missouri Freight Asso. supra, the object of the suit was to obtain the judgment of the court on the legality of an agreement between railroads, alleged to be in violation of the Sherman law. In the case at bar the object of the suit is to have declared illegal an order of the Interstate Commerce Commission. In that case there was an attempt to defeat the purposes of the suit by a voluntary dissolution of the agreement, and of the attempt the court said: "The mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, and if such agreement be declared to be illegal the court is asked not only to dissolve the association named in the bill, but that the defendants should be enjoined for the future. . . . Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the 516]action may terminate before *judgment is obtained, or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the government has endeavored to procure by a judgment of a court under the provisions of the act of Congress above recited. The defendants cannot foreclose those rights, nor prevent the assertion thereof by the government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case." And, referring to the agreement as one claimed by the government as illegal, it was further said: "That question the government has the right to bring before the court and obtain its judgment thereof." The interests there passed upon are no more of a public character than those involved in the order of the Interstate Commerce Commission in the case at bar, and there was no greater necessity for continuing a jurisdiction which had properly attached; and that the government is the respondent, not complainant, does not lessen or change the character of the interests involved in the controversy, or terminate its questions.

In Boise City Irrig. & Land Co. v. Clark, supra, the period for which a municipal ordinance fixed a water rate expired pending the litigation as to its legality, and it was contended that the case had become moot. The court replied: "But the courts have entertained and decided such cases heretofore, partly because the rate, once fixed, continues in force until changed as provided by law, and partly because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter."

The motion to dismiss is denied.

Four errors are assigned in the action of the circuit *court in dismissing the[517 bill of complaint: (1) The Interstate Commerce Commission had no jurisdiction over the terminal company, it not being a common carrier, and therefore not subject to the act to regulate commerce. (2) The Commission had no power or authority to declare the lease to Young illegal. (3) The lease does not constitute an unlawful or undue preference or advantage within the meaning of the act to regulate commerce. (4) The Commission by its order assumed to control intrastate and foreign commerce, not subject to the act to regulate commerce.

Two facts are prominent in the case: That the piers of the terminal company are facilities of import and export traffic at the port of Galveston, and that the arrangement of the terminal company with Young has enabled him to largely and rapidly increase his business until his exports of cotton-seed products are more than twice those of all other competitors, that he derives therefrom 30 to 40 cents per ton over the ordinary buying and selling profit, and that some who were his competitors have ceased

to export. A direct advantage to Young is manifest. A direct detriment to other exporters is equally manifest.

The situation challenges attention. Appellants find in it nothing but the natural and legal result of the sagacity which could see an opportunity for profit, and the enterprise which could avail of it. It was the simple matter on the part of Young, it is contended, of bringing his business to the ship's side and cutting out intervening expenses. And it is said that the terminal company had an equally lawful inducement. It had an idle property, it is contended, over which it had absolute control, and which it turned to use and profit by the arrangement with Young. And this, it is insisted, was a simple exercise of ownership. If the elements of the controversy are correctly stated, the justification may be considered as made out.

518] *Appellants make much of their title, and, assuming it to be absolute, assert the right to an unrestrained use of the property. But the assertion overlooks or underestimates the condition expressed in the deed to Huntington, that from his estate to the terminal company, in the ordinance of the city of Galveston, and in the act of the legislature of the state of Texas. The condition expressed in all of them was that terminal facilities should be constructed upon the property for the use of the Southern Pacific Railroad & Steamship Systems. The act of the legislature declared that the property "should be developed for shipping and transportation purposes, and that the shipping facilities at the port of Galveston should be thereby improved and enlarged in order to better accommodate the commerce of the port and of the state." And wharfage charges, except so far as they should be covered by the freight rates, should be subject to regulation by the railroad commission of the state.

It is clear, therefore, that it was the purpose of the ordinance and of the act confirming it to secure shipping facilities for the city, open, to public use; and necessarily so, for the property was to be the terminal of a railroad and steamship system. It may be, as it is contended, that there was no necessity for the ordinance, "except for the purpose of a valid relinquishment of the municipal right, often asserted by it, of opening streets through the bay-front property and constructing wharves thereon." The relinquishment was treated as valuable, and Huntington pledged the property to a public use as a consideration for it. And, as we have said, such use was also a condition expressed in the act of the legislature. It was not discharged by the expenditure of $150,000 and the erection of wharves by Huntington, as seems to be the contention.

The case has no likeness whatever to Louisville & N. R. Co. v. West Coast Naval Stores Co. 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. Rep. 745. In the latter case there was no discrimination against the West Coast Company *by the railroad company,[519 or a preference given to any person. The West Coast Company had the same privilege of using the wharves of the railroad company as other shippers were given. It asserted other privileges. It asserted the privilege of using the wharf for the purpose of transferring goods into vessels which it might arrange to take them; in other words, not into the vessels of the railroad company or into those with which it had traffic agreements. And we said, through Mr. Justice Peckham: "In brief, the fact seems to be that the only complaint of the plaintiff [West Coast Company] is that the defendant [the railroad company] will not permit competing vessels to make use of its wharf for the purpose of such competition."

It is true that there was a contention that the wharf was a public one, but the contention was based only on the fact that the wharf was built at the foot of a public street by authority from the city of Pensacola and the state of Florida. That fact alone was not considered sufficient to support the contention. And it was said: "The city or state authorities in granting the right to erect such facilities might, of course, have attached such conditions as they thought wise, but in their absence neither the public nor this plaintiff, as the owner of goods, would have the right, on this state of facts, to go to the wharf with vessels for the purpose of continuing transportation of goods in competition with defendant." It is true it was said that the railroad company never became a common carrier as to the wharf, in the sense that it was bound to accord to the public or to the West Coast Company the right to use it upon payment of compensation. But it was added that the railroad company would be bound to carry the West Coast Company's goods on the rails which led to the wharf, for the same purpose and upon the same terms that it did for others, *viz.*, in order that it might itself, or through others it had contracted with, forward *the[520 goods beyond its own line. And it was further said that the West Coast Company demanded more than this; it demanded that the railroad company should carry its goods in order that it might itself forward them by vessels of its own selection, and that the railroad company should surrender possession of enough of its wharf to enable the other company to do so.

Nor is Weems S. B. Co. v. People's S. B. Co. 214 U. S. 344, 53 L. ed. 1024, 29 Sup. Ct. Rep. 661, 16 A. & E. Ann. Cas. 1222, applicable to the pending controversy. The contest there was between two independent lines of steamboats, the one claiming a right to use the wharves of the other, on the ground that the wharves had been dedicated to the public. The fact was found adversely to the contention, and the claim of right to the use of the wharves denied. A review of the reasoning of the court is unnecessary. There is great difference between competing carriers claiming the right to use the facilities of one another, and the patrons of the same carrier contending for equality of treatment. In stating this we assume that the wharves in the pending case are the instruments of a common carrier. This is, however, denied, and it is asserted that the terminal company is purely a wharfage company, and "has no power under its charter to act as a common carrier." The contention is based on a partial view of the condition. The terminal company was incorporated to execute the purposes expressed in the act of the legislature of the state of Texas, that is, to construct terminal facilities for the Southern Pacific Railroad & Steamship Systems, and to accommodate the export and import traffic at Galveston; and, necessarily, as instrumentalities of such traffic, wharves and piers are as essential as steamships and railroads, and are, in fact, as they were intended to be by the charter of their authorization, parts of a system. The only track facilities for movement of cars to or from the ships, from or to the tracks of the Southern Pacific Railway, are on the terminal 521]*company's lands, and are owned by it. To these tracks the Galveston, Harrisburg, & San Antonio Railway switches cars for other railroads, charging $1.75 per car, and the terminal company receives a trackage charge of 50 cents per car. It is true that the terminal company does a wharfage business and publishes a schedule of its charges, which, while not filed with the Interstate Commerce Commission, shows a charge of 20 cents a ton on cotton-seed cake and meal, and this appears as a wharfage charge in the tariffs of the Galveston, Harrisburg, & San Antonio Railway Company and other railways entering the city of Galveston. And, besides, the terminal company was a party to numerous circulars issued by the Southern Pacific Railway Company, and that effective May 23, 1905, was filed with the Interstate Commerce Commission. These circulars gave terminal charges at the port of Galveston. The charge on cotton-seed meal and cake was given at 1 cent per 100 pounds. Shipments on through bills of lading include in the freight rate the wharfage charge.

Another and important fact is the control of the properties by the Southern Pacific Company through stock ownership. There is a separation of the companies if we regard only their charters; there is a union of them if we regard their control and operation through the Southern Pacific Company. This control and operation are the important facts to shippers. It is of no consequence that by mere charter declaration the terminal company is a wharfage company, or the Southern Pacific a holding company. Verbal declarations cannot alter the facts. The control and operation of the Southern Pacific Company of the railroads and the terminal company have united them into a system of which all are necessary parts, the terminal company as well as the railroad companies. As said by the Interstate Commerce Commission, "the terminal company was organized to furnish terminal *facilities for the system at the port[522 of Galveston;" and it is further said that "through shipments on the railroad lines from and to points in different states of the Union pass and repass over the docks of the terminal company. It forms a link in this chain of transportation. It is necessary to complete the avenue through which move shipments over these lines owned by a single corporation." And this unity of the railroad's lines and the terminal facilities is recognized in the lease to Young. By it he agrees to route all of his shipments over "the lines of the terminal company and its connections, according to the instructions of said terminal company from time to time." And provision is made against the possibility of other lines bidding for the traffic by lower rates. In such event he must give notice to the terminal company, and give it "the option of meeting such proposed rates," and if the company "elects to do so," then he "shall not divert such shipments, but shall abide by the provisions" of his agreement. And surely a system so constituted and used as an instrument of interstate commerce may not escape regulation as such because one of its constituents is a wharfage company and its dominating power a holding company. As was well said by the Interstate Commerce Commission; "a corporation such as this terminal company, which has 'competing lines,' should not be permitted to defeat the jurisdiction of this Commission by showing that it is not in fact owned by any railroad company. . . . The terminal company is part and parcel of the system engaged in the transportation of commerce, and to the extent that such commerce is interstate the Commission has

jurisdiction to supervise and control it within statutory limits. To hold otherwise would in effect permit carriers generally, though the organization of separate corporations, to exempt all of their terminals from our regulating authority."

The reasoning of the Commission is justi-[523]fied by the *statute. It includes in the term "railroad" "all bridges and ferries used or operated in connection with any railroad, and also all the roads in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property."

The property of the terminal company is "necessary in the transportation or delivery" of the interstate and foreign freight transported by the lines of the Southern Pacific system. It is the only terminal for freight moving over the lines of such system, the rails of one of those lines, the Galveston, Harrisburg, & San Antonio Railway Company, connecting with tracks upon the docks of the terminal company. That the latter collects a trackage charge from the former, and it a switching charge from the terminal company, are, to quote the Commission, "but incidents of the separate corporations."

In opposition to these views appellants urge the legal individuality of the different railroads and the terminal company, and cite cases which establish, it is contended, that stock ownership simply or through a holding company does not identify them. We are not concerned to combat the proposition. The record does not present a case of stock ownership merely, or of a holding company which was content to hold. It presents a case, as we have already said, of one actively managing and uniting the railroads and the terminal company into an organized system. And it is with the system that the law must deal, not with its elements. Such elements may, indeed, be regarded from some standpoints as legal entities; may have, in a sense, separate corporate operation; but they are directed by the same paramount and combining power [524]and *made single by it. In all transactions it is treated as single. In the ordinance of the city of Galveston, in the act of the legislature of the state of 1899, and in public circulars and in the lease of Young, it is the system which is dealt with, and not its separate links. And, we have seen, the terminal facilities which the terminal company was authorized to maintain were for the system, not for the corporate elements considered separately.

It is next contended that the lease to Young, under the facts proven, does not constitute an unlawful or undue preference under the interstate commerce act.

To a certain extent we have considered this contention. An absolute advantage to Young cannot be denied. A facility that has enabled him to acquire practically all the export of cotton-seed products must have something in it of advantage which other shippers do not receive, and it would seem to proclaim a power working for his benefit which is not working for others. And yet it is urged that there is a contrariety of opinion about it among cotton-seed-cake producers, and as to whether Young is able to dominate the Texas market and to command the foreign trade. The facts, we think, put the matter beyond conjecture or opinion, and demonstrate the potency of his situation. That it is a preference, however, is denied; and it is urged that by the agreed statement of facts all cotton-seed-cake producers "agree that if there was a general establishment of plants in Galveston, so that a monopoly could not be acquired" by Young, "it would be of great benefit to the cotton-seed industry." But it is also agreed that neither the Galveston Wharf Company nor the terminal company has space enough to afford facilities to "all exporters doing business at Galveston," such as Young. And the Commission found that as a practical matter other shippers could not be given the same facilities on the same conditions as those granted to him, nor could such facilities *be se-[525]cured on the bay front. It was further found that the terminal company had indicated that it is not willing to accord shippers generally such facilities, and that the situation of its docks with respect to space was such that it cannot do so even if it should be willing. It may be contended that the patrons of a railroad are not obliged to seek or compete for extraordinary facilities in its terminals. But, be that as it may, all shippers must be treated alike.

Appellants bring forward the same argument to support the contention under consideration which they advance to support their first contention, to wit, the right, as owner of the property, to make a lease of its "unused property," subject only to the limitation that there shall be no interference "with the use of the adjacent navigable waters." It would seem that, if the argument have any force at all, it would extend the rights of ownership to used as well as unused property, and be exercised in any form of preference, even to the exclu-

sion of some shippers from the wharves. However, as appellants do not press the argument so far, we need not dwell upon it, and will only add that the terminal facilities contemplated by the ordinance of the city of Galveston and the act of the legislature of Texas confirming it were public terminal facilities, not those which might be granted or withheld in preferences or discriminations.

The last contention advanced is that "the order of the Commission transcends its jurisdiction, in that it regulates commerce purely state and intrastate, and also purely foreign commerce, neither of which is subject to its authority."

In support of this contention it is insisted that the evidence shows the following facts: The cake and meal purchased by Young are bought by him in Texas, Oklahoma, Louisiana, and Arkansas, but chiefly in Texas, and shipped to him on bills of lad-
526]ing and way bills, showing *the point of origin in those states and the destination at Galveston. The purchases are made for export, there being no consumption of the products at Galveston. His sales to foreign countries are sometimes for immediate and sometimes for future delivery, irrespective of whether he has the product on hand at Galveston. At times he has it on hand. At times, therefore, orders must be filled from cake to be purchased in the interior or then in transit to him. When the cake reaches Galveston it is ground into meal and sacked by Young, and for the meal thus ground and such meal as has been brought to his customers he takes out ships" bills of lading made to his order.

This evidence establishes, appellants contend, that the transit of the cake and meal is absolutely ended at the leased premises at Galveston, and that it is "a final point of concentration and manufacture, the cotton-seed cake being there manufactured into meal and sacked for export." But this does not distinguish between the meal and the cake, nor between the meal that is purchased at points outside of Texas and directly exported, from that so purchased and manufactured on the wharves of the terminal company. Nor does it take account of the fact that the wharves were intended for shipping facilities, a means of transition from land carriage to water carriage. It is manifest, as we have said, that to make the wharves manufacturing or concentrating points for one shipper, and not for all, is to give that shipper a preference. And, being a preference, the traffic necessarily comes under the jurisdiction of the Interstate Commerce Commission. In other words, the manufacture or concentration on the wharves of the terminal company are but incidents, under the circumstances presented by the record, in the transhipment of the products in export trade, and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise *would be to disregard, as the[527 Commission said, the substance of things, and make evasions of the act of Congress quite easy. It makes no difference, therefore, that the shipments of the products were not made on through bills of lading, or whether their initial point was Galveston or some other place in Texas. They were all destined for export, and by their delivery to the Galveston, Harrisburg, & San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the terminal company being a part of the railway for such purpose. The case, therefore, comes under Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have "actually started in the course of transportation to another state or been delivered to a carrier for transportation." In Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360, the facts are different, and the case is not apposite.

Decree affirmed.

MERRIMACK RIVER SAVINGS BANK, Appt.,
v.
CITY OF CLAY CENTER et al.

(See S. C. Reporter's ed. 527–537.)

Appeal — continuing injunction pending appeal.

1. The continuance of a temporary injunction pending an appeal to the Federal Supreme Court from a decree of a circuit court, dismissing a bill asking injunctive relief, is within the inherent equity powers of the latter court.

[For other cases, see Appeal and Error, 2775–2786, in Digest Sup. Ct. 1908.]

Note.—On practice and procedure governing the transfer of causes to the Federal Supreme Court by appeal or writ of error—see note to Wedding v. Meyler, 66 L.R.A. 833.

Effect of appeal upon trial court's jurisdiction to punish contempt in injunction cases.

The trial court's jurisdiction to punish as a contempt after an appeal the violation of an injunction forbidding a labor union to picket the premises of complainants, and to interfere with their business and employees, was considered at length

Contempt — disobeying injunction pending appeal.

2. Continuing a temporary injunction pending an appeal to the Federal Supreme Court from a decree of a circuit court, dismissing a bill asking injunctive relief, operates to continue in the circuit court such jurisdiction over the subject-matter of the litigation and the parties as to enable it to preserve the *status quo* pending the appeal, including the power to take cognizance of the violation of the injunction.

[For other cases, see Contempt, 30–34, in Digest Sup. Ct. 1908.]

Contempt — destruction of subject-matter of litigation pending appeal.

3. The wilful destruction by municipal officers of the poles and wires of a light and power company, pending an appeal to the Federal Supreme Court from a decree of a circuit court, dismissing a bill praying, among other things, an injunction to prevent such destruction until the right shall be determined, is, in and of itself, a contempt of the appellate jurisdiction of the Supreme Court, although such conduct may also be a violation of the temporary injunction order continued by the court below pending the appeal.

[For other cases, see Contempt, 6–16, in Digest Sup. Ct. 1908.]

Contempt — excuse — punishment.

4. The honest belief that when an appeal to the Federal Supreme Court from a decree of a circuit court, dismissing a bill asking injunctive relief against the removal or destruction by municipal officers of the poles and wires of a light and power company, had been dismissed and an order of dismissal entered, there was no reason

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in Barnes v. Chicago Typographical Union, No. 16, 232 Ill. 402, 14 L.R.A.(N.S.) 1150, 122 Am. St. Rep. 129, 83 N. E. 932, and the conclusion reached that such power existed. "The question being by what court the contempt can be punished, the natural answer would be," said Cartwright, J., "by the court whose order is disobeyed and whose dignity and authority are defied. And indeed, it does not seem to be disputed that, if the proceeding is in the name of the people, for the purpose of maintaining the dignity and authority of the court, an appeal would present no obstacle to it. Such a proceeding is wholly independent of the appeal or any question to be considered by the appellate tribunal; and we see no substantial distinction between a prosecution for contempt, instituted for the purpose of punishing a person for disobeying an order of the court, on the ground that its authority or dignity is in question, and one which is instituted to enforce the authority of the court in the administration of justice between litigants. . . . When the transcript has been filed in the appellate court, if an act is committed which constitutes a contempt, it is not a contempt of the appellate court, but of the court which entered the decree, and which is conceded by all parties to remain in full force and effect."

The perfecting of an appeal with supersedeas from an injunction order does not stay the operation of the injunction, and the court in which the decree was rendered may still punish for contempt a violation of such injunction. State ex rel. Busch v. Dillon, 96 Mo. 56, 8 S. W. 781; Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 9 L.R.A. (N.S.) 1225, 56 S. E. 257.

Indeed, it has been held that in such case the lower court has exclusive jurisdiction of the contempt proceedings. State ex rel. Bettman v. Harness, 42 W. Va. 414, 26 S. E. 270.

But in Wilkinson v. Dunkley-Williams Co. 141 Mich. 409, 104 N. W. 772, 7 A. & E. Ann. Cas. 40, the supreme court, while not disputing the power of the lower court, nevertheless itself proceeded to punish the contempt.

And in Kentucky & I. Bridge Co. v. Krieger, 91 Ky. 625, 16 S. W. 824, it was held that a violation of a decree perpetuating an injunction after an appeal with supersedeas must be treated as in contempt and defiance of the appellate court, because "the lower court for the time has no power to enforce obedience to its mandate."

So, in Pennsylvania R. Co. v. National Docks & N. J. Junction Connecting R. Co. 54 N. J. Eq. 647, 35 Atl. 433, reversing 54 N. J. Eq. 167, 33 Atl. 936, it was held that after an appeal from a decree restraining interference with the building of a railroad suburban passageway, the decree had, for the time, lost all its force; and that to allow the chancellor to enforce his decree by contempt proceedings would be wholly inconsistent with the paramount cognizance given to the appellate court over the subject.

Where there is dissolution of the injunction, and an appeal with supersedeas, the contempt proceedings must be had in the appellate court. State ex rel. Mason v. Harper's Ferry Bridge Co. 16 W. Va. 864.

Contra, State ex rel. Barthet v. Houston, 37 La. Ann. 852, where, under similar circumstances, the trial court was held to possess jurisdiction to punish for contempt.

But see Turner v. Scott, 5 Rand. (Va.) 332, where the court was in doubt as to whether the proceeding ought to be in the lower or appellate court.

The trial court may punish a contempt consisting in the violation of an injunction which had been granted by that court in the first instance, but upon final hearing had been dissolved and the bill dismissed, when a writ of error had been sued out of the supreme court, upon which the decree of dismissal was reversed and the injunction reinstated and perpetuated. Gates v. McDaniel, 3 Port. (Ala.) 356. The court said: "The effect of the decree of the circuit court, so long as it remained unreversed, absolved all persons from the re-

straint imposed by the injunction. But so soon as that decree was reversed, the injunction revived and acquired all its original influence; the order of the judge, which had been superseded and temporarily vacated, received strength and became operative. And having thus its efficiency renewed, it stood as it did before its vacation, —an order of the circuit court. It will be recollected that this court did what the circuit court should have done, and nothing more; and had it decreed anything beyond reinstating and continuing the injunction, which it would be a contempt to disregard, such a contempt, it is possible, could only be punished here; for the reason that it would be no offense against any other tribunal. Not so when the injunction itself is set at naught; that having issued from the circuit court, and being approved by this court, disobedience to its restrictions may, with propriety, be punished there."

So, where a statute existed which provided that on appeal with a stay of proceedings, "all proceedings in the court below upon the judgment appealed from are stayed," it was held in Howe v. Searing, 6 Bosw. 686, that the lower court, pending the appeal, could not proceed against the defendant for contempt in disobeying the injunction appealed from, but that the defendant would act at its peril; and that if the judgment should be affirmed, the lower court could then punish the defendant.

See, however, Sixth Ave. R. Co. v. Gilbert Elev. R. Co. 71 N. Y. 430, where the court said that where an appeal with a stay of proceedings had been taken to the general term of the supreme court from an injunction decree rendered by the special term, which, under the New York statute, stayed "all proceedings on the part of the plaintiff in execution of the judgment," the court below should have, and doubtless has, the power, notwithstanding an appeal, to command respect for its judgments and obedience to its mandates until they are reversed.

A violation of a decree of a court of common pleas granting a perpetual injunction after an appeal taken to a circuit court with a view to a trial *de novo* is to be punished in the latter court, since the case by operation of law passed, upon perfecting the appeal, from the jurisdiction of the common pleas into that of the circuit court, a part of the case which so passed being the perpetual injunction from which the appeal was taken. Thereafter authority to suspend, modify, or enforce the injunction must be deemed to rest exclusively in the circuit court, in view of the provisions of Ohio Rev. Stat. 1906, § 5235, that when such appeal is taken and bond given, the judgment is thereby suspended unless some part of the final judgment appealed from be an injunction, in which case such injunction shall not be suspended except by order of the circuit court or two judges thereof, on reasonable notice to the adverse party. Menuez v. Grimes Candy Co. 77 Ohio St. 386, 83 N. E. 82, 11 A. & E. Ann. Cas. 1037.

The trial court—not the supreme court —is the proper forum to which an application should be made for an attachment for contempt in disregarding an injunction which had been granted by the circuit court, and affirmed on appeal by the supreme court. Gates v. McDaniel, 4 Stew. & P. (Ala.) 69.

why such poles and wires should not be removed or destroyed, although not sufficient to acquit of a technical contempt of court where no mandate had issued or could have issued under the rules of the Supreme Court, may reduce the punishment to the payment of the costs of the contempt proceedings.

[For other cases, see Contempt, 24–26, 58–62, in Digest Sup. Ct. 1908.]

[No. 604.]

Return to rule argued January 26, 1911. Decided February 20, 1911.

IN Re Proceedings for contempt in the removal by municipal officers of the poles and wires of a light and power company after an appeal from a decree of the Circuit Court of the United States for the District of Kansas, dismissing a bill asking injunctive relief against such action, had been dismissed by the Federal Supreme Court, and an order of dismissal entered, but before any mandate had issued or could issue under the rules of the court. Rule discharged upon payment of the costs of the proceeding.

The facts are stated in the opinion.

Mr. F. L. Williams argued the cause, and, with Messrs. C. C. Coleman, D. R. Hite, and Mulvane & Gault, filed a brief for appellant:

This court is, of necessity, possessed of the power so to deal with the property as to make its final decision and judgment effectual.

Pennsylvania R. Co. v. National Docks & N. J. Junction Connecting R. Co. 54 N. J. Eq. 654, 35 Atl. 433.

Judgments and final decrees rendered by circuit courts cannot be attacked collaterally in such cases as the one at bar.

M'Cormick v. Sullivant, 10 Wheat. 192–199, 6 L. ed. 300–302; Evers v. Watson, 156 U. S. 527, 39 L. ed. 520, 15 Sup. Ct. Rep. 430; Ex parte Watkins, 3 Pet. 193, 7 L. ed. 650; Kennedy v. Bank of Georgia, 8 How. 586, 12 L. ed. 1209; Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217;

Dowell v. Applegate, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611.

Authorities showing the practice and sustaining the power of the appellate courts to punish contemptuous conduct in violating the orders of the trial court are abundant.

People ex rel. Stidger v. Horan, 34 Colo. 304, 338, 114 Am. St. Rep. 163, 86 Pac. 252, 263; 9 Cyc. Law & Proc. p. 32; Wilkinson v. Dunkley-Williams Co. 141 Mich. 409, 104 N. W. 772, 7 A. & E. Ann. Cas. 40; Kentucky & I. Bridge Co. v. Krieger, 91 Ky. 625, 16 S. W. 824; State ex rel. Mason v. Harper's Ferry Bridge Co. 16 W. Va. 874; Lytle v. Galveston, H. & S. A. R. Co. 41 Tex. Civ. App. 112, 90 S. W. 316; State ex rel. Carroll v. Campbell, 25 Mo. App. 640; San Antonio Street R. Co. v. State, — Tex. Civ. App. —, 38 S. W. 59; Pennsylvania R. Co. v. National Docks & N. J. Junction Connecting R. Co. 54 N. J. Eq. 654, 35 Atl. 433; State v. Johnson, 13 Fla. 33.

Even if the case is one in which the court in which it is pending eventually determines that there is want of jurisdiction, the injunctional orders of the court are not therefore void.

Williamson's Case, 26 Pa. 21, 67 Am. Dec. 374; Ex parte Wimberly, 57 Miss. 437; Franklin Union No. 4 v. People, 220 Ill. 355, 4 L.R.A.(N.S.) 1001, 110 Am. St. Rep. 255, 77 N. E. 176; Posthlewaite v. Ghiselin, 97 Mo. 424, 10 S. W. 482; State ex rel. Union Depot R. Co. v. Southern R. Co. 100 Mo. 61, 13 S. W. 398; Dowdy v. Wamble, 110 Mo. 284, 19 S. W. 489; State ex rel. Egan v. Wolever, 127 Ind. 306, 26 N. E. 762; United States v. Shipp, 203 U. S. 563, 573, 51 L. ed. 319, 323, 27 Sup. Ct. Rep. 165, 8 A. & E. Ann. Cas. 265.

It is contempt of the court in whch an action is pending for a litigant to destroy, remove, or conceal the subject of the litigation, or do any other act in respect to the subject of the litigation which may render nugatory the decision of the court.

Re Debs, 158 U. S. 564, 598, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; 9 Cyc. Law & Proc. p. 8; Wartman v. Wartman, Taney, 362, Fed. Cas. No. 17,210; Richard v. Van Meter, 3 Cranch, C. C. 214, Fed. Cas. No. 11,763; State ex rel. Morse v. District Ct. 29 Mont. 230, 74 Pac. 412; Ex parte Kellogg, 64 Cal. 344, 30 Pac. 1030; Cottier v. People, 61 Ill. App. 30; People ex rel. Brooklyn Industrial School v. Kearney, 21 How. Pr. 77; State ex rel. Coleman v. Pittsburg, 80 Kan. 712, 25 L.R.A.(N.S.) 226, 133 Am. St. Rep. 227, 104 Pac. 847; United States v. Shipp, 203 U. S. 563, 575, 51 L. ed. 319, 27 Sup. Ct. Rep. 165, 8 A. & E. Ann. Cas. 265.

A disclaimer or denial of an intention to be in contempt of court, or to violate the court's orders, does not purge the accused parties of the contempt.

Hughes v. People, 5 Colo. 453; Wilcox Silver Plate Co. v. Schimmel, 59 Mich. 524, 26 N. W. 692; Dodge v. State, 140 Ind. 284, 39 N. E. 745; 7 Am. & Eng. Enc. Law, p. 76; State v. Simmons, 1 Ark. 265; Watson v. Citizens' Sav. Bank, 5 S. C. 159.

The power of the Supreme Court to punish for contempt is not limited or restricted by statutory provisions.

Thomas, Constructive Contempt, pp. 210–212; State ex rel. Chicago, B. & Q. R. Co. v. Bland, 189 Mo. 197, 88 S. W. 28, 3 A. & E. Ann. Cas. 1044; Smith v. Speed, 11 Okla. 95, 55 L.R.A. 402, 66 Pac. 511.

Mr. F. B. Dawes argued the cause, and, with Mr. R. C. Miller, filed a brief for respondents:

An appeal from the decision of the trial court in a case in which an injunction has been granted does not suspend the force or binding character of the injunction during the appeal, save only where the injunction is mandatory and commands some affirmative act to be performed. The trial court in which the original papers remain retains the sole jurisdiction to punish for the violation of its order which occurs during the pendency of the appeal.

Slaughter-house Cases, 10 Wall. 273, 19 L. ed. 915; State ex rel. Barthet v. Houston, 37 La. Ann. 852; Gates v. McDaniel, 3 Port. (Ala.) 356; 4 Stew. & P. (Ala.) 69; State ex rel. Matthews v. Chase, 41 Ind. 358; Central U. Teleph. Co. v. State, 110 Ind. 203, 10 N. E. 922, 12 N. E. 136; Dewey v. Superior Ct. 81 Cal. 64, 22 Pac. 333; Balkum v. Harper, 50 Ala. 372; State ex rel. Busch v. Dillon, 96 Mo. 56, 8 S. W. 781; State ex rel. Bettman v. Harness, 42 W. Va. 414, 26 S. E. 270; Bullion, B. & C. Min. Co. v. Eureka Hill Min. Co. 5 Utah, 151, 13 Pac. 174, 15 Mor. Min. Rep. 449; Ex parte Whitmore, 9 Utah, 441, 35 Pac. 524; Sixth Ave. R. Co. v. Gilbert Elev. R. Co. 71 N. Y. 430; Fitzsimmons v. Board of Canvassers, 119 Mich. 147, 77 N. W. 632; Lindsay v. Clayton Dist. Ct. 75 Iowa, 509, 39 N. W. 817; Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 9 L.R.A.(N.S.) 1225, 56 S. E. 257; Barnes v. Chicago Typographical Union No. 16, 232 Ill. 402, 14 L.R.A.(N.S.) 1150, 122 Am. St. Rep. 129, 83 N. E. 932; State ex rel. Edwards v. Davis, 2 N. D. 461, 51 N. W. 942; 2 High, Inj. 4th ed. §§ 1431, 1698A, 1699; Beach, Inj. § 283; 1 Joyce, Inj. § 277; Green Bay & M. Canal Co. v. Norrie, 118 Fed. 923; Voorhees v. Albright, 2 N. J. L. J. 57, Fed. Cas. No. 16,999; Kirk v. Milwaukee Dust Collector Mfg. Co. 20 Fed. 501.

When, from the face of the bill, the court has no jurisdiction to pass upon and render a final judgment upon the subject-matter contained in the bill, it has no authority to issue a temporary injunction therein. If a temporary injunction has been issued and violated, and afterwards the court holds and finds on a demurrer that from the face of the bill it had no jurisdiction to proceed and render a final judgment, granting the relief prayed for, it cannot punish for the violation of the temporary injunction which it had no jurisdiction to issue.

Cooper v. Reynolds, 10 Wall. 308, 19 L. ed. 931; Hope v. Blair, 105 Mo. 85, 24 Am. St. Rep. 366, 16 S. W. 595; United States ex rel. McIntosh v. Crawford, 47 Fed. 561; Rapalje & Lawrence's Dict. Jurisdiction; Bouvier's Law Dict. "Jurisdiction;" 22 Cyc. Law & Proc. p. 100; Joyce, Inj. § 246; Beach, Inj. § 246; High, Inj. § 1425; Rapalje, Contempts, § 16; McHenry v. State, 91 Miss. 562, 16 L.R.A.(N.S.) 1063, 44 So. 831; Ex parte Gardner, 22 Nev. 280, 39 Pac. 570; State ex rel. Evans v. Winder, 14 Wash. 114, 44 Pac. 125; State ex rel. News Pub. Co. v. Milligan, 3 Wash. 144, 28 Pac. 369; People ex rel. Brewer v. Kidd, 23 Mich. 440; Call v. Pike, 66 Me. 350; Dickey v. Reed, 78 Ill. 261; Morgan v. County Ct. 53 W. Va. 372, 44 S. E. 182; State ex rel. New Orleans v. Theard, 48 La. Ann. 1448, 21 So. 28; State ex rel. Register v. McGahey, 97 N. W. 865, 1 A. & E. Ann. Cas. 650, 14 Am. Crim. Rep. 283; Freeman, Judgm. §§ 116, 119; State ex rel. Trudgeon v. Blair, 39 W. Va. 704, 20 S. E. 658; Re Turner, 119 Fed. 231; Ex parte Perkins, 29 Fed. 908; Evans v. Pack, 2 Flipp. 267, Fed. Cas. No. 4,566; Ex parte Fisk, 113 U. S. 713, 718, 28 L. ed. 1117, 1119, 5 Sup. Ct. Rep. 724; Re Sawyer, 124 U. S. 200, 221, 31 L. ed. 402, 409, 8 Sup. Ct. Rep. 482; American Lighting Co. v. Public Service Corp. 134 Fed. 130; United States v. Atchison, T. & S. F. R. Co. 142 Fed. 176.

Mr. Justice **Lurton** delivered the opinion of the court:

The Merrimack River Savings Bank filed a bill in equity in the circuit court of the United States for the district of Kansas, claiming to be a creditor of the light and power company by bonds secured by mortgage upon its plant, property, and franchises, against the city of Clay Center, the Clay Center Light & Power Company, and certain individuals, officials of said city. The bill averred that the Clay Center Light & Power Company was a corporation owning and conducting a light and power plant at Clay Center under a perpetual franchise, authorizing it to place and maintain a line of poles and wires upon the streets of that city; that the city, claiming that its franchise had expired, had, through its council, *of which the individual defend-[533 ants were members, required said company to remove its poles and wires from the public streets, and that the officials named as defendants were threatening to cut down its poles and destroy its wires thereon, and thus destroy all possibility of operating its plant, to the irreparable ruin of the security to which the complainant must look for the payment of its bonds. A temporary injunction was issued to prevent the destruction of the lines of poles and wires as threatened. A demurrer to the bill for want of jurisdiction in the circuit court as a court of the United States was sustained and the bill dismissed. An appeal to this court was allowed and the injunction continued pending the appeal. Upon a hearing in this court, the appeal was dismissed without opinion. [218 U. S. 665, 54 L. ed. 1201, 31 Sup. Ct. Rep. 222.]

The present petition alleges that after this court had made an order dismissing said appeal, but before any mandate had issued or could issue under the rules of this court, and pending the right of petitioners to file an application for a rehearing, since filed and now pending, certain of the defendants to said appeal, namely, George W. Hanna, O. L. Slade, W. D. Vincent, S. D. Tripp, and G. P. Randall, had, by force and violence, cut down many of the poles and destroyed much of the cable and wires stretched thereon, and had put the light and power company out of business and disabled it so that it could not exercise its franchise or carry on its operations. It is averred that the said defendants did thus destroy the subject-matter of the suit, knowing that this appeal was pending and that this court had not lost control over the controversy, and that no mandate had issued and could not issue under the rules. The petition concludes by praying that the individual defendants named be cited and required to appear before this court and "show cause, if any they have, why they should not be proceeded against as for contempt of this court." Such a *rule was made, and the defendants[534 have appeared and made defense.

The respondents have moved to discharge the rule, because the petition fails to show that they have in any way violated any injunction, rule, order, or mandate of this court. This is bottomed, first, upon the claim that the injunction, which was continued pending the appeal to this court, is the injunction of the circuit court, and that any violation is cognizable only in the circuit court; and second, upon the claim

that if that be so, that the petition fails to show any facts which constitute a contempt of this court.

The plain purpose of the order continuing the injunction pending this appeal was to preserve the subject-matter of the litigation until the rights of the complaint could be heard and decided. It is well settled that the force and effect of a decree dismissing a bill and discharging an injunction is neither suspended nor annulled as a mere consequence of an appeal to this court, even if a supersedeas is allowed. Slaughter-house Cases, 10 Wall. 273, 297, 19 L. ed. 915, 922; Hovey v. McDonald, 109 U. S. 150, 161, 27 L. ed. 888, 891, 3 Sup. Ct. Rep. 136; Leonard v. Ozark Land Co. 115 U. S. 465, 29 L. ed. 445, 6 Sup. Ct. Rep. 127; Knox County v. Harshman, 132 U. S. 14, 33 L. ed. 249, 10 Sup. Ct. Rep. 8. That the circuit court, to the end that the *status quo* might be preserved pending such appeal, had the power to continue an injunction in force by virtue of its inherent equity power, is not doubtful. In Hovey v. McDonald, cited above, Mr. Justice Bradley, for the court, referring to what had been said in the Slaughter-house Cases as to the effect of an appeal, said:

"It was not decided that the court below had no power, if the purposes of justice required it, to order a continuance of the *status quo* until a decision should be made by the appellate court, or until that court should order the contrary. This power undoubtedly exists, and should always be exercised when any irremedial injury 535]*may result from the effect of the decree as rendered; but it is a discretionary power, and its exercise or nonexercise is not an appealable matter. In recognition of this power, and for the purpose of facilitating its proper exercise in certain cases, on appeals from the circuit courts, this court, by an additional rule of practice in equity, adopted in October term, 1878, declared that 'when an appeal from a final decree in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.' Rule 93."

Obviously, this may include a continuance of an injunction which would be otherwise vacated.

Plainly, the effect of continuing the injunction operated to continue in the circuit court such jurisdiction over the subject-matter of the litigation and of the parties as to enable it to preserve the *status quo* pending the appeal, including power to take cognizance of a violation of its injunction.

It does not necessarily follow that disobedience of such an injunction, intended only to preserve the *status quo* pending an appeal, may not be regarded as a contempt of the appellate jurisdiction of this court, which might be rendered nugatory by conduct calculated to remove the subject-matter of the appeal beyond its control, or by its destruction. This we need not decide, since, irrespective of any such injunction actually issued, the wilful removal beyond the reach of the court of the subject-matter of the litigation, or its destruction pending an appeal from a decree praying, among other things, an injunction to prevent such removal or destruction until the right shall be determined, is, in and of itself, a contempt *of the appellate jurisdiction of[536 this court. That such conduct may be a violation of the injunction below affords no reason why it is not also a contempt of this court. Unless this be so, a reversal of the decree would be but a barren victory, since the very result would have been brought about by the lawless act of the defendants which it was the object of the suit to prevent. See United States v. Shipp, 203 U. S. 563, 51 L. ed. 319, 27 Sup. Ct. Rep. 165, 8 A. & E. Ann. Cas. 265; Richard v. Van Meter, 3 Cranch, C. C. 214, Fed. Cas. No. 11,763; Wartman v. Wartman, Taney, 362, Fed. Cas. No. 17,210; State ex rel. Morse v. District Ct. 29 Mont. 230, 74 Pac. 412; Ex parte Kellogg, 64 Cal. 343, 344, 30 Pac. 1030; State ex rel. Coleman v. Pittsburg, 80 Kan. 710, 712, 25 L.R.A.(N.S.) 226, 133 Am. St. Rep. 227, 104 Pac. 847.

In Wartman v. Wartman, cited above, a case heard by Chief Justice Taney on the circuit, the question was whether a defendant who had parted with an alleged trust fund in his custody pending an application for an order requiring him to pay the money into court was thereby in contempt. His act was held to be in contempt of the authority of the court, as a final decree would be idle and nugatory if, pending the litigation, he should be held at liberty to put the fund beyond the reach of the process of the court.

The defendants have severally answered, and have denied under oath that they meant any contempt of this court. They say that when they were advised that the decree of the court dismissing the bill of complaint had been affirmed and an order of affirmance entered, that they honestly believed the case to be finally concluded, and that there was no reason why the order of the city council requiring the removal of the lines

of poles and wires should not be carried out. This is an excuse, but does not acquit them of a technical contempt, since the appeal must be regarded as pending and undisposed of until a mandate issues. In view, however, of the good faith of the de-
537]fendants, it is enough for the *vindication of the court under the circumstances of this case that the rule be discharged upon the payment of the costs of the proceeding.

T. L. ROUGHTON, Plff. in Err.,
v.
HARRY L. KNIGHT.

(See S. C. Reporter's ed. 537–548.)

Public lands — exchange of lands in forest reserve — power of Land Department.

1. The Land Department had the power to adopt reasonable rules and regulations for the administration of the act of June 4, 1897 (30 Stat. at L. 36, chap. 2, U. S. Comp. Stat. 1901, p. 1541), authorizing the selection of public lands in lieu of lands relinquished in a forest reserve.

[For other cases, see Public Lands, 813–815, in Digest Sup. Ct. 1908.]

Public lands — exchange of lands in forest reserve — selection — repeal of statute.

2. An owner of patented land in a forest reserve whose deed to the United States, made in contemplation of an exchange under the act of June 4, 1897, was returned because not accompanied by a selection of lieu lands, as required by the regulations and practice of the Land Department, had no vested right to the exchange which would be saved by the exception in the repealing act of March 3, 1905 (33 Stat. at L. 1264, chap. 1495, U. S. Comp. Stat. Supp. 1909, p. 581), in favor of selections theretofore made, and of existing contracts with the Secretary of the Interior.

[For other cases, see Public Lands, 813–815, in Digest Sup. Ct. 1908.]

[No. 711.]

Submitted January 6, 1911. Decided February 20, 1911.

IN ERROR to the Supreme Court of the State of California to review a decree which affirmed a decree of the Superior Court of Kern County, in that State, dismissing the bill in a suit to have a patentee of public lands decreed to hold the legal title in trust for the complainant, claiming a vested right to an exchange under the forest reserve act. Affirmed.

See same case below, 156 Cal. 123, 103 Pac. 844.

The facts are stated in the opinion.

Messrs. **E. D. F. Brady** and **W. P. Fennell** submitted the cause for plaintiff in error.

Mr. **E. O. Miller** also submitted the cause for plaintiff in error. Mr. W. H. Morrissey was on the brief.

Messrs. **S. D. Luckett** and **Charles R. Pierce** submitted the cause for defendant in error.

Mr. Justice **Lurton** delivered the opinion of the court:

The question in this case is whether the complainant below, and plaintiff in error here, has acquired a vested right to an exchange of a 160-acre tract of land owned by him, and situated inside the exterior boundary of a forest reserve, for a tract of public land of similar area, by reason of acts done in compliance with the terms of that provision of the forest law act of June 4, 1897, [30 Stat. at L. 36, chap. 2, U. S. Comp. Stat. 1901, p. 1541], providing for such exchanges. The supreme court of California sustained a demurrer and dismissed his *bill. 156 Cal. 123, 103 Pac. 844.[544 A writ of error to that court brings the case here for review as to the Federal question.

That the complainant came within the terms of the act of June 4, 1897, there can be no doubt. He owned 160 acres of patented land within the exterior lines of a public forest reservation, and was entitled to relinquish title to the United States, and receive a patent for 160 acres of public land outside the reservation, to be selected by himself. The provision of that act conferring this privilege is set out in the margin, being found in the act of 1897, (30 Stat. at L. 36,† chap. 2, U. S. Comp. Stat. 1901, p. 1541).

The contention is that he lost his right because he neglected to make a selection and thereby complete any exchange until the act extending the privilege was re-

†"That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement, not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record, or issuing the patent to cover the tract selected: Provided, further, that in cases of unperfected claims, the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."

pealed by the act of March 3, 1905, (33 Stat. at L. 1264, chap. 1495, U. S. Comp. Stat. Supp. 1909, p. 581). The repealing act is set out in the margin.††

545] *Before the repeal of the act, the plaintiff in error, in pursuance of the provisions thereof and of the regulations prescribed by the Secretary of the Interior, did these things:

He executed a deed of relinquishment to the United States, and caused the same to be duly recorded in June, 1899. He deposited this deed, together with an abstract of title, in the land office of the United States for the proper district at Visalia, California. This was in June, 1899. It is then averred that the deed and the abstract were forwarded to the Commissioner of the Land Office at Washington, and reached there about June 25, 1899, and were there retained until January 3, 1905, when they were returned to the Visalia, land office for delivery to the complainant, and were delivered to him January 9, 1905, and that no objection as to either form or sufficiency of the relinquishment was made by the Commissioner or any other official of the United States. Thus the matter stood from January 9, 1905, until March 3, when the repealing act was passed.

On March 14, 1905, eleven days after the repealing act, the plaintiff in error undertook to make a selection, and for that purpose filed his application to select the 160 acres subsequently patented to the defendant, with notice of the prior selection so made by complainant. Upon these facts he demanded that a patent should issue to him for the land so selected, but the Commissioner and the Secretary of the Interior denied power to issue any such patent, the law having been repealed before the selection was made.

The issue is a sharp one. The complainant insists that when he made and delivered his deed, with an abstract showing a clear title 546]to 160 acres *within a forest reservation, he became entitled to make a selection of 160 acres in lieu thereof at any time, and that the repeal of the act did not deprive him of the right to a patent for the land selected on March 14, 1905. The plaintiff in error does not bring himself within any of the exceptions to the repealing act. No selection actually made before the repeal has proven invalid, and there was no contract with the Secretary of the Interior to be saved from impairment, unless the acts referred to constitute, in and of themselves, such part performance as to constitute a contract with the Secretary of the Interior. That there was no such contract is evident from a consideration of the character of the exchange provision and the regulations adopted by the Secretary of the Interior, prescribing the method of carrying out the act. Upon its face the act is neither more nor less than a proposal by the government for an exchange of claims to land unperfected, or lands held under patents, situated within the exterior lines of a forest reservation, for an equal area of public land subject to entry elsewhere. The reasons for the provision are found in the disadvantages which result to such a settler or owner who had acquired his right before the creation of a reservation in the public lands surrounding him. He was thereby isolated from neighborhood association, and deprived of the advantage of schools, churches, and of increasing value to his own land from occupation by others of the lands thus devoted to reservation purposes. But the act did not prescribe the method by which one so situated might avail himself of the proposal. It was therefore competent for the Land Department to adopt rules and regulations for the administration of the act in this particular, and this was done, and those rules are found in 24 Land Dec. 592, 593.

In Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 309, 47 L. ed. 1064, 1070, 23 Sup. Ct. Rep. 692, these regulations are referred to as reasonable and valid rules, *"entitled to respect and obe-[547 dience." The regulations which have a bearing here are rules 14, 15, and 16.

To take advantage of the proposal contained in this act, the applicant must select the land he wishes to receive in lieu, and file a sufficient relinquishment of land within a forest reserve. Manifestly there must be an acceptance of the relinquishment by someone authorized to decide upon its suffi-

††"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the acts of June fourth, eighteen hundred and ninety-seven, June sixth, nineteen hundred, and March third, nineteen hundred and one, are hereby repealed so far as they provide for the relinquishment, selection, and patenting of lands in lieu of tracts covered by an unperfected bona fide claim or patent within a forest reserve, but the validity of contracts entered into by the Secretary of the Interior prior to the passage of this act shall not be impaired: Provided, that selections heretofore made in lieu of lands relinquished to the United States may be perfected and patents issued therefor the same as though this act had not been passed; and if for any reason not the fault of the party making the same, any pending selection is held invalid, another selection for a like quantity of land may be made in lieu thereof."

ciency, and an assent to the particular selection made in lieu.

It was not unreasonable that, in the administration of this act, the Land Department should limit the authority of any official to accept a relinquishment. As far back as April 14, 1899, the Secretary of the Interior construed the act and made the regulation before mentioned. In Hyde's Case, 28 Land Dec. 284, he instructed the Commissioner of the General Land Office that "the officers of the Land Department are not authorized to accept, consider, or pass upon a relinquishment of the tract within the limits of a forest reservation, except in connection with a proffered or tendered selection of other lands in lieu thereof."

In the case of Re Tevis, February 28, 1900, 29 Land Dec. 575, 576, the Secretary instructed the Commissioner in the same terms, saying: "Paragraphs 15 and 16 of the rules and regulations issued June 30, 1897, under said act (24 Land Dec. 589, 592), clearly require that in all cases of exchange of lands under said act, whether the land relinquished be 'a tract covered by an unperfected bona fide claim or by a patent,' an application to select lieu lands must accompany the relinquishment of the lands within the limits of a forest reservation."

In a ruling made February 24, 1900, Re Moses Land Scrip & Realty Co. 34 Land Dec. 458, in connection with the application for an exchange, the facts were nearly identical with those in the present case. The applicant filed his deed of relinquishment with abstract of title on January 12, 1905. He made no selection until March 30, 1905, a date subsequent to the repeal [548]of the *act. The proposal was rejected. Upon a review by the Secretary, the rejection was sustained, upon the ground that "no contract arises until a selection is made and the conveyance of the base tract filed in the Land Department. . . . Under the act of June 4, 1897, it is the filing of the deed in the local land office and the selection of land in lieu of that relinquished which initiates the exchange. Until that time the exchange is not initiated and is merely a purpose in the private owner's mind."

The regulation and practice of the Land Department in requiring that a deed of relinquishment shall be accompanied by a selection was not unreasonable. The return to this complainant of his deed of relinquishment several months before the repeal of the act was obviously due to his delay in presenting a case for the consideration of the Department.

That a proposal for an exchange of land within a forest reservation for lands outside may be withdrawn before acceptance is an obvious proposition. There having been no contract in force between this appellant and the Secretary of the Interior at the date of the repeal, he had no right to save under the exceptions in the repealing act.

There was no error in the judgment of the California Supreme Court, and it is therefore affirmed.

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*CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY and Chicago, Burlington, & Quincy Railway Company, Plffs. in Err., [549

v.

CHARLES L. McGUIRE.

(See S. C. Reporter's ed. 549–575.)

Constitutional law — freedom to contract — police power — railway relief fund — acceptance of benefits.

1. The freedom of contract is not unconstitutionally infringed by amending the provisions of Iowa Code, § 2071, which define the liability of railway corporations for injuries resulting from negligence and mismanagement in the use and operation of their railways, so that a railway company, when sued on such liability, is precluded from making the defense that a recovery is barred by the acceptance of benefits under a contract of membership in its relief department.

[For other cases, see Constitutional Law, 891–894, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification of railway employees — railway relief.

2. An unconstitutional discrimination is not made by amending Iowa Code, § 2071, which defined the liability of railway corporations for injuries resulting from negligence or mismanagement in the use and operation of their railways, so that a railway company, when sued on such liability, may not raise the defense that a recovery is barred by the acceptance of benefits under a contract of membership in its relief

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Note.—On the constitutionality of statutes restricting contracts and business—see note to State v. Loomis, 21 L.R.A. 789.

For a discussion of police power generally—see notes to State v. Marshall, 1 L.R.A. 51; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; State v. Schlemmer, 10 L.R.A. 135; and Barbier v. Connolly, 28 L. ed. U. S. 923.

As to the validity of class legislation—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, supra.

On constitutionality of statute forbidding deduction in damage suit because of insurance branch—see note to McGuire v. Chicago, B. & Q. R. Co. 33 L.R.A. (N.S.) 706.

department, although this provision of the amendatory act applies only to those employees who were embraced within the provisions of the original statute, and to the enforcement of the particular liabilities which that statute defined, and the benefits of such statute were confined to those engaged in the hazardous business of operating railroads.

[For other cases, see Constitutional Law, 286–291, in Digest Sup. Ct. 1908.]

[No. 62.]

Argued and submitted December 5, 6, 1910. Decided February 20, 1911.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment which, on a second appeal, affirmed a judgment of the District Court of Appanoose County, in that state, in favor of plaintiff in an action by a railway employee to recover damages for injuries received through negligence imputable to the company. Affirmed.

See same case below, 131 Iowa, 340, — L.R.A.(N.S.) —, 108 N. W. 902; on second appeal, 138 Iowa, 664, 116 N. W. 801.

The facts are stated in the opinion.

Mr. **John J. Herrick** argued the cause, and, with Mr. Chester M. Dawes, filed a brief for plaintiffs in error:

The duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked, to declare unconstitutional and void any act of the legislature which impairs or destroys any right secured by the Constitution.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 107, 46 L. ed. 92, 107, 22 Sup. Ct. Rep. 30.

Corporations are persons within the meaning of the 14th Amendment, and for that reason cannot be deprived by an act of the legislature of any right guaranteed by it, any more than natural persons.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255.

Freedom of contract is one of the inalienable rights which is protected by the provision of the 14th Amendment, that no state shall deprive any person of life, liberty, or property without due process of law; and for that reason any statute of the state which prohibits its exercise should be declared void by the court, unless the act can be sustained as a valid exercise of the police power.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206.

The contract of accord and satisfaction, resulting from the acceptance of benefits under the contract of membership, was a contract based on mutual considerations, and valid and enforceable as lawfully made by the parties, in the exercise of their power to contract.

Donald v. Chicago, B. & Q. R. Co. 93 Iowa, 284, 33 L.R.A. 492, 61 N. W. 971; Maine v. Chicago, B. & Q. R. Co. 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315; Pittsburgh, C. C. & St. L. R. Co. v. Moore, 152 Ind. 345, 44 L.R.A. 638, 53 N. E. 290; Pittsburg, C. C. & St. L. R. Co. v. Cox, 55 Ohio St. 497, 35 L.R.A. 507, 45 N. E. 641; Chicago, B. & Q. R. Co. v. Bell, 44 Neb. 44, 62 N. W. 314; Beck v. Pennsylvania R. Co. 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908; Johnson v. Philadelphia & R. R. Co. 163 Pa. 127, 29 Atl. 854; Ringle v. Pennsylvania R. Co. 164 Pa. 529, 44 Am. St. Rep. 628, 30 Atl. 492; Otis v. Pennsylvania Co. 71 Fed. 137; Hamilton v. St. Louis, K. & N. W. R. Co. 118 Fed. 94; Atlantic Coast Line R. Co. v. Dunning, 94 C. C. A. 128, 166 Fed. 850; Day v. Atlantic Coast Line R. Co. 102 C. C. A. 654, 179 Fed. 26; Owens v. Baltimore & O. R. Co. 1 L.R.A. 75, 35 Fed. 715; Maryland use of Black v. Baltimore & O. R. Co. 36 Fed. 655; Martin v. Baltimore & O. R. Co. 41 Fed. 125; Vickers v. Chicago, B. & Q. R. Co. 71 Fed. 139; Shaver v. Pennsylvania Co. 71 Fed. 931; State ex rel. Sheets v. Pittsburg, C. C. & St. L. R. Co. 68 Ohio St. 9, 64 L.R.A. 405, 96 Am. St. Rep. 635, 67 N. E. 93; Cox v. Pittsburgh, C. C. & St. L. R. Co. 1 Ohio N. P. 213, 2 Ohio S. & C. P. Dec. 594; Pittsburgh, C. C. & St. L. R. Co. v. Hosea, 152 Ind. 412, 53 N. E. 419; Pittsburgh, C. C. & St. L. R. Co. v. Gipe, 160 Ind. 360, 65 N. E. 1034; Lease v. Pennsylvania Co. 10 Ind. App. 47, 37 N. E. 423; Clinton v. Chicago, B. & Q. R. Co. 60 Neb. 692, 84 N. W. 90; Chicago, B. & Q. R. Co. v. Curtis, 51 Neb. 442, 66 Am. St. Rep. 456, 71 N. W. 42; Oyster v. Burlington Relief Dept. 65 Neb. 789, 59 L.R.A. 291, 91 N. W. 699; Eckman v. Chicago, B. & Q. R. Co. 169 Ill. 312, 38 L.R.A. 750, 48 N. E. 496; Fivey v. Pennsylvania R. Co. 67 N. J. L. 627, 91 Am. St. Rep. 445, 52 Atl. 472; Fuller v. Baltimore & O. Employes' Relief Asso. 67 Md. 433, 10 Atl. 237; Petty v. Brunswick & W. R. Co. 109 Ga. 666, 35 S. E. 82; Carter v. Brunswick & W. R. Co. 115 Ga. 853, 42 S. E. 239; Harrison v. Alabama Midland R. Co. 144 Ala. 246, 40 So. 394, 6 A. & E. Ann. Cas. 804.

The police power of the state is limited to such enactments as have some reasonable tendency to promote the public health, safety, morals, or welfare. In order to establish the validity of a law enacted under the police power, it must appear to the court, 1st, that the end in view is the promotion of some or all of these objects; and, 2d, that the law is appropriate and reasonably necessary to the end.

Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 689, 699, 43 L. ed. 858, 861, 864, 19 Sup. Ct. Rep. 565; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764.

The statute only authorizes a recovery in suits brought (1) against railway corporations; (2) by a limited class of the employees of such corporations,—those whose ordinary duties are connected with the operation of the railroad; and (3) for damages for injury or death resulting from negligence connected with the operation of the railroad,—the movement of trains, etc., over the tracks of the company.

Deppe v. Chicago, R. I. & P. R. Co. 36 Iowa, 52; Malone v. Burlington, C. R. & N. R. Co. 65 Iowa, 417, 54 Am. Rep. 11, 21 N. W. 756; Akeson v. Chicago, B. & Q. R. Co. 106 Iowa, 54, 75 N. W. 676; Reddington v. Chicago, M. & St. P. R. Co. 108 Iowa, 96, 78 N. W. 800; Hughes v. Iowa C. R. Co. 128 Iowa, 207, 103 N. W. 339; Dunn v. Chicago, R. I. & P. R. Co. 130 Iowa, 580, 6 L.R.A.(N.S.) 452, 107 N. W. 616, 8 A. & E. Ann. Cas. 226.

It follows that in all that class of cases not within the provisions of the particular statute, in which there was a common-law liability for negligence,—the large class of cases in which the fellow-servant rule did not apply,—there could be a recovery at common law.

Baldwin v. St. Louis, K. & N. W. R. Co. 75 Iowa 297, 9 Am. St. Rep. 479, 39 N. W. 507; McQueeny v. Chicago, M. & St. P. R. Co. 120 Iowa, 524, 94 N. W. 1124; Beresford v. American Coal Co. 124 Iowa, 34 70 L.R.A. 256, 98 N. W. 902; Klaffke v. Bettendorf Axle Co. 125 Iowa, 223, 100 N. W. 1116; Scott v. Iowa Teleph. Co. 126 Iowa, 527, 102 N. W. 432.

Even if it is assumed that the "end in view" was to promote the public safety, the prohibition was not appropriate and reasonably necessary for that purpose.

Pittsburg, C. C. & St. L. R. Co. v. Cox, 55 Ohio St. 513, 35 L.R.A. 507, 45 N. E. 641.

Neither the rule of the defendant's relief department, nor the contract of membership, nor the contract of release, which, under the decisions, results from the acceptance of the benefits after the cause of action has accrued, limits in any way the company's liability for negligence.

Donald v. Chicago, B. & Q. R. Co. 93 Iowa, 284, 33 L.R.A. 492, 61 N. W. 971; Maine v. Chicago, B. & Q. R. Co. 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315; Pittsburgh, C. C. & St. L. R. Co. v. Moore, 152 Ind. 345, 44 L.R.A. 638, 53 N. E. 290; Pittsburg, C. C. & St. L. R. Co. v. Cox, 55 Ohio St. 497, 35 L.R.A. 507, 45 N. E. 641; Chicago, B. & Q. R. Co. v. Bell, 44 Neb. 44, 62 N. W. 314; Beck v. Pennsylvania R. Co. 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908; Johnson v. Philadelphia & R. R. Co. 163 Pa. 127, 29 Atl. 854; Ringle v. Pennsylvania R. Co. 164 Pa. 529, 44 Am. St. Rep. 628, 30 Atl. 492; Otis v. Pennsylvania Co. 71 Fed. 137; Hamilton v. St. Louis, K. & N. W. R. Co. 118 Fed. 94; Atlantic Coast Line R. Co. v. Dunning, 94 C. C. A. 128, 166 Fed. 850; Day v. Atlantic Coast Line R. Co. 102 C. C. A. 654, 179 Fed. 26.

There is nothing in the rule of the defendant's relief department, or the contract of release, that, under the decision, results from the acceptance of the benefits on the terms of the membership contract, which is detrimental to the public welfare.

Donald v. Chicago, B. & Q. R. Co. 93 Iowa, 284, 33 L.R.A. 492, 61 N. W. 971; Maine v. Chicago, B. & Q. R. Co. 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315; Owens v. Baltimore & O. R. Co. 1 L.R.A. 75, 35 Fed. 715; Maryland use of Black v. Baltimore & O. R. Co. 36 Fed. 655; Martin v. Baltimore & O. R. Co. 41 Fed. 125; Otis v. Pennsylvania Co. 71 Fed. 136; Vickers v. Chicago, B. & Q. R. Co. 71 Fed. 139; Shaver v. Pennsylvania Co. 71 Fed. 931; Hamilton v. St. Louis, K. & N. W. R. Co. 118 Fed. 92; Atlantic Coast Line Co. v. Dunning, 94 C. C. A. 128, 166 Fed. 850; Day v. Atlantic Coast Line R. Co. 102 C. C. A. 654, 179 Fed. 26; Johnson v. Philadelphia & R. R. Co. 163 Pa. 127, 29 Atl. 854; Ringle v. Pennsylvania R. Co. 164 Pa. 529, 44 Am. St. Rep. 628, 30 Atl. 492; Pittsburg, C. C. & St. L. R. Co. v. Cox, 55 Ohio St. 497, 35 L.R.A. 507, 45 N. E. 641; State ex rel. Sheets v. Pittsburg, C. C. & St. L. R. Co. 68 Ohio St. 9, 64 L.R.A. 405, 96 Am. St. Rep. 635, 67 N. E. 93; Cox v. Pittsburgh, C. C. & St. L. R. Co. 1 Ohio N. P. 213, 2 Ohio S. & C. P. Dec. 594; Pittsburgh, C. C. & St. L. R. Co. v. Moore, 152 Ind. 345, 44 L.R.A. 638, 53 N. E. 290; Pittsburgh,

C. C. & St. L. R. Co. v. Hosea, 152 Ind. 412, 53 N. E. 419; Pittsburgh, C. C. & St. L. R. Co. v. Gipe, 160 Ind. 360, 65 N. E. 1034; Lease v. Pennsylvania Co. 10 Ind. App. 47, 37 N. E. 423; Chicago, B. & Q. R. Co. v. Bell, 44 Neb. 44, 62 N. W. 314; Clinton v. Chicago, B. & Q. R. Co. 60 Neb. 692, 84 N. W. 90; Chicago, B. & Q. R. Co. v. Curtis, 51 Neb. 442, 66 Am. St. Rep. 456, 71 N. W. 42; Oyster v. Burlington Relief Dept. 65 Neb. 789, 59 L.R.A. 291, 91 N. W. 699; Eckman v. Chicago, B. & Q. R. Co. 169 Ill. 312, 38 L.R.A. 750, 48 N. E. 496; Beck v. Pennsylvania R. Co. 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908; Fivey v. Pennsylvania R. Co. 67 N. J. L. 627, 91 Am. St. Rep. 445, 52 Atl. 472; Fuller v. Baltimore & O. Employes' Relief Asso. 67 Md. 433, 10 Atl. 237; Petty v. Brunswick & W. R. Co. 109 Ga. 666, 35 S. E. 82; Carter v. Brunswick & W. R. Co. 115 Ga. 853, 42 S. E. 239; Harrison v. Alabama Midland R. Co. 144 Ala. 246, 40 So. 394, 6 A. & E. Ann. Cas. 804.

The act is an unauthorized interference with the freedom of contract guaranteed by the 14th Amendment, and for that reason void.

Cox v. Pittsburgh, C. C. & St. L. R. Co. 1 Ohio N. P. 213, 2 Ohio S. & C. P. Dec. 594; Farrow v. Pittsburgh, C. C. & St. L. R. Co. 7 Ohio N. P. 606, 5 Ohio S. & C. P. Dec. 582; Shaver v. Pennsylvania Co. 71 Fed. 931; Sturgiss v. Atlantic Coast Line R. Co. 80 S. C. 167, 60 S. E. 939, 61 S. E. 261; Atlantic Coast Line R. Co. v. Dunning, 94 C. C. A. 128, 166 Fed. 850; Pittsburg, C. C. & St. L. R. Co. v. Cox, 55 Ohio St. 497, 35 L.R.A. 507, 45 N. E. 641; Pittsburgh, C. C. & St. L. R. Co. v. Moore, 152 Ind. 345, 44 L.R.A. 638, 53 N. E. 290.

A classification for the purpose of legislation cannot be made arbitrarily, but must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is made.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 41 L. ed. 666, 668, 17 Sup. Ct. Rep. 255; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; Duncan v. Missouri, 152 U. S. 377, 382, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 696, 43 L. ed. 858, 863, 19 Sup. Ct. Rep. 565; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064.

Mr. **A. J. Baker** submitted the cause for defendant in error. Messrs. C. F. Howell and C. H. Elgin were on the brief:

While it is an imperative duty, from which no court will shrink, to declare void any statute the unconstitutionality of which is made apparent, due regard to the boundary between the legislative and judicial departments of our government requires that this prerogative be exercised with the greatest caution, and only after every reasonable presumption has been indulged in favor of the validity of the act.

McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 33 L.R.A.(N.S.) 706, 108 N. W. 902; Sioux City Street R. Co. v. Sioux City, 78 Iowa, 371, 43 N. W. 224, 138 U. S. 98, 34 L. ed. 898, 11 Sup. Ct. Rep. 226; Sherman v. Smith, 1 Black, 587, 17 L. ed. 163; Miller v. New York, 15 Wall. 478, 21 L. ed. 98; Merchants' Union Barb Wire Co. v. Brown, 64 Iowa, 275, 20 N. W. 434; Holyoke Water-Power Co. v. Lyman, 15 Wall. 500, 21 L. ed. 133; Sinking Fund Cases, 99 U. S. 700, 727, 25 L. ed. 496, 504; Oliver Lee & Co's Bank v. Talcott, 19 N. Y. 146; Stewart v. Polk County, 30 Iowa, 9, 1 Am. Rep. 238; Flint & F. Pl. Road Co. v. Woodhull, 25 Mich. 99, 12 Am. Rep. 233; Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159; Evans v. Job, 8 Nev. 322; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; Duncombe v. Prindle, 12 Iowa, 1; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 23 L.R.A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; Ex parte Davis, 21 Fed. 396; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 344, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; Missouri P. R. Co. v. Castle, 97 C. C. A. 124, 172 Fed. 841; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176.

The Supreme Court of the United States may not consider evils which it is supposed will arise from the execution of the law, whether they be real or imaginary, in passing on the constitutionality of any given law; nor is it its province to pass upon the policy, wisdom, or justice of the statute, or the expediency of its enactment.

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 492, 52 L. ed. 306, 28 Sup. Ct. Rep. 141; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; State v. Evans, 130 Wis. 381, 110 N. W. 241; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Kiley v. Chicago, M. & St. P. R. Co. 138 Wis. 215, 119 N. W. 309, 120 N. W. 756.

Liberty of contract is not a universal right, and may be abridged when required for the public good.

McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; People v. Erie R. Co. 198 N. Y. 369, 29 L.R.A.(N.S.) 240, 91 N. E. 849, 19 A. & E. Ann. Cas. 811; Welsh v. Chicago, B. & Q. R. Co. 53 Iowa, 632, 6 N. W. 13; Jones v. Galena & C. Union R. Co. 16 Iowa, 6; Missouri, K. & T. R. Co. v. McCann, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755; Smeltzer v. St. Louis & S. F. R. Co. 158 Fed. 649; Brush v. Sabula, A. & D. R. Co. 43 Iowa, 554; Lucas v. Burlington, C. R. & N. R. Co. 112 Iowa, 594, 84 N. W. 673; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; McCune v. Burlington, C. R. & N. R. Co. 52 Iowa, 602, 3 N. W. 615; Rose v. Des Moines Valley R. Co. 39 Iowa, 246; Solan v. Chicago, M. & St. P. R. Co. 95 Iowa, 260, 28 L.R.A. 718, 58 Am. St. Rep. 430, 63 N. W. 692, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; Central Trust Co. v. Sloan, 65 Iowa, 656, 22 N. W. 916; Davis v. Chicago, R. I. & P. R. Co. 83 Iowa, 744, 49 N. W. 77.

Analogous statutory provisions, even more drastic, have been upheld.

St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 42 L. ed. 611, 17 Sup. Ct. Rep. 243; Rodemacher v. Milwaukee & St. P. R. Co. 41 Iowa, 297, 20 Am. Rep. 592; Small v. Chicago, R. I. & P. R. Co. 50 Iowa, 338; Garrett v. Western U. Teleg. Co. 83 Iowa, 257, 49 N. W. 88; Lewis v. Burlington Ins. Co. 71 Iowa, 97, 32 N. W. 190; Boyd v. Cedar Rapids Ins. Co. 70 Iowa, 325, 30 N. W. 585; Ross v. Hawkeye Ins. Co. 83 Iowa, 586, 50 N. W. 47; Holbrook Bros. v. Mill Owners' Mut. Ins. Co. 86 Iowa, 255, 53 N. W. 229; State v. Chovin, 7 Iowa, 204; Hoffbauer v. Davenport & N. W. R. Co. 52 Iowa, 342, 35 Am. Rep. 278, 3 N. W. 121; Everett v. Chicago, R. I. & P. R. Co. 69 Iowa, 15, 58 Am. Rep. 207, 28 N. W. 410; Curl v. Chicago, R. I. & P. R. Co. 63 Iowa, 417, 16 N. W. 69, 19 N. W. 308; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Hancock v. Yaden, 121 Ind. 366, 6 L.R.A. 576, 16 Am. St. Rep. 396, 23 N. E. 253; Reilly v. Franklin Ins. Co. 43 Wis. 449, 28 Am. Rep. 552; White v. Connecticut Mut. L. Ins. Co. 4 Dill. 177, Fed. Cas. No. 17,545; Emery v. Piscataqua F. & M. Ins. Co. 52 Me. 322; Chamberlain v. New Hampshire F. Ins. Co. 55 N. H. 249; Equitable Life Assur. Soc. v. Clements (Equitable Life Assur. Soc. v. Pettus) 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; Smeltzer v. St. Louis & S. F. R. Co. 158 Fed. 659; Missouri, K. & T. R. Co. v. McCann, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755; Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 9 L.R.A. 45, 24 N. E. 1072.

The legislature has a discretion vested in it ordinarily to determine when an act is necessary in the exercise of the reserve and police power. The legislature is conclusively presumed to have made a thorough investigation as to the necessity of each statutory amendment.

Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Kiley v. Chicago, M. & St. P. R. Co. 138 Wis. 215, 119 N. W. 309, 120 N. W. 756; Watson v. St. Louis, I. M. & S. R. Co. 169 Fed. 947; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; People v. Budd, 117 N. Y. 7, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670; Charles River Bridge v. Warren Bridge, 11 Pet. 605, 9 L. ed. 847; Ohio Life Ins. & T. Co. v. De Bolt, 16 How. 428, 14 L. ed. 1002; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 104, 43 L. ed. 912, 19 Sup. Ct. Rep. 609; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; Lowe v. Kansas, 163 U. S. 81, 41 L. ed. 78,

16 Sup. Ct. Rep. 1031; Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Jones v. Brim, 165 U. S. 180, 41 L. ed. 677, 17 Sup. Ct. Rep. 282; Western U. Teleg. Co. v. Indiana, 165 U. S. 304, 41 L. ed. 725, 17 Sup. Ct. Rep. 345; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Savings & L. Soc. v. Multnomah County, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Tinsley v. Anderson, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Skinner v. Garnett Gold Min. Co. 96 Fed. 735; Daniels v. Hilgard, 77 Ill. 640, 15 Mor. Min. Rep. 280; Com. v. Hamilton Mfg. Co. 120 Mass. 383; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; State v. Wilson, 7 Kan. App. 428, 53 Pac. 371; Knoxville Iron Co. v. Harbison, 183 U. S. 17, 46 L. ed. 57, 22 Sup. Ct. Rep. 1.

All powers not delegated to United States by the terms of the Federal Constitution and its Amendments, or prohibited by it to the states, are reserved to the states. Subject to the authority thus expressly or by necessary inference delegated to the Federal government, the state has sovereign legislative power over all subjects, except such as are withheld from it by the Constitution of the state itself.

McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 349, 33 L.R.A.(N.S.) 706, 108 N. W. 902; Hawkeye Ins. Co. v. French, 109 Iowa, 588, 80 N. W. 660; New York v. Miln, 11 Pet. 102, 9 L. ed. 648; Watson v. St. Louis, I. M. & S. R. Co. 169 Fed. 947; Missouri P. R. Co. v. Castle, 97 C. C. A. 124, 172 Fed. 841; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; Re Meador, 1 Abb. (U. S.) 317, Fed. Cas. No. 9,375; Wadleigh v. Develling, 1 Ill. App. 596; Moor v. Veazie, 32 Me. 343, 52 Am. Rep. 655; Beyman v. Black, 47 Tex. 558; Boyd v. Ellis, 11 Iowa, 97; Stewart v. Polk County, 30 Iowa, 9, 1 Am. Rep. 238; Purczell v. Smidt, 21 Iowa, 540; Morrison v. Springer, 15 Iowa, 324; Boyer v. Kinnick, 90 Iowa, 74, 57 N. W. 691.

If, under any possible state of facts, the act would be constitutional and valid, the court is bound to presume that such condition existed.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; State v. Peckham, 3 R. I. 289; Re Ten Hour Law, 24 R. I. 603, 61 L.R.A. 612, 54 Atl. 602; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 350, 33 L.R.A.(N.S.) 706, 108 N. W. 902.

The mere fact that legislation is special, and made to apply to certain persons, and not to others, does not affect its validity, if it be so made that all persons subject to its terms are treated alike under like circumstances and conditions.

Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Com v. Interstate Consol. Street R. Co. 187 Mass. 436, 11 L.R.A.(N.S.) 973, 73 N. E. 530, 2 A. & E. Ann. Cas. 419; State v. Nelson, 52 Ohio St. 88, 26 L.R.A. 317, 39 N. E. 22; People v. Smith, 108 Mich. 527, 32 L.R.A. 853, 62 Am. St. Rep. 715, 66 N. W. 382; People v. Walbridge, 6 Cow. 512; Dugger v. Mechanics' & T. Ins. Co. 95 Tenn. 245, 28 L.R.A. 796, 32 S. W. 5; Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; Kane v. Erie R. Co. 68 L.R.A. 788, 67 C. C. A. 653, 133 Fed. 681; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; Herrick v. Minneapolis & St. L. R. Co. 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; Broadfoot v. Fayetteville, 121 N. C. 422, 39 L.R.A. 245, 61 Am. St. Rep. 668, 28 S. E. 515; Pittsburgh, C. C. & St. L. R. Co. v. Montgomery, 152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; State v. Tower, 185 Mo. 79, 68 L.R.A. 402, 84 S. W. 10; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; State v. Brown & S. Mfg. Co. 18 R. I. 16, 17 L.R.A. 856, 25 Atl. 246; People v. Bellet, 99 Mich. 151, 22 L.R.A. 696, 41 Am. St. Rep. 589, 57 N. W. 1094; McAunich v. Mississippi & M. R. Co. 20 Iowa, 338; Kilpatrick v. Grand Trunk R. Co. 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531; Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Hancock v. Yaden, 121 Ind. 366, 6 L.R.A. 576, 16 Am. St. Rep. 396, 23 N. E. 253; Shaffer v. Union Min. Co. 55 Md. 74, 15 Mor. Min. Rep. 59; Kiley v. Chicago, M. & St. P. R. Co. 138 Wis. 215, 119 N. W. 309, 120 N. W. 756; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; People v. Havnor, 149 N. Y. 205, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989;

Peirce v. Van Dusen, 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; Illinois C. R. Co. v. Crider, 91 Tenn. 501, 19 S. W. 618; Butte v. Paltrovich, 30 Mont. 18, 104 Am. St. Rep. 698, 75 Pac. 521; Gano v. Minneapolis & St. L. R. Co. 114 Iowa, 719, 55 L.R.A. 263, 89 Am. St. Rep. 393, 87 N. W. 714; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 104, 43 L. ed. 912, 19 Sup. Ct. Rep. 609.

The Temple amendment under consideration was properly enacted in the exercise of the police power residing in the state of Iowa at the time it was exercised.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Shelley v. St. Charles County, 5 McCrary, 474, 17 Fed. 909; Farmers' Loan & T. Co. v. Stone, 20 Fed. 273; Sarony v. Burrow-Giles Lithographic Co. 17 Fed. 591; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 344, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; Ex parte Davis, 21 Fed. 396; McAunich v. Mississippi & M. R. Co. 20 Iowa, 343; Deppe v. Chicago, R. I. & P. R. Co. 36 Iowa, 52; Iowa Electric Medical College Asso. v. Schrader, 87 Iowa, 668, 20 L.R.A. 355, 55 N. W. 24; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Miller v. Chicago, B. & Q. R. Co. 65 Fed. 305; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Jones v. Galena & C. Union R. Co. 16 Iowa, 6; Welsh v. Chicago, B. & Q. R. Co. 53 Iowa, 632, 6 N. W. 13; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Brush v. Sabula, A. & D. R. Co. 43 Iowa, 554; Davis v. Chicago, R. I. & P. R. Co. 83 Iowa, 744, 49 N. W. 77; Lucas v. Burlington, C. R. & N. W. R. Co. 112 Iowa, 594, 84 N. W. 673; McCune v. Burlington, C. R. & N. R. Co. 52 Iowa, 602, 3 N. W. 615; Rose v. Des Moines Valley R. Co. 39 Iowa, 246; Solan v. Chicago, M. & St. P. R. Co. 95 Iowa, 260, 28 L.R.A. 718, 58 Am. St. Rep. 430, 63 N. W. 692; Central Trust Co. v. Sloan, 65 Iowa, 656, 22 N. W. 916; Rodemacher v. Milwaukee & St. P. R. Co. 41 Iowa, 297, 20 Am. Rep. 592; Small v. Chicago, R. I. & P. R. Co. 50 Iowa, 338; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; Dayton Coal & I. Co. v. Barton, 183 U. S. 23, 46 L. ed. 61, 22 Sup. Ct. Rep. 5; Barron v. Burnside, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Litcheld Coal Co. v. Taylor, 81 Ill. 590, 10 Mor. Min. Rep. 684; Com. v. Alger, 7 Cush. 53; Com. v. Hamilton Mfg. Co. 120 Mass. 383; Avent Beattyville Coal Co. v. Com. 96 Ky. 218, 28 L.R.A. 273, 28 S. W. 502; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; 6 Words & Phrases, pp. 5, 424; People v. Budd, 117 N. Y. 1, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670; State v. Harrington, 68 Vt. 622, 34 L.R.A. 100, 35 Atl. 515; State v. Reynolds, 77 Conn. 131, 58 Atl. 755; Mill, Liberty, chap. 4; Powell v. Com. 114 Pa. 265, 60 Am. Rep. 350, 7 Atl. 913, 7 Am. Crim. Rep. 32, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Oil City v. Oil City Trust Co. 151 Pa. 454, 31 Am. St. Rep. 770, 25 Atl. 124; Crowley v. Christensen, 137 U. S. 89, 34 L. ed. 621, 11 Sup. Ct. Rep. 13; Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 566, 12 L.R.A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76; Garrett v. Aby, 47 La. Ann. 630, 17 So. 238; Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; State v. Tower, 185 Mo. 79, 68 L.R.A. 402, 84 S. W. 10; Cooley, Const. Lim. chap. 7; Winter v. Jones, 10 Ga. 190, 54 Am. Dec. 379; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; Re Converse, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191; Mikkelson v. Truesdale, 63 Minn. 137, 65 N. W. 260; Lake Shore & M. S. R. Co. v. Spangler, 44 Ohio St. 471, 58 Am. Rep. 833, 8 N. E. 467; Kane v. Erie R. Co. 68 L.R.A. 788, 67 C. C. A. 653, 133 Fed. 681; Frisbie v. United States, 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586.

The opportunities of the employer and

employed are not equal,—they are not on the same footing.

Kilpatrick v. Grand Trunk R. Co. 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531; Freund, Pol. Power, 500–503; Archer v. James, 2 Best & S. 73, 31 L. J. Q. B. N. S. 153, 8 Jur. N. S. 166, 6 L. T. N. S. 167, 10 Week. Rep. 489; Hancock v. Yaden, 121 Ind. 366, 6 L.R.A. 576, 16 Am. St. Rep. 396, 23 N. E. 255.

The right of the state to regulate liberty of contract is peculiarly applicable to corporations.

New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419, 64 Ark. 83, 37 L.R.A. 504, 62 Am. St. Rep. 154, 40 S. W. 705; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; Dayton Coal & I. Co. v. Barton, 183 U. S. 23, 46 L. ed. 61, 22 Sup. Ct. Rep. 5; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Herrick v. Minneapolis & St. L. R. Co. 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413; State v. Brown & S. Mfg. Co. 18 R. I. 16, 17 L.R.A. 856, 25 Atl. 246; Pittsburgh, C. & St. L. R. Co. v. Lyon, 123 Pa. 140, 2 L.R.A. 489, 10 Am. St. Rep. 517, 16 Atl. 607; State v. Peel Splint Coal Co. 36 W. Va. 802, 17 L.R.A. 385, 15 S. E. 1000; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; Skinner v. Garnett Gold Min. Co. 96 Fed. 735; Union P. R. Co. v. Mason City & Ft. D. R. Co. 64 C. C. A. 348, 128 Fed. 238; Com. v. New York, L. E. & W. R. Co. 129 Pa. 463, 15 Am. St. Rep. 724, 18 Atl. 412; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; Sioux City Street R. Co. v. Sioux City, 78 Iowa, 746, 39 N. W. 498.

Special legislation affecting the rights and liabilities of railroad companies, or a distinct class or kind of corporations, does not constitute a denial of the equal protection of the laws, simply because the same regulation or restriction is not extended over other corporations or other kinds of business.

St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Peoria, D. & E. R. Co. v. Duggan, 109 Ill. 537, 50 Am. Rep. 619; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; Gano v. Minneapolis & St. L. R. Co. 114 Iowa, 719, 55 L.R.A. 263, 89 Am. St. Rep. 393, 87 N. W. 714; Cameron v. Chicago, M. & St. P. R. Co. 63 Minn. 384, 31 L.R.A. 553, 65 N. W. 652; Missouri, K. & T. R. Co. v. Simonson, 64 Kan. 802, 57 L.R.A. 765, 91 Am. St. Rep. 248, 68 Pac. 653; Farmers & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; Campbell v. Missouri P. R. Co. 121 Mo. 340, 25 L.R.A. 175, 42 Am. St. Rep. 530, 25 S. W. 936; State v. Nelson, 52 Ohio, 88, 26 L.R.A. 317, 39 N. E. 22; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; Cincinnati Street R. Co. v. Snell, 193 U. S. 30, 48 L. ed. 604, 24 Sup. Ct. Rep. 319; Iowa L. Ins. Co. v. Lewis, 187 U. S. 335, 47 L. ed. 204, 23 Sup. Ct. Rep. 126.

Mr. Justice **Hughes** delivered the opinion of the court:

Charles L. McGuire, the defendant in error, while acting as a brakeman in the service of the Chicago, Burlington, & Quincy Railroad Company, in Iowa, in the year 1900, received injuries through negligence imputable to the company, and recovered judgment in the district court of that state for the sum of $2,000. By stipulation, the Chicago, Burlington, & Quincy Railway Company *was joined[560 in the judgment. It was affirmed by the supreme court of the state of Iowa, and the companies bring this writ of error.

The question presented is with respect to the validity of § 2071 of the Code of Iowa, as amended in the year 1898, which was held to preclude the railroad company from making the defense that recovery was barred by the acceptance of benefits under a contract of membership in its relief department.

The section in its original form was as follows:

"Every corporation operating a railway

shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employees thereof, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

The amendment of 1898 added the following provision:

"Nor shall any contract of insurance relief, benefit or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation, or any other person or association acting for such corporation, nor shall the acceptance of any such insurance relief, benefit or indemnity by the person injured, his widow, heirs, or legal representatives, after the injury, from such corporation, person, or association, constitute any bar or defense to any cause of action brought under the provisions of this section; but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to injuries received."

The question arose upon demurrer to the 561]defense in the *answer of the railroad company, which asserted the bar denied by the statute. This defense, in substance, alleged that in November, 1900, and prior to his injury, the defendant in error had voluntarily become a member of the relief department of the railroad company, and thereupon had agreed that the acceptance of benefits payable to him in accordance with the regulations of the department should discharge the company from all liability for damages; that after he had sustained the injuries alleged in his petition, he had received benefits from the relief fund of the department, amounting to $822; and that the payment and acceptance of these benefits constituted, under the agreement, full satisfaction of the claim in suit.

The facts with regard to the organization, purpose, and management of the relief department, and the regulations governing it, were fully averred. The department was organized in 1889, as a part of the service of the railroad company, with the object of creating a fund out of which definite amounts of money should be paid to contributing employees in the event of disability from sickness or accident, or, in case of death, for their proper burial and the relief of their families. The various companies forming the Burlington, system organized similar departments, and by agreement these were associated in joint administration.

The regulations of the relief department provided that membership in the department should be voluntary, and defined the amount of contributions to be paid monthly, the members being classified for this purpose according to their monthly wages. The amount of benefits according to these classes was also specified. The relief fund consisted of the contributions of members, income from investments, interest paid by the railroad company on monthly balances, and appropriations made by the company when necessary to cover deficiencies. From the time of organization to December 31, 1900, there was paid *in benefits out[562 of the fund so constituted the sum of $2,671,510.54, of which $1,294,790.50 was paid by reason of sickness, and $1,376,720.04 for injuries and death.

The railroad company had general charge of the relief department, and guaranteed the fulfilment of its obligations. It was responsible for the safe-keeping of the moneys of the relief fund, paid into the fund interest at the rate of 4 per centum per annum on monthly balances, supplied without expense to the fund the necessary facilities for the business of the department, and defrayed from the moneys of the company the operating expenses. It was alleged that for these expenses the company had paid to December, 1900, $621,572.44. This sum did not include office rent for the department or of medical examiners or various sundry expenses; nor did it embrace the service of officers and of clerks who were not wholly concerned with the work of the department, and this service and incidental expenses were alleged to be worth approximately $50,000 a year. In addition, during the period mentioned, the railroad company paid to make up deficits in the fund the sum of $42,532.94, for which it had no right to reimbursement.

Among the regulations by which the members of the relief department agreed to be bound was the following:

"64. In case of injury to a member, he may elect to accept the benefits in pursuance of these regulations, or to prosecute such claims as he may have at law against the company or any company associated therewith in the administration of their relief departments.

"The acceptance by the member of benefits for injury shall operate as a release and satisfaction of all claims against the company and all other companies associated therewith, as aforesaid, for damages arising from or growing out of such injury;

and further, in the event of the death of a member, no part of the death benefit or un paid disability benefit shall be due or pay 563]able unless and until *good and sufficient releases shall be delivered to the superintendent, of all claims against the relief department, as well as against the company and all other companies associated therewith, as aforesaid, arising from or growing out of the death of the member, said releases having been duly executed by all who might legally assert such claims; and further, if any suit shall be brought against the company or any other company associated therewith, as aforesaid, for damages arising from or growing out of injury or death occurring to a member, the benefits otherwise payable and all obligations of the relief department and of the company, created by the membership of such member in the relief fund, shall thereupon be forfeited without any declaration or other act by the relief department or the company; but the superintendent may, in his discretion, waive such forfeiture upon condition that all pending suits shall first be dismissed.

"The payment by the company, or any company associated therewith, as aforesaid, of any amount in compromise of a claim for damages arising from or growing out of an injury to, or the death of, a member, shall preclude any and all claims for benefits from the relief fund, arising from or growing out of such injury or death."

In support of the defense based upon this regulation, the railroad company further asserted that the amended statute above quoted did not deprive it of the right to plead the contract with the defendant in error, and its satisfaction, as a discharge, for the reason that the statute was repugnant to the 14th Amendment of the Constitution of the United States, (1) as an unwarranted interference with liberty to make contracts, and (2) as a denial of the equal protection of the laws.

The district court overruled the demurrer, but its judgment was reversed by the supreme court of the state, which held the statute to be valid, and, in consequence, that the demurrer should have been sus- 564]tained. *McGuire v. Chicago B. & Q. R. Co. 131 Iowa, 340, 33 L.R.A.(N.S.) 786, 108 N. W. 902. This ruling was adhered to when the question was again raised on the appeal to that court from the final judgment. 138 Iowa, 664, 116 N. W. 801. And to review this decision as to the constitutionality of the statute, the case has been brought here.

We pass without comment the criticisms which are made of certain details of the relief plan, for neither the suggested excellence nor the alleged defects of a particular scheme may be permitted to determine the validity of the statute, which is general in its application. The question with which we are concerned is not whether the regulations set forth in the answer are just or unjust, but whether the amended statute transcends the limits of power as defined by the Federal Constitution.

The first ground of attack is that the statute violates the 14th Amendment by reason of the restraint it lays upon liberty of contract. This section of the Code of Iowa (§ 2071), as originally enacted, imposed liability upon railroad corporations for injuries to employees, although caused by the negligence or mismanagement of fellow servants. And it was held by this court that it was clearly within the competency of the legislature to prescribe this measure of responsibility. Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176, following Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161. The statute in its original form also provided that "no contract which restricts such liability shall be legal or binding."

Subsequent to this enactment, the railroad company established its relief department, and the question was raised in the state court as to the legality of the provision then incorporated in the contract of membership, by which, in case of suit for damages, the payment of benefits was to be suspended until the suit should be discontinued, *and the acceptance of 565 benefits was to operate as a full discharge. The two principal contentions against it were, first, that it was against public policy, and second, that it was in violation of the statute. Both were overruled, and with reference to the statute, it was held that the contract of membership did not fall within the prohibition, for the reason that it did not restrict liability, but put the employee to his election. Donald v. Chicago B. & Q. R. Co. 93 Iowa, 284, 32 L.R.A. 492, 61 N. W. 971; Maine v. Chicago, B. & Q. R. Co. 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315. The legislature then amended the section by providing expressly that a contract of this sort and the acceptance of benefits should not defeat the enforcement of the liability which the statute defined.

Manifestly, the decision that the existing statute was not broad enough to embrace the inhibition did not prevent the legislature from enlarging its scope so that it should be included. Nor was the holding of the court final upon the point of public policy, so far as the power of the legislature is concerned. The legislature,

provided it acts within its constitutional authority, is the arbiter of the public policy of the state. While the court, unaided by legislative declaration, and applying the principles of the common law, may uphold or condemn contracts in the light of what is conceived to be public policy, its determination as a rule for future action must yield to the legislative will when expressed in accordance with the organic law. If the legislature had the power to incorporate a similar provision in the statute when it was passed originally, it had the same power with regard to future transactions to enact the amendment.

It may also be observed that the statute, as amended, does not affect contracts of settlement or compromise, made after the injury, and the question of the extent of the legislative power with respect to such contracts is not presented. The amendment provides: "But nothing contained herein shall be construed to prevent or in-[566]validate *any settlement for damages between the parties subsequent to injuries received." As was said by the state court in construing the act (131 Iowa, p. 377): "The legislature does not in this act forbid or place any obstacle in the way of such insurance, nor does it forbid or prevent any settlement of the matter of damages with an injured employee, fairly made after the injury is received. On the contrary, the right to make such settlement is expressly provided for in the amendment to Code, § 2071. The one thing which that amendment was intended to prevent was the use of this insurance or relief for which the employee has himself paid in whole or in part, as a bar to the right which the statute has given him to recover damages from the corporation." It is urged, however, that the amendatory act prohibits the making of a contract for settlement "by acts done after the liability had become fixed." The acceptance of benefits is, of course, an act done after the injury, but the legal consequences sought to be attached to that act are derived from the provision in the contract of membership. The stipulation which the statute nullifies is one made in advance of the injury, that the subsequent acceptance of benefits shall constitute full satisfaction of the claim for damages. It is in this aspect that the question arises as to the restriction of liberty of contract.

It has been held that the right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution. Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764. In Allgeyer v. Louisiana, supra, the court, in referring to the 14th Amendment, said (p. 589): "The liberty mentioned in that Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use *them[567 in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned." But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. Crowley v. Christensen, 137 U. S. 89, 34 L. ed. 621, 11 Sup. Ct. Rep. 13; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765. "It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessaries of existence; to the common carrier the power to make any contract releasing himself from negligence; and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property." Frisbie v. United States, 157 U. S. 165, 166, 39 L. ed. 658, 659, 15 Sup. Ct. Rep. 586.

The right to make contracts is subject to the exercise of the powers granted to Congress for the suitable conduct of matters of national concern; as, for example, the regulation of commerce with foreign nation and among the *several states.[568

Addyston Pipe & Steel Co. v. United States, 175 U. S. 228-231, 44 L. ed. 142-144, 20 Sup. Ct. Rep. 96; Patterson v. The Eudora, 190 U. S. 174-176, 47 L. ed. 1006, 1007, 23 Sup. Ct. Rep. 821; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, ante, 167, 31 Sup. Ct. Rep. 164; Louisville & N. R. Co. v. Mottley (decided this day) 219 U. S. 467, ante, 297, 31 Sup. Ct. Rep. 265.

It is subject, also, in the field of state action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals, and welfare of those subject to its jurisdiction. This limitation has had abundant illustration in a variety of circumstances. Thus, in addition to upholding the power of the state to require reasonable maximum charges for public service (Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94; Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 A. & E. Ann. Cas. 1034), and to prescribe the hours of labor for those employed by the state or its municipalities (Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124), this court has sustained the validity of state legislation in prohibiting the manufacture and sale of intoxicating liquors within the state (Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Crowley v. Christensen, supra); in limiting employment in underground mines or workings, and in smelters and other institutions for the reduction or refining of ores or metals, to eight hours a day, except in cases of emergency (Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383); in prohibiting the sale of cigarettes without license (Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633); in requiring the redemption in cash of store orders or other evidences of indebtedness issued in payment of wages (Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1); in prohibiting contracts for options to sell or buy grain or other commodity at a future time (Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425); in prohibiting the employment of women in laundries more than ten hours a day (Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 A. & E. Ann. Cas. 957); and in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal, in[569] stead of the weight *of the coal as originally produced in the mine (McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206).

The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

The principle was thus stated in McLean v. Arkansas, supra, pp. 547, 548: "The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power [Cases cited.] . . . If there existed a condition of affairs concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public *within the scope of legislative power,[570] the act must fail."

In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. What differences, as to the extent of this power, may exist with respect to particular employments, and how far that which may be authorized as to one department of activity may appear to be arbitrary in another,

must be determined as cases are presented for decision. But it is well established that, so far as its regulations are valid, not being arbitrary or unrelated to a proper purpose, the legislature undoubtedly may prevent them from being nullified by prohibiting contracts which, by modification or waiver, would alter or impair the obligation imposed. If the legislature may require the use of safety devices, it may prohibit agreements to dispense with them. If it may restrict employment in mines and smelters to eight hours a day, it may make contracts for longer service unlawful. In such case the interference with the right to contract is incidental to the main object of the regulation, and if the power exists to accomplish the latter, the interference is justified as an aid to its exercise. As was pointed out in Holden v. Hardy, supra, on page 397: "The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detri-
571]mental to their health or *strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority. . . . But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. 'The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.'"

Here there is no question as to the validity of the regulation or as to the power of the state to impose the liability which the statute prescribes. The statute relates to that phase of the relation of master and servant which is presented by the case of railroad corporations. It defined the liability of such corporations for injuries resulting from negligence and mismanagement in the use and operation of their railways. In the cases within its purview it extended the liability of the common law by abolishing the fellow-servant rule. Having authority to establish this regulation, it is manifest that the legislature was also entitled to insure its efficacy by prohibiting contracts in derogation of its provisions. In the exercise of this power, the legislature was not limited with respect either to the form of the contract, or the nature of the consideration, or the absolute or conditional character of the engagement. It was as competent to prohibit contracts which, on a specified event, or in a given contingency, should operate to relieve the corporation from the statutory liability which would otherwise exist, as it was to deny validity to agreements of absolute waiver.

The policy of the amendatory act was the same as that *of the original stat-[572
ute. Its provision that contracts of insurance relief, benefit or indemnity, and the acceptance of such benefits, should not defeat recovery under the statute, was incidental to the regulation it was intended to enforce. Assuming the right of enforcement, the authority to enact this inhibition cannot be denied. If the legislature had the power to prohibit contracts limiting the liability imposed, it certainly could include in the prohibition stipulations of that sort in contracts of insurance relief, benefit or indemnity, as well as in other agreements. But if the legislature could specifically provide that no contract for insurance relief should limit the liability for damages, upon what ground can it be said that it was beyond the legislative authority to deny that effect to the payment of benefits, or the acceptance of such payment, under the contract?

The asserted distinction is sought to be based upon the fact that under the contract of membership, the employee has an election after the injury. But this circumstance, however appropriate it may be for legislative consideration, cannot be regarded as defining a limitation of legislative power. The power to prohibit contracts, in any case where it exists, necessarily implies legislative control over the transaction, despite the action of the parties. Whether this control may be exercised in a particular case depends upon the relation of the transaction to the execution of a policy which the state is competent to establish. It does not aid the argument to describe the defense as one of accord and satisfaction. The payment of benefits is the performance of the promise to pay, contained in the contract of membership. If the legislature may prohibit the acceptance of the promise as a substitution for the statutory liability, it should also be able to

prevent the like substitution of its performance.

For the reasons we have stated, the considerations which properly bear upon the
573] wisdom of the legislation *need not be discussed. On the one hand it is said that the relief department is in the control of the corporation; that by reason of their exigency the employees may readily be constrained to become members; that the relief fund consists in larger part of contributions made from wages; that the acceptance of benefits takes place at a time when the employee is suffering from the consequences of his injury, and, being seriously in need of aid, he may easily be induced to accept payment from the fund in which, by reason of his contributions, he feels that he is entitled to share; and that such a plan, if it were permitted, through the payment of benefits, to result in a discharge of the liability for negligence, would operate to transfer from the corporation to its employees a burden which, in the interest of their protection and the safety of the public, the corporation should be compelled to bear. On the other hand, it is urged that the relief plan is a beneficent scheme, avoiding the waste of litigation, securing prompt relief in case of need due to sickness or injury, making equitable provision for deserving cases, and hence tends in an important way to promote the good of the service and the security of the employment. Even a partial statement of these various considerations shows clearly that they are of a character to invoke the judgment of the legislature in deciding, within the limits of its power, upon the policy of the state. And whether the policy declared by the statute in question is approved or disapproved, it cannot be said that the legislative power has been exceeded, either in defining the liability or in the means taken to prevent the legislative will, with respect to it, from being thwarted.

The second ground upon which the statute, as amended, is assailed, is that it constitutes a denial of the equal protection of the laws.

It is urged that the prohibition of the amendatory act applies only to those employees of railroad corporations who were embraced within the provision of the origi-
574] nal *statute, and to the enforcement of the particular liabilities which that statute defined. The limitation to a particular class of employees of railroad corporations is based upon the decisions of the state court that the benefits of the original statute were confined to those who were engaged in the hazardous business of operating railroads. Deppe v. Chicago, R. I. & P. R. Co. 36 Iowa, 52; Malone v. Burlington, C. R. & N. R. Co. 65 Iowa, 417, 54 Am. Rep. 11, 21 N. W. 756; Akeson v. Chicago, B. & Q. R. Co. 106 Iowa, 54, 75 N. W. 676. It is said that all employees of the plaintiffs in error may become members of the relief department, and that the limited application of the amendment, as to the effect of the acceptance of benefits under the membership contract, is an invalid discrimination.

It was, however, entirely competent for the legislature, in enacting the prohibition, for the purpose of securing the enforcement of the liability it had defined, to limit it to those cases in which the liability arose. As the purpose of the amendment was to supplement the original statute, the classification was properly the same. And with respect to subsequent transactions, the amendment must be regarded as having the same validity as it would have had if it had formed a part of the earlier enactment. No criticism on the ground of discrimination can successfully be addressed to the amendatory act which would not likewise impeach the statute in its earlier form.

But the propriety of the classification of the original statute was considered and upheld by this court. And the validity of legislation abrogating the fellow-servant rule, both with respect to the class of cases embraced in the statute, and also where it is abolished as to railway employees generally, has been sustained. Minneapolis & St. L. R. Co. v. Herriek, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, ante, 78, 31 Sup. Ct. Rep. 136. In view of the full discussion of this subject in the recent decisions *above cited, nothing[575 further need be said upon this point.

We find none of the objections which have been made to the validity of the amendatory act to be well taken, and the judgment is therefore affirmed.

NOBLE STATE BANK, Plff. in Err.,
v.
C. N. HASKELL et al.

(See S. C. Reporter's ed. 575–580.)

Eminent domain — public use — creating bank guaranty fund.

The levy and collection, under a state statute, from every bank existing under the state laws, of an assessment based upon average daily deposits, for the purpose

of creating a depositors' guaranty fund to secure the full repayment of deposits in case any such bank becomes insolvent, is for a public use, although, judged from the proximate effect of the taking, the use seems to be a private one.

[For other cases, see Eminent Domain, I. d, in Digest Sup. Ct. 1908.]

[No. 71.]

Petition for rehearing presented January 27, 1911. Amended opinion filed February 20, 1911.

ON MOTION for leave to file petition for rehearing of a writ of error to the Supreme Court of the State of Oklahoma to review a decree which affirmed a decree of the District Court of Logan County, in that state, dismissing the petition in a suit to enjoin the levy and collection from a state bank of an assessment for the purpose of creating a depositors' guaranty fund. Original opinion amended.

See ante, 112.

The facts are stated in the opinion.

Mr C. B. Ames in support of the motion:

Private property cannot be taken for private use, and, if taken for public use, there must be compensation.

Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 417, 41 L. ed. 489, 495, 17 Sup. Ct. Rep. 130; Wilkinson v. Leland, 2 Pet. 627. 658, 7 L. ed. 542, 553; Boyd v. United States, 116 U. S. 616, 635, 29 L. ed. 746, 752, 6 Sup. Ct. Rep. 524; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499, 501; Cole v. La Grange, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416, 418; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup Ct. Rep. 431, 438; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581, 586; Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522, 527; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 350, 4 A. & E. Ann. Cas. 1175; 8 Rose's Notes (U. S.) 362; Garland v. Montgomery County, 87 Ala. 227, 6 So. 403; McClelland v. State, 138 Ind. 332, 37 N. E. 1092; State ex rel. Griffith v. Osawkee Twp. 14 Kan. 428, 19 Am. Rep. 100; Blain v. Riley County Agri. Soc. 21 Kan. 560; Atchison, T. & S. F. R. Co. v. Atchison, 47 Kan. 714, 28 Pac. 1001; Geneseo v. Geneseo Natural Gas, Coal, Oil, Salt & Mineral Co. 55 Kan. 362, 40 Pac. 656; Lancaster v. Clayton, 86 Ky. 380, 5 S. W. 864; Baltimore & E. S. R. Co. v. Spring, 80 Md. 517, 27 L.R.A. 74, 31 Atl. 210; Kingman v. Brockton, 153 Mass. 259, 11 L.R.A. 125, 26 N. E. 999; Opinion of Justices, 155 Mass. 601, 15 L.R.A. 810, 30 N. E. 1144; Deal v. Mississippi County, 107 Mo. 469, 14 L.R.A. 623, 18 S. W. 25; State ex rel. Garth v. Switzler, 143 Mo. 314, 40 L.R.A. 285, 65 Am. St. Rep. 658, 45 S. W. 248; Manning v. Klippel, 9 Or. 370; Feldman v. Charleston, 23 S. C. 63, 55 Am. Rep. 9; Mauldin v. Greenville, 53 S. C. 293, 43 L.R.A. 104, 69 Am. St. Rep. 860, 31 S. E. 254; Williams v. Davidson, 43 Tex. 37; Brooke Academy v. George, 14 W. Va. 420, 35 Am. Rep. 762; Pittsburg, W. & K. R. Co. v. Benwood Iron Works, 31 W. Va. 734, 2 L.R.A. 690, 8 S. E. 466; Wisconsin Keeley Institute v. Milwaukee County, 95 Wis. 161, 36 L.R.A. 59, 60 Am. St. Rep. 110, 70 N. W. 71; Hope v. Board of Liquidation, 43 La. Ann. 780, 9 So. 769; State ex rel. Rosenblatt v. Sargent, 12 Mo. App. 241; 2 Kent, Com. 329; Louisville & N. R. Co. v. Baldwin, 85 Ala. 619, 7 L.R.A. 266, 5 So. 311; Sadler v. Langham, 34 Ala. 330; Billings v. Hall, 7 Cal. 10; Enfield Toll Bridge Co. v. Hartford & N. H. R. Co. 17 Conn. 40, 42 Am. Dec. 716; Wilder v. Lumpkin, 4 Ga. 215; Great Western Natural Gas & Oil Co. v. Hawkins, 30 Ind. App. 566, 66 N. E. 765; Blackman v. Halves, 72 Ind. 515; Bankhead v. Brown, 25 Iowa, 540; Harding v. Funk, 8 Kan. 323; Bank of Louisville v. Public Schools, — Ky. —, 5 S. W. 737; Allen v. Jay, 60 Me. 124, 11 Am. Rep. 197; University of Maryland v. Williams, 9 Gill & J. 365, 31 Am. Dec. 79; Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 56; Michigan Sugar Co. v. Auditor General, 124 Mich. 674, 56 L.R.A. 329, 83 Am. St. Rep. 357, 83 N. W. 625; Coates v. Campbell, 37 Minn. 498, 35 N. W. 366; State ex rel. Wheeler v. Foley, 30 Minn. 350, 15 N. W. 379; Moody v. Hoskins, 64 Miss. 468, 1 So. 623; Newby v. Platte County, 25 Mo. 261; Dickey v. Tennison, 27 Mo. 373; Atchison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 362; Ten Eyck v. Delaware & R. Canal Co. 18 N. J. L. 200, 37 Am. Dec. 233; Coster v. Tide Water Co. 18 N. J. Eq. 63; Taylor v. Porter, 4 Hill, 140, 40 Am. Dec. 274; Bloodgood v. Mohawk & H.

Note.—As to what constitutes a taking of private property for public use—see notes to Memphis & C. R. Co. v. Birmingham, S. & T. River R. Co. 18 L.R.A. 166; D. M. Osborne & Co. v. Missouri P. R. Co. 37 L. ed. U. S. 156; Sweet v. Rechel, 40 L. ed. U. S. 188; A. Backus, Jr. & Sons v. Fort Street Union Depot Co. 42 L. ed. U. S. 853; and High Bridge Lumber Co. v. United States, 16 C. C. A. 468.

On combination of public and private uses—see note to Wisconsin River Improv. Co. v. Pier, 21 L.R.A.(N.S.) 538.

As to what uses are public—see note to Sweet v. Rechel, 40 L. ed. U. S. 188.

River R. Co. 18 Wend. 9, 31 Am. Dec. 316; Embury v. Conner, 3 N. Y. 515, 53 Am. Dec. 325; Reeves v. Wood County, 8 Ohio St. 347; Lamb v. Lane, 4 Ohio St. 178; Lucas County v. State (Davies v. State) 75 Ohio St. 114, 7 L.R.A. (N.S.) 1196, 78 N. E. 955; Witham v. Osbourn, 4 Or. 318, 18 Am. Rep. 290; Sharpless v. Philadelphia, 21 Pa. 169, 59 Am. Dec. 759; Harding v. Goodlett, 3 Yerg. 43, 24 Am. Dec. 546; Clack v. White, 2 Swan, 549; Dilworth v. State, 36 Tex. Crim. Rep. 189, 36 S. W. 274; State ex rel. Garrett v. Froehlich, 118 Wis. 129, 61 L.R.A. 345, 99 Am. St. Rep. 985, 94 N. W. 50; United States v. Douglas-Willan Sartoris Co. 3 Wyo. 287, 22 Pac. 96.

580] *Mr. Justice **Holmes** delivered the opinion of the court:

Leave to file an application for rehearing is asked in this case. We see no reason to grant it, but, as the judgment delivered seems to have conveyed a wrong impression of the opinion of the court in some details, we add a few words to what was said when the case was decided. We fully understand the practical importance of the question, and the very powerful argument that can be made against the wisdom of the legislation, but on that point we have nothing to say, as it is not our concern. Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 A. & E. Ann. Cas. 1171; Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 A. & E. Ann. Cas. 1174, were cited to establish, not that property might be taken for a private use, but that, among the public uses for which it might be taken, were some which, if looked at only in their immediate aspect, according to the proximate effect of the taking, might seem to be private. This case, in our opinion, is of that sort. The analysis of the police power, whether correct or not, was intended to indicate an interpretation of what has taken place in the past, not to give a new or wider scope to the power. The propositions with regard to it, however, in any form, are rather in the nature of preliminaries. For in this case there is no out-and-out unconditional taking at all. The payment can be avoided by going out of the banking business, and is required only as a condition for keeping on, from corporations created by the state. We have given what we deem sufficient reasons for holding that such a condition may be imposed.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

581]*BUCK'S STOVE & RANGE COMPANY, Appellant, v. AMERICAN FEDERATION OF LABOR et al. [No. 190]; AMERICAN FEDERATION OF LABOR et al., Appellants, v. BUCK'S STOVE & RANGE COMPANY [No. 394.]

Appeal—dismissal—moot case

Cross Appeals from the Court of Appeals of the District of Columbia to review a decree which modified, and, as so modified, affirmed a decree of the Supreme Court of the District enjoining defendants from interfering with complainant's business

See same case below, 33 App. D. C. 83, 32 L.R.A.(N.S.) 748.

Messrs. Daniel Davenport and J. J. Darlington for Buck's Stove & Range Company.

Messrs. Alton B. Parker, Jackson H. Ralston, F. L. Siddons, and W. E. Richardson for American Federation of Labor et al.

February 20, 1911. *Per Curiam:* When these cases were reached for hearing, and after the argument had materially progressed, it developed from statements made by counsel for both parties that the cases had become purely moot because of the settlement between the parties of every material controversy which the record presented. On the disclosure of this situation, further argument was dispensed with; and for the reason which led to that action, that is, as we have said, that the controversies between the parties had become in all respects moot, the appeals must be dismissed. Richardson v. McChesney, 218 U. S. 487, 492, 54 L. ed. 1121, 1122, 31 Sup. Ct. Rep. 43, and cases cited. Appeals dismissed without costs to either party.

582]*STATE OF MINNESOTA EX REL. JALMER M. LARSEN, Plaintiff in Error, v. HUGH R. SCOTT, as Auditor of the County of Hennepin. [No. 586.]

In Error to the Supreme Court of the State of Minnesota.

See same case below, 110 Minn. 461, 126 N. W. 70.

Mr. Carl Strover for plaintiff in error.

Mr. Milton D. Purdy for defendant in error.

December 19, 1910. *Per Curiam:* Dismissed with costs.

SAMUEL LOEB, Plaintiff in Error, v. HENRY JENNINGS, Chief of Police of the City of Atlanta. [No. 497.]

Error to state court—frivolousness of Federal question.

In Error to the Supreme Court of the State of Georgia to review a decision adverse to the accused on questions certified from the Court of Appeals of that state involving the validity of a sentence to work on municipal streets and public places.

See same case below, 133 Ga. 796, 67 S. E. 101, 18 A. & E. Ann. Cas. 376.

Mr. Thomas B. Felder for plaintiff in error.

Mr. William A. Wimbish for defendant in error.

January 3, 1911. *Per Curiam:* Judgment affirmed on the authority of Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 118, 53 L. ed. 430, 434, 29 Sup. Ct. Rep. 227; Goodrich v. Ferris, 214 U. S. 79, 53 L. ed. 917, 29 Sup. Ct. Rep. 580; Griffith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151, 31 Sup. Ct. Rep. 132.

G. WASH HUNTER, Plaintiff in Error, v. STATE OF SOUTH CAROLINA. [No. 192.]

Error to state court—Federal question—criminal matters.

In Error to the Supreme Court of the State of South Carolina to review a judgment which affirmed a conviction of manslaughter had in the Circuit Court for Greenwood County in that state.

See same case below, 82 S. C. 153, 63 S. E. 685.

Messrs. John G. Capers, Joseph D. Wright, Coleman L. Blease, William R. Andrews, John M. Thurston, and Robert B. Brown for plaintiff in error.

Mr. J. Fraser Lyon for defendant in error.

January 16, 1911. *Per Curiam:* Writ of error dismissed for the want of jurisdiction. Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 100, 50 L. ed. 107, 25 Sup. Ct. Rep. 727; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 53 L. ed. 430, 29 Sup. 583]Ct. Rep. 220; *King v. West Virginia, 216 U. S. 92, 54 L. ed. 396, 30 Sup. Ct. Rep. 225; Griffith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151, 31 Sup. Ct. Rep. 132.

CLARENCE H. VENNER et al., Plaintiffs in Error, v. DENVER UNION WATER COMPANY et al. [No. 216.]

Error to state court—frivolousness of Federal question.

In Error to the Supreme Court of the State of Colorado to review a decree which affirmed a decree of the District Court of Arapahoe County in that state in favor of defendants in a suit to set aside certain foreclosure decrees for want of jurisdiction, fraud, and certain irregularities in the proceedings.

See same case below, 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623.

Messrs. Elijah N. Zoline and Caldwell Yeaman for plaintiffs in error.

Messrs. Joel F. Vaile, Gerald Hughes, Arthur H. Van Brunt, and Frederick B. Van Vorst for defendants in error.

February 20, 1911. *Per Curiam:* Writ of error dismissed for want of jurisdiction. Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 100, 50 L. ed. 107, 25 Sup. Ct. Rep. 727; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 53 L. ed. 431, 29 Sup. Ct. Rep. 227; King v. West Virginia, 216 U. S. 92, 54 L. ed. 396, 30 Sup. Ct. Rep. 225; Griffith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151, 31 Sup. Ct. Rep. 132.

GEORGE GODFREY MOORE et al., etc., Petitioners, v. SECURITY TRUST & LIFE INSURANCE COMPANY. [No. 477.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 93 C. C. A. 652, 168 Fed. 496.

Messrs. James A. Troutman, Robert Stone, and D. R. Hite for petitioners.

Messrs. Joseph D. Wright and John G. Capers for respondent.

December 19, 1910. Denied.

PABST BREWING COMPANY, Petitioner, v. CHARLES THORLEY. [No. 805.]

Petition for a *Writ of Certiorari[584 to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 102 C. C. A. 522, 179 Fed. 338.

Messrs. A. S. Gilbert and J. M. Mayer for petitioner.

Mr. Harold Nathan for respondent.

December 19, 1910. Denied.

MURRAY CORRINGTON et al., Petitioners, v. WESTINGHOUSE AIR BRAKE COMPANY. [No. 816.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 103 C. C. A. 479, 178 Fed. 711.

Mr. William G. Choate for petitioners.

Messrs. Thomas B. Kerr, J. Snowden Bell, and E. A. Wright for respondent.

December 19, 1910. Denied.

LIZZIE M. TROXELL, Petitioner, v. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY. [No. 823.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 183 Fed. 373.

Mr. George Demming for petitioner.

Mr. James F. Campbell for respondent.

January 3, 1911. Denied.

C. H. REXFORD, Petitioner, v. BRUNSWICK-BALKE-COLLENDER COMPANY. [No. 826.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. Julius C. Martin for petitioner.

Mr. James H. Merrimon for respondent.

January 3, 1911. Granted.

A. F. MILLAN, Petitioner, v. EXCHANGE BANK OF MANNINGTON et al. [No. 820.]

Petition *for a Writ of Certiorari[585 to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 183 Fed. 753.

Mr. John W. Davis for petitioner.

Mr. E. M. Showalter for respondents.

January 9, 1911. Denied.

CITY OF NEW ORLEANS et al., Petitioners, v. WAKEFIELD SHEET PILING COMPANY. [No. 833.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 101 C. C. A. 384, 177 Fed. 214.

Messrs. Edgar H. Farrar and Omer Villere for petitioners.

No appearance for respondent.

January 9, 1911. Denied.

DEWITT C. HILLEGAS, Petitioner, v. UNITED STATES. [No. 824.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 183 Fed. 199.

Mr. Wilton J. Lambert for petitioner.

The Attorney General and Assistant Attorney General Fowler for respondent.

January 16, 1911. Denied.

FRANK HORN et al., Petitioners, v. UNITED STATES. [No. 835.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 182 Fed. 721.

Messrs. Frank Hagerman, Wash. Adams, and J. S. Botsford for petitioners.

The Attorney General, the Solicitor General, and Assistant Attorney General Harr for respondent.

January 16, 1911. Denied.

LA COMPAGNIE GÉNÉRALE TRANSATLANTIQUE, OWNER, etc., Petitioner, v. BALTI-
586] MORE & OHIO *RAILROAD COMPANY. [No. 845.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 102 C. C. A. 651, 179 Fed. 286.

Messrs. Joseph P. Nolan and John M. Nolan for petitioner.

Mr. Frederick M. Brown for respondent.

January 16, 1911. Denied.

WILLIAM H. GRAY, Petitioner, v. ALLEN W. FIELD et al. [No. 848.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 103 C. C. A. 77, 179 Fed. 673.

Mr. Horace G. Stone for petitioner.

Messrs. S. S. Gregory, Jacob Newman, S. O. Levinson, B. V. Becker, and C. H. Poppenhusen for respondents.

January 16, 1911. Denied.

EDWARD J. SCHURMEIER et al., as Executors, etc., Petitioners, v. CONNECTICUT MUTUAL LIFE INSURANCE COMPANY. [No. 550.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 96 C. C. A. 107, 171 Fed. 1.

Mr. Harris Richardson for petitioners.

Messrs. James E. Markham, John B. Sanborn, and George W. Markham for respondent.

January 16, 1911. Dismissed for want of prosecution.

COMPTOGRAPH COMPANY, Petitioner, v. BURROUGHS ADDING MACHINE COMPANY, [Nos. 843 and 844.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, — L.R.A.(N.S.) —, 183 Fed. 321.

Mr. John W. Munday for petitioner.

Messrs. Robert H. Parkinson and Edward Rector for respondent.

January 23, 1911. Denied.

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*NAPOLEON v. SMITH et al., Petition- [587
ers, v. NELLIE MAE MOORE. [No. 839.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 182 Fed. 540.

Messrs. R. Lee Word, William Wallace, and A. B. Browne for petitioners.

Messrs. William Scallon, T. J. Walsh, and Cornelius B. Nolan for respondent.

January 30, 1911. Denied.

STATE OF NEW JERSEY, Petitioner, v. ARTHUR LOVELL, Trustee, etc. [No. 847.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 31 L.R.A.(N.S.) 988, 102 C. C. A. 505, 179 Fed. 321.

Mr. Edmund Wilson for petitioner.

Mr. Howard H. Williams for respondent.

January 30, 1911. Denied.

M. B. SHELTON, as Trustee, etc., Petitioner, v. CHARLES H. PRICE. [No. 852.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 104 C. C. A. 669, 182 Fed. 1023.

Mr. Lawrence Cooper for petitioner.

Mr. Richard W. Walker for respondent.

Mr. J. T. Kirk for creditors.

January 30, 1911. Denied.

EDMUND S. NASH et al., Petitioners, v. UNITED STATES. [No. 842.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. John C. Spooner and Samuel B. Adams for petitioners.

The Attorney General, the Solicitor General, Assistant to the Attorney General Kenyon, and Mr. E. P. Grosvenor for respondent.

February 20, 1911. Granted.

588]*DOWAGIAC MANUFACTURING COMPANY, Petitioner, v. MINNESOTA MOLINE PLOW COMPANY et al. [No. 875]; DOWAGIAC MANUFACTURING COMPANY, Petitioner, v. ERNEST F. SMITH et al. [No. 876.]

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Fred L. Chappell for petitioner.

Mr. Thomas A. Banning for respondents.

February 20, 1911. Granted.

SANITARY STREET FLUSHING MACHINE COMPANY, Petitioner, v. ST. LOUIS STREET FLUSHING MACHINE COMPANY et al. [No. 856.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 103 C. C. A. 565, 178 Fed. 923.

Mr. James L. Hopkins for petitioner.

No appearance for respondents.

February 20, 1911. Denied.

WHITNEY ELEVATOR & WAREHOUSE COMPANY, Petitioner, v. BELLE N. WHITNEY. [No. 867.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 183 Fed. 678.

Mr. Joseph McLean for petitioner.

Mr. William G. Tracy for respondent.

February 20, 1911. Denied.

SCHMERTZ WIRE GLASS CO. et al., Petitioners, v. HIGHLAND GLASS COMPANY. [No. 870.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 102 C. C. A. 316, 178 Fed. 944.

Messrs. John W. Griggs, Arthur J. Baldwin, Thomas B. Kerr, and Drury W. Cooper for petitioners.

Messrs. Charles Neave and William G. McKnight for respondent.

February 20, 1911. Denied.

*FRANK L. NEAL, astrustee, Petitioner, [589 v. MARYLAND DREDGING & CONTRACTING COMPANY et al. [No. 873.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 183 Fed. 731.

Mr. William S. Montgomery for petitioner.

Mr. Frederick M. Brown for respondents.

February 20, 1911. Denied.

E. G. COFFIN et al., Petitioners, v. CHARLES R. FLINT. [No. 874.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 100 C. C. A. 342, 176 Fed. 872.

Messrs. D. T. Watson, John M. Freeman, and R. W. Sutton for petitioners.

Messrs. J. Frank Snyder and James H. Merrimon for respondent.

February 20, 1911. Denied.

EMPIRE TIMBER COMPANY, Petitioner, v. WOODBINE TIMBER COMPANY. [No. 877.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 183 Fed. 214.

Mr. Philip Walker for petitioner.

No appearance for respondent.

February 20, 1911. Denied.

GOVERNMENT OF HIS MAJESTY, THE KING OF ITALY, through A. Raybaudi Massiglia, its Consul General at New York, Appellant, v. GIROLAMO ASARO, alias Vincenzo Fudera. [No. 78.]

Appeal from the Circuit Court of the United States for the Southern District *of New York. [590

See same case below, 162 Fed. 590.

Messrs. Walter V. R. Berry, Gino C. Speranza, Benjamin S. Minor, and Hugh B. Rowland for appellant.

Mr. John J. Hamilton for respondent.

January 11, 1911. Dismissed with costs on motion of counsel for the appellant.

HEIRS OF LOPEZ et al., Appellants, v. RUBERT HERMANOS. [No. 863.]

Appeal from the Supreme Court of Porto Rico.

Mr. Frederick S. Tyler for appellees.

January 18, 1911. Docketed and dismissed with costs on motion of Mr. Frederick S. Tyler for the appellees.

MARIA DEL ENCARNACIÓN PRADO, Widow of Suro, Appellant, v. SUCCESSION OF ALONZO DEL RIO, etc. [No. 864.]

Appeal from the Supreme Court of Porto Rico.

Mr. Frederick S. Tyler for appellee.

January 18, 1911. Docketed and dismissed with costs on motion of Mr. Frederick S. Tyler for appellee.

CHOCTAW, OKLAHOMA, & GULF RAILROAD COMPANY, Plaintiff in Error, v. MRS. MYRA BURGESS and W. N. BURGESS. [No. 76.]

In Error to the Supreme Court of the State of Oklahoma.

See same case below, 21 Okla. 653, 97 Pac. 271.

Mr. Ernest E. Blake for plaintiff in error.

Mr. A. C. Cruce for defendants in error.

January 26, 1911. Dismissed with costs, per stipulation.

PHILADELPHIA & READING RAILWAY COMPANY, Plaintiff in Error, v. UNITED STATES. [No. 93.]

In Error to the District Court of the 591]United States for the *Eastern District of Pennsylvania.

See same case below, 162 Fed. 403.

Messrs. J. D. Campbell and James F. Campbell for plaintiff in error.

The Attorney General for defendant in error.

January 27, 1911. Dismissed on motion of counsel for the plaintiff in error.

JUSTO PUENTE Y ARMSTERDAM et al., Appellants, v. FELIX PUENTE et al. [No. 912.]

Appeal from the Supreme Court of Porto Rico.

Mr. Frederic D. McKenney for appellees.

February 20, 1911. Docketed and dismissed with costs, on motion of Mr. Frederic D. McKenney for the appellees.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error, v. MRS. MARY A. STEVENSON et al. [No. 178.]

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. John F. Dillon, Rush Taggart, and W. L. Hall for plaintiff in error.

Messrs. Colin Johnson and James M. Edwards for defendants in error.

February 20, 1911. Dismissed per stipulation.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1910.

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55 L. ed. 351

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1910.

1]*COMMONWEALTH OF VIRGINIA
v.
STATE OF WEST VIRGINIA.

(See S. C. Reporter's ed. 1–36.)

Supreme Court — original jurisdiction suits between states.

1. A suit between the commonwealth of Virginia and the state of West Virginia, to determine the amount due to the former by the latter as the equitable proportion of the public debt of the original state of Virginia, which was assumed by West Virginia at the time of its creation as a state, is to be considered by the Federal Supreme Court in the untechnical spirit proper for dealing with a quasi international controversy.

[For other cases, see Supreme Court of the United States, in Digest Sup. Ct. 1908.]

Supreme Court — original jurisdiction — suits between states.

2. Objections as to multifariousness, laches, and the like, except so far as they affect the merits, will not be considered by the Federal Supreme Court in a suit by the commonwealth of Virginia against the state of West Virginia, to determine the amount due to the former by the latter as the equitable proportion of the public debt of Virginia which was assumed by West Virginia at the time of its creation as a state.

[For other cases, see Supreme Court of the United States, in Digest Sup. Ct. 1908.]

States — compacts between — adjustment of public debt between Virginia and West Virginia.

3. A contract between the states of Virginia and West Virginia, under which the latter assumed the payment of her just and equitable share of the debt of the original state of Virginia at the time of the creation of West Virginia as a state, whoever might be the persons to whom ultimately the payment was to be made, was established by the provisions of W. Va. Const. art. 8, § 8, for the assumption of an equitable proportion of the Virginia public debt existing prior to January 1, 1861, and of Va. act of May 13, 1862, consenting to the formation of the new state on those terms, and of the sanctioning act of Congress of December 31, 1862 (12 Stat. at L. 633, chap. 6), and the contract so established was not modified or affected in any practical way by the preliminary suggestions as to the special mode of ascertaining a just proportion of the debt, contained in the Wheeling ordinance of August 20, 1861, for the formation of the new state, which is not mentioned in any of the other enactments.

[For other cases, see States, VII. b, in Digest Sup. Ct. 1908.]

States — compacts between — adjustment of public debt between Virginia and West Virginia.

4. The public debt of the original state of Virginia, an equitable proportion of which was assumed by West Virginia at the time of its creation as a state, need not, because incurred for local improvements, be divided according to the territory in which the money was expended, since in form the debt was an investment which generally took the shape of a subscription for stock in a corporation, making it an adventure on behalf of the whole state, all the expenditures having the ultimate good of the whole state in view.

[For other cases, see States, VII. b, in Digest Sup. Ct. 1908.]

Supreme Court — original jurisdiction — suit between states.

5. The determination of the just and equitable proportion of the public debt of the original state of Virginia which was assumed by West Virgina at the time of its creation as a state is within the original jurisdiction of the Federal Supreme Court, although, by W. Va. Const. art. 8, § 8, it is provided that the legislature shall ascertain the proportion as soon as may be practicable.

[For other cases, see Supreme Court of the United States, I. c, 1, in Digest Sup. Ct. 1908.]

States — compacts between — adjustment of public debt between Virginia and West Virginia.

6. The liability of the state of West Virginia, assumed at the time of its creation as a state, for an equitable proportion of the public debt of the original state of Virginia, was not discharged by changes in the form of the debt, nor split up by the unilateral attempts of Virginia to apportion specific parts to the two states.

[For other cases, see States, VII. b, in Digest Sup. Ct. 1908.]

Supreme Court — original jurisdiction — suits between states — interest in suit.

7. The commonwealth of Virginia has a sufficient interest to enable it to maintain a suit in the Federal Supreme Court against the state of West Virginia, to determine the amount due the former state by the latter as the equitable proportion of the public debt of the original state of Virginia, which was assumed by West Virginia at the time of its creation as a state, although, by reason of certain transactions with her creditors, Virginia may have been discharged from all liability as to West Virginia's share, other than to turn over the proceeds of the suit.

[For other cases, see Supreme Court of the United States, 106-111, 120, 121, in Digest Sup. Ct. 1908.]

States — compacts between — adjustment of public debt between Virginia and West Virginia.

8. The valuation of the real and personal property of the two states of Virginia and West Virginia on the date of their separation, excluding slaves, is the proper basis for determining the equitable proportion of the public debt of the original state of Virginia which was assumed by the state of West Virginia at the time of its creation as a state, subject to the qualification that the difference between Virginia's share on this ratio and the amount which her creditors were content to accept from her should be deducted from the sum to be apportioned.

[For other cases, see States, VII. b, in Digest Sup. Ct. 1908.]

[No. 3, Original.]

Argued January 20, 23, 24, 25, and 26, 1911.
Decided March 6, 1911.

ORIGINAL BILL in equity, filed by the commonwealth of Virginia against the state of West Virginia, which seeks an adjudication of the amount due to the former as the equitable proportion of the public debt of the original state of Virginia, which was assumed by the state of West Virginia at the time of its creation as a state. Ratio determined according to valuation of the real and personal property of the two states on the date of their separation, excluding slaves.

The facts are stated in the opinion.

Mr. **Holmes Conrad** argued the cause and filed a brief for the bondholders:

Both on the ground of public or international law and on the express provision of the Constitution of the state, under which Congress admitted it into the Union, the liability of West Virginia for an equitable proportion of the public debt of Virginia appears to be unavoidable.

Hartman v. Greenhow, 102 U. S. 672, 26 L. ed. 271; Puffendorf, Nature & Nations, Bk. 8, chap. 12, § 5; Phillimore, International Law, pt. 2, chap. 137; Wheaton, International Law, Dana's ed. § 30; 1 Moore, International Law Dig. p. 334; Wharton, International Law Dig. § 5, p. 19; 1 Oppenheim, International Law, p. 122; 5 Moore, International Arbitration, pp. 4618, 4619; Taylor, International Pub. Law, § 168.

No compact was ever entered into between Virginia and West Virginia by which the latter state was released from such liability.

Minneapolis & St. L. R. Co. v. Columbia Rolling Mill, 119 U. S. 149, 30 L. ed. 376, 7 Sup. Ct. Rep. 168; La Compañia Bilbaina v. Spanish-American Light & P. Co. 146 U. S. 497, 36 L. ed. 1058, 13 Sup. Ct. Rep. 142; Virginia Hot Springs Co. v. Harrison, 93 Va. 569, 25 S. E. 888; 1 Chitty, Contr. 11th Am. ed. 15; Anson, Contr. 2d Am. ed. 22.

If, as insisted now by West Virginia, the framers of her Constitution intended that her legislature should ascertain such proportion by the method proposed by the ordinance, and that method appears on its face and without the aid of external evidence to have been impracticable and impossible, and leading inevitably to absurd and monstrous consequences, should any construction be given to the Constitution that must involve such result?

Cooley, Const. Lim. p. 73.

A change in phraseology creates a presumption of a change in intent.

Crawford v. Burke, 195 U. S. 190, 49 L. ed. 152, 252, 25 Sup. Ct. Rep. 9.

Mr. **Samuel W. Williams**, Attorney General of Virginia, and Messrs. **William A. Anderson** and **Randolph Harrison**, argued the cause, and, with Mr. John B. Moon, filed a brief for complainant:

On the 20th day of June, 1863, when West Virginia became one of the states of the American Union, the public debt of Virginia, then existing, constituted, independently of any stipulation between Virginia and the new state, an equitable and a moral claim against the people and the property, both of West Virginia and Virginia; and both states, and the people of both states,

were bound for the payment of those obligations.

Higginbotham v. Com. 25 Gratt. 627; Greenhow v. Vashon, 81 Va. 336; Hartman v. Greenhow, 102 U. S. 672, 26 L. ed. 271.

Independently of any convention between the two states, according to recognized authorities the debt should have been ratably apportioned between the two states.

1 Moore, International Law Dig. p. 334; Abdy's Kent, Com. p. 96; Lawrence's Wheaton, International Law, 52 (n) 20.

The statement that Virginia has no interest in this suit in her own right is founded on a singular misapprehension of the facts.

Greenhow v. Vashon, 81 Va. 342.

Messrs. **Charles E. Hogg, George W. McClintic,** and **John C. Spooner** argued the cause, and, with Mr. William G. Conley, Attorney General of West Virginia, and Messrs. W. Mollohan, W. G. Mathews, and William M. O. Dawson, filed a brief for defendant:

A party without interest cannot maintain an action.

Bissell v. Spencer, 9 Conn. 267, 23 Am. Dec. 336; Gilmore v. Pope, 5 Mass. 491; Gunn v. Cantine, 10 Johns. 387; State v. New London, 22 Conn. 170; Townsend v. Hoyle, 20 Conn. 6; People v. Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178; Morris Canal & Bkg. Co. v. State, 14 N. J. L. 411; People v. Booth, 32 N. Y. 397; State ex rel. Wilson v. Shively, 10 Or. 267; State v. Braddish, 34 Vt. 420; Lynch v. United States, 13 Okla. 142, 73 Pac. 1095; United States v. San Jacinto Tin Co. 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850; State v. Warner Valley Stock Co. 48 Or. 378, 86 Pac. 780, 87 Pac. 534; Atchison v. State, 34 Kan. 379, 8 Pac. 367; People ex rel. Pixley v. Stratton, 25 Cal. 242; Kansas v. United States, 204 U. S. 331, 51 L. ed. 510, 27 Sup. Ct. Rep. 388; Smith v. Brittenham, 109 Ill. 549; Ashby v. Ashby 39 La. Ann. 105, 1 So. 282; Oakey v. Bend, 3 Edw. Ch. 482.

Virginia, being without interest in the unfunded debt held by third parties, cannot constitute herself a trustee, and thus create a controversy between herself as trustee and the state of West Virginia, and thereby maintain this suit as to such unfunded part of said debt.

Malin v. Malin, 2 Johns. Ch. 238; Gorham v. Gorham, 3 Barb. Ch. 24; Collins v. Lofftuss, 10 Leigh, 5, 34 Am. Dec. 722; Nichols v. Williams, 22 N. J. Eq. 63; Elmer v. Loper, 25 N. J. Eq. 475; Field v. Maghee, 5 Paige, 539; Dunn v. Seymour, 11 N. J. Eq. 220; Willink v. Morris Canal & Bkg. Co. 4 N. J. Eq. 390; Blake v. Allman, 58 N. C. (5 Jones, Eq.) 407; Ebell v. Bursinger, 70 Tex. 120, 8 S. W. 77; State ex rel. Rife v. Hawes, 177 Mo. 360, 76 S. W. 653; Story, Eq. Pl. 9th ed. § 207; Fish v. Howland, 1 Paige, 20; Reed v. Reed, 16 N. J. Eq. 248; Monday v. Vance, 11 Tex. Civ. App. 374, 32 S. W. 559.

The principles of law governing suits between private persons are applied to controversies between states.

State v. Cloudt — Tex. Civ. App. —, 84 S. W. 415; State ex rel. Taylor v. Lord, 28 Or. 498, 31 L.R.A. 473, 43 Pac. 471; State ex rel. Smyth v. Kennedy, 60 Neb. 300, 83 N. W. 87; Green v. State 73 Cal. 29, 11 Pac. 602, 14 Pac. 610; Harris v. State, 9 S. D. 453, 69 N. W. 825; State v. Paxson, 119 Ga. 730, 46 S. E. 873.

This suit discloses no controversy between the two states as to the unfunded debt represented by certificates owned by individuals.

New Hampshire v. Louisiana, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176; Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; New York v. Connecticut, 4 Dall. 3, 1 L. ed. 715.

Every case that has ever come before this court involving a controversy between states has been one affecting boundaries and jurisdiction over lands, or cases directly affecting the property rights and interest of a state.

Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331; South Dakota v. North Carolina, 192 U. S. 286, 48 L. ed. 448, 24 Sup. Ct. Rep. 269; New Jersey v. New York, 5 Pet. 285, 8 L. ed. 127; Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. ed. 1233; Florida v. Georgia, 11 How. 293, 13 L. ed. 702; Virginia v. West Virginia, 11 Wall. 39, 20 L. ed. 67; Missouri v. Iowa, 7 How. 660, 12 L. ed. 861; Florida v. Georgia, 17 How. 478, 15 L. ed. 181; Alabama v. Georgia, 23 How. 505, 16 L. ed. 556; Louisiana v. Mississippi, 202 U. S. 1, 50 L. ed. 913, 26 Sup. Ct. Rep. 408, 571; Missouri v. Kentucky, 11 Wall. 395, 20 L. ed. 116; Maryland v. West Virginia, 217 U. S. 1, 54 L. ed. 645, 30 Sup. Ct. Rep. 268; Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 14 L. ed. 249; New Hampshire v. Louisiana, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176.

In case of the division of a state, general debts are apportioned on the basis of taxable value; local debts are assumed by the state for the exclusive benefit of whose territory they were incurred.

Hall, International Law, pp. 78, 80; Oppenheim, International Law, § 84; Glenn, International Law, p. 36; Taylor, International Pub. Law, § 166; 1 Fodere, Traite de Droit International Public, 1885, §§

156, 157; Bluntschli, § 59; Bonfils, Manuel de Droit International Public, 3d ed. 1901, §§ 223–226; Liszt, Das Volkerrecht, 2d ed. 1902, § 23, p. 175; Piedelievre, Precis de Droit International Public, 1894, §§ 154, 156; 1 Rivier, Principes du Droit des Gens, 1826, p. 213 (art. 40 V.); Fiore, Il. Diritto Internazionale Codificato, § 132; Fiore, Nouveau Droit International, 1885, § 360; Huber, Staaten Succession 1898, p. 90, § 34, p. 96, §§ 136, 272; Appleton, Des Effets des Annexions de Territoires sur Les Dettes de L'Etat Demembré ou Annexé, 1895, chap. 4, § 2, § 65.

The rule of public law does not govern this case, because the Wheeling ordinance and the Constitution of West Virginia constitute a special agreement as to the proporton of the old Virginia debt to be assumed by West Virginia.

Virginia v. West Virginia, 11 Wall. 39, 20 L. ed. 67.

This court has declared that the ordinance and the Constitution do not conflict, and are to be read *in pari materia*.

Virginia v. West Virginia, 206 U. S. 290, 319, 51 L. ed. 1068, 1080, 27 Sup. Ct. Rep. 732.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill brought by the commonwealth of Virginia [*23] to have the state of West Virginia's proportion of the public debt of Virginia, as it stood before 1861, ascertained and satisfied. The bill was set forth when the case was before this court on demurrer. 206 U. S. 290, 51 L. ed. 1068, 27 Sup. Ct. Rep. 732. Nothing turns on the form or contents of it. The object has been stated. The bill alleges the existence of a debt contracted between 1820 and 1861 in connection with internal improvements intended to develop the whole state, but with especial view to West Virginia, and carried through by the votes of the representatives of the West Virginia counties. It then sets forth the proceedings for the formation of a separate state, and the material provisions of the ordinance adopted for that purpose at Wheeling on August 20, 1861, the passage of an act of Congress for the admission of the new state under a Constitution that had been adopted, and the admission of West Virginia into the Union, all of which we shall show more fully a little further on. Then follows an averment of the transfer in 1863 to West Virginia of the property within her boundaries belonging to West Virginia, to be accounted for in the settlement thereafter to be made with the last-named state. As West Virginia gets the benefit of this property without an accounting, on the principles of this decision, it needs not to be mentioned in more detail. A further appropriation to West Virginia is alleged of $150,000, together with unappropriated balances, subject to accounting for the surplus on hand received from counties outside of the new state. Then follows an argumentative averment of a contract in the Constitution of West Virginia to assume an equitable proportion of the above-mentioned public debt, as hereafter will be explained. Attempts between 1865 and 1872 to ascertain the two states' proportion of the debt and their failure are averred, and the subsequent legislation and action of Virginia in arranging with the bondholders, that will be explained hereafter so far as needs. Substantially all the bonds outstanding in 1861 [*24] have been taken up. It is stated that both in area of territory and in population West Virginia was equal to about one third of Virginia, that being the proportion that Virginia asserts to be the proper one for the division of the debt, and this claim is based upon the division of the state, upon the above-mentioned Wheeling ordinance and the Constitution of the new state, upon the recognition of the liability by statute and resolution, and upon the receipt of property, as has been stated above. After stating further efforts to bring about an adjustment, and their failure, the bill prays for an accounting to ascertain the balance due to Virginia in her own right and as trustee for bondholders, and an adjudication in accord with this result.

The answer admits a debt of about $33,000,000, but avers that the main object of the internal improvements in connection with which it was contracted was to afford outlets to the Ohio river on the west and to the seaboard on the east for the products of the eastern part of the state, and to develop the resources of that part, not those of what is now West Virginia. In aid of this conclusion it goes into some elaboration of details. It admits the proceedings for the separation of the state, and refers to an act of May, 1862, consenting to the same, to which we also shall refer. It denies that it received property of more than a little value from Virginia, or that West Virginia received more than belonged to her in the way of surplus revenue on hand when she was admitted to the Union, and denies that any liability for these items was assumed by her Constitution. It sets forth in detail the proceedings looking to a settlement, but, as they have no bearing upon our decision, we do not dwell upon them. It admits the transactions of Virginia with the bondholders, and sets up that they discharged the commonwealth from one third of its debt, and that what may have been done as to

two-thirds does not concern the defendant, 25]*since Virginia admits that her share was not less than that. If the bonds outstanding in 1861 have been taken up, it is only by the issue of new bonds for two thirds and certificates to be paid by West Virginia alone for the other third. Liability for any payments by Virginia is denied, and accountability, if any, is averred to be only on the principle of § 9 of the Wheeling ordinance, to be stated. It is set up further that under the Constitution of West Virginia her equitable proportion can be established by her legislature alone; that the liquidation can be only in the way provided by that instrument; and hence that this suit cannot be maintained. The settlement by Virginia with her creditors also is pleaded as a bar, and that she brings this suit solely as trustee for them.

The grounds of the claim are matters of public history. After the Virginia ordinance of secession, citizens of the state who dissented from that ordinance organized a government that was recognized as the state of Virginia by the government of the United States. Forthwith a convention of the restored state, as it was called, held at Wheeling, proceeded to carry out a long-entertained wish of many West Virginians by adopting an ordinance for the formation of a new state out of the western portion of the old commonwealth. A part of § 9 of the ordinance was as follows: "The new state shall take upon itself a just proportion of the public debt of the commonwealth of Virginia prior to the 1st day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government since any part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the commonwealth from the counties included within the said new state during the same period." Having previously provided for a popular vote, a constitutional convention, etc., the ordinance in § 10 ordained that when the general assembly 26]should give *its consent to the formation of such new state, it should forward to the Congress of the United States such consent, together with an official copy of such Constitution, with the request that the new state might be admitted into the union of states.

A Constitution was framed for the new state by a constitutional convention, as provided in the ordinance, on November 26, 1861, and was adopted. By article 8, § 8, "An equitable proportion of the public debt of the commonwealth of Virginia, prior to the first day of January in the year one thousand eight hundred and sixty-one shall be assumed by this state; and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years." An act of the legislature of the restored state of Virginia, passed May 13, 1862, gave the consent of that legislature to the erection of the new state "under the provisions set forth in the Constitution for the said state of West Virginia." Finally Congress gave its sanction by an act of December 31, 1862, chap. 6, 12 Stat. at L. 633, which recited the framing and adoption of the West Virginia Constitution and the consent given by the legislature of Virginia through the last-mentioned act, as well as the request of the West Virginia convention and of the Virginia legislature, as the grounds for its consent. There was a provision for the adoption of an emancipation clause before the act of Congress should take effect, and for a proclamation by the President, stating the fact, when the desired amendment was made. Accordingly, after the amendment and a proclamation by President Lincoln, West Virginia became a state on June 20, 1863.

It was held in 1870 that the foregoing constituted an agreement between the old state and the new (Virginia v. West Virginia, 11 Wall. 39, 20 L. ed. 67), and so much may be taken *practically to have[27 been decided again upon the demurrer in this case, although the demurrer was overruled without prejudice to any question. Indeed, so much is almost if not quite admitted in the answer. After the answer had been filed the cause was referred to a master by a decree made on May 4, 1908 (209 U. S. 514, 534, 52 L. ed. 914, 915, 28 Sup. Ct. Rep. 614), which provided for the ascertainment of the facts made the basis of apportionment by the original Wheeling ordinance, and also of other facts that would furnish an alternative method if that prescribed in the Wheeling ordinance should not be followed; this again without prejudice to any question in the cause. The master has reported, the case has been heard upon the merits, and now is submitted to the decision of the court.

The case is to be considered in the untechnical spirit proper for dealing with a quasi international controversy, remembering that there is no municipal code governing the matter, and that this court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either state alone. Missouri v. Illinois, 200 U. S. 496, 519, 520, 50 L. ed. 572, 578, 579, 26 Sup. Ct. Rep. 268; Kansas v. Colorado, 206 U. S. 46, 82-84, 51 L.

ed. 956, 968, 969, 27 Sup. Ct. Rep. 655. Therefore we shall spend no time on objections as to multifariousness, laches, and the like, except so far as they affect the merits, with which we proceed to deal. See Rhode Island v. Massachusetts, 14 Pet. 210, 257, 10 L. ed. 423, 445; United States v. Beebe, 127 U. S. 338, 32 L. ed. 121, 8 Sup. Ct. Rep. 1083.

The amount of the debt January 1, 1861, that we have to apportion, no longer is in dispute. The master's finding was accepted by West Virginia, and at the argument we understood Virginia not to press her exception that it should be enlarged by a disputed item. It was $33,897,073.82, the sum being represented mainly by interest-bearing bonds. The first thing to be decided is what the final agreement was that was made between the two states. Here again we are not to be bound by technical 28]*form. A state is superior to the forms that it may require of its citizens. But there would be no technical difficulty in making a contract by a constitutive ordinance if followed by the creation of the contemplated state. Wedding v. Meyler, 192 U. S. 573, 583, 48 L. ed. 570, 574, 66 L.R.A. 833, 24 Sup. Ct. Rep. 322. And, on the other hand, there is equally little difficulty in making a contract by the Constitution of the new state if it be apparent that the instrument is not addressed solely to those who are to be subject to its provisions, but is intended to be understood by the parent state and by Congress as embodying a just term which conditions the parent's consent. There can be no question that such was the case with West Virginia. As has been shown, the consent of the legislature of the restored state was a consent to the admission of West Virginia under the provisions set forth in the Constitution for the would-be state, and Congress gave its sanction only on the footing of the same Constitution and the consent of Virginia in the last-mentioned act. These three documents would establish a contract, without more. We may add, with reference to an argument to which we attach little weight, that they establish a contract of West Virginia with Virginia. There is no reference to the form of the debt or to its holders, and it is obvious that Virginia had an interest that it was most important that she should be able to protect. Therefore West Virginia must be taken to have promised to Virginia to pay her share, whoever might be the persons to whom ultimately the payment was to be made.

We are of opinion that the contract established as we have said is not modified or affected in any practical way by the preliminary suggestions of the Wheeling ordinance. Neither the ordinance nor the special mode of ascertaining a just proportion of the debt that it puts forward is mentioned in the Constitution of West Virginia, or in the act of Virginia giving her consent, or in the act of Congress by which West Virginia became a state. The ordinance *re-[29 quired that a copy of the new Constitution should be laid before Congress, but said nothing about the ordinance itself. It is enough to refer to the circumstances in which the separation took place to show that Virginia is entitled to the benefit of any doubt so far as the construction of the contract is concerned. See opinion of Attorney General Bates to President Lincoln, 10 Ops. Atty. Gen. 426. The mode of the Wheeling ordinance would not throw on West Virginia a proportion of the debt that would be just, as the ordinance requires, or equitable, according to the promise of the Constitution, unless upon the assumption that interest on the public debt should be considered as part of the ordinary expenses referred to in its terms. That, we believe, would put upon West Virginia a larger obligation than the mode that we adopt, but we are of opinion that her share should be ascertained in a different way. All the modes, however, consistent with the plain contract of West Virginia, whether under the Wheeling ordinance or the Constitution of that state, come out with surprisingly similar results.

It was argued, to be sure, that the debt of Virginia was incurred for local improvements, and that in such a case, even apart from the ordinance, it should be divided according to the territory in which the money was expended. We see no sufficient reason for the application of such a principle to this case. In form the aid was an investment. It generally took the shape of a subscription for stock in a corporation. To make the investment a safe one, the precaution was taken to require as a condition precedent that two or three fifths of the stock should have been subscribed for by solvent persons, fully able to pay, and that one fourth of the subscriptions should have been paid up into the hands of the treasurer. From this point of view the venture was on behalf of the whole state. The parties interested in the investment were the same, wherever the sphere of corporate action might be. The whole state *would[30 have got the gain, and the whole state must bear the loss, as it does not appear that there are any stocks of value on hand. If we should attempt to look farther, many of the corporations concerned were engaged in improvements that had West Virginia for their objective point, and we should be lost in futile detail if we should try to unravel in

each instance the ultimate scope of the scheme. It would be unjust, however, to stop with the place where the first steps were taken, and not to consider the purpose with which the enterprise was begun. All the expenditures had the ultimate good of the whole state in view. Therefore we adhere to our conclusion that West Virginia's share of the debt must be ascertained in a different way. In coming to it we do but apply against West Virginia the argument pressed on her behalf to exclude her liability under the Wheeling ordinance in like cases. By the ordinance, West Virginia was to be charged with all state expenditures within the limits thereof. But she vigorously protested against being charged with any sum expended in the form of a purchase of stocks.

But again, it was argued that if this contract should be found to be what we have said, then the determination of a just proportion was left by the Constitution to the legislature of West Virginia, and that, irrespectively of the words of the instrument, it was only by legislation that a just proportion could be fixed. These arguments do not impress us. The provision in the Constitution of the state of West Virginia that the legislature shall ascertain the proportion as soon as may be practicable was not intended to undo the contract in the preceding words by making the representative and mouthpiece of one of the parties the sole tribunal for its enforcement. It was simply an exhortation and command from supreme to subordinate authority to perform the promise as soon as might be, and an indication of the way. Apart from the 31]*language used, what is just and equitable is a judicial question similar to many that arise in private litigation, and in nowise beyond the competence of a tribunal to decide.

The ground now is clear, so far as the original contract between the two states is concerned. The effect of that is that West Virginia must bear her just and equitable proportion of the public debt, as it was intimated in Hartman v. Greenhow, 102 U. S. 672, 26 L. ed. 271, so long ago as 1880, that she should. It remains for us to consider such subsequent acts as may have affected the original liability, or as may bear on the determination of the amount to be paid. On March 30, 1871, Virginia, assuming that the equitable share of West Virginia was about one third, passed an act authorizing an exchange of the outstanding bonds, etc., and providing for the funding of two thirds of the debt, with interest accrued to July 1, 1871, by the issue of new bonds, bearing the same rate of interest as the old,—6 per cent. There were to be issued at the same time, for the other one third, certificates of same date, setting forth the amount of the old bond that was not funded, that payment thereof with interest at the rate prescribed in the old bond would be provided for in accordance with such settlement as should be had between Virginia and West Virginia in regard to the public debt, and that Virginia held the old bonds in trust for the holder or his assignees. There were further details that need not be mentioned. The coupons of the new bonds were receivable for all taxes and demands due to the state. Hartman v. Greenhow, supra; McGahey v. Virginia, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972. The certificates issued to the public under this statute, and outstanding, amount to $12,703,451.79.

The burden under the statute of 1871 still being greater than Virginia felt able to bear, a new refunding act was passed on March 28, 1879, reducing the interest, and providing that Virginia would negotiate or aid in negotiating *with West Virginia[32 for the settlement of the claims of certificate holders, and that the acceptance of certificates "for West Virginia's one third" under this act should be an absolute release of Virgina from all liability on account of the same. Few of these certificates were accepted. On February 14, 1882, another attempt was made, but without sufficient success to make it necessary to set forth the contents of the statute. The certificates for balances not represented by bonds, "constituting West Virginia's share of the old debt," stated that the balance was "to be accounted for by the state of West Virginia without recourse upon this commonwealth."

On February 20, 1892, a statute was passed which led to a settlement, described in the bill as final and satisfactory. This provided for the issue of bonds for $19,000,000 in exchange for $28,000,000 outstanding, not funded, the new bonds bearing interest at 2 per cent for the first ten years and 3 per cent for ninety years; and certificates in form similar to that just stated in the act of 1882. On March 6, 1894, a joint resolution of the senate and house of delegates was passed, reciting the passage of the four above-mentioned statutes, the provisions for certificates, and the satisfactory adjustment of the liabilities assumed by Virginia on account of two thirds of the debt, and appointing a committee to negotiate with West Virginia when satisfied that a majority of the certificate holders desired it, and would accept the amount to be paid by West Virginia in full settlement of the one third that Virginia had not assumed. The state was to be subjected to no expense. Finally an act of March 6, 1900, authorized the commission to receive and

take on deposit the certificates, upon a contract that the certificate holders would accept the amount realized from West Virginia in full settlement of all their claims under the same. It also authorized a suit if certain proportions of the certificates should 33]be so deposited, *as since then they have been,—the state, as before, to be subjected to no expense.

On January 9, 1906, the commission reported that, apart from certificates held by the state, and not entering into this account, there were outstanding of the certificates of 1871 in the hands of the public, $12,703,451.79, as we have said, of which the commission held $10,851,294.09, and of other certificates there were in the hands of the public $2,778,239.80, of which the commission held $2,322,141.32.

On the foregoing facts a technical argument is pressed that Virginia has discharged herself of all liability as to one third of the debt; that therefore she is without interest in this suit, and cannot maintain it on her own behalf; that she cannot maintain it as trustee for the certificate holders (New Hampshire v. Louisiana, 108 U. S. 76, 27 L. ed. 656, 2 Sup. Ct. Rep. 176); and that the bill is multifarious in attempting to unite claims made by the plaintiff as such trustee with some others set up under the Wheeling ordinance, etc., which, in the view we take, it has not been necessary to mention or discuss. We shall assume it to be true for the purposes of our decision, although it may be open to debate (Greenhow v. Vashon, 81 Va. 336, 342, 343), that the certificate holders who have turned in their certificates, being much the greater number, as has been seen, by doing so, if not before, surrendered all claims under the original bonds or otherwise against Virginia to the extent of one third of the debt. But even on that concession the argument seems to us unsound.

The liability of West Virginia is a deep-seated equity, not discharged by changes in the form of the debt, nor split up by the unilateral attempt of Virginia to apportion specific parts to the two states. If one third of the debt were discharged in fact, to all intents, we perceive no reason, in what has happened, why West Virginia should not contribute her proportion of the remaining 34]*two thirds. But we are of opinion that no part of the debt is extinguished, and further, that nothing has happened to bring the rule of New Hampshire v. Louisiana into play. For even if Virginia is not liable, she has the contract of West Virginia to bear an equitable share of the whole debt,—a contract in the performance of which the honor and credit of Virginia is concerned, and which she does not lose her right to insist upon by her creditors accepting from necessity the performance of her estimated duty as confining their claims for the residue to the party equitably bound. Her creditors never could have sued her if the supposed discharge had not been granted, and the discharge does not diminish her interest and right to have the whole debt paid by the help of the defendant. The suit is in Virginia's own interest, none the less that she is to turn over the proceeds. See United States v. Beebe, 127 U. S. 338, 342, 32 L. ed. 121, 123, 8 Sup. Ct. Rep. 1083; United States v. Nashville, C. & St. L. R. Co. 118 U. S. 120, 125, 126, 30 L. ed. 81, 83, 6 Sup. Ct. Rep. 1006. Moreover, even in private litigation it has been held that a trustee may recover to the extent of the interest of his *cestui que trust*. Lloyd's v. Harper, L. R. 16 Ch. Div. 290, 309, 315, 1 Eng. Rul. Cas. 686; Lamb v. Vice, 6 Mees. & W. 467, 472. We may add that in all its aspects it is a suit on the contract, and it is most proper that the whole matter should be disposed of at once.

It remains true, then, notwithstanding all the transactions between the old commonwealth and her bondholders, that West Virginia must bear her equitable proportion of the whole debt. With a qualification which we shall mention in a moment, we are of opinion that the nearest aproach to justice that we can make is to adopt a ratio determined by the master's estimated valuation of the real and personal property of the two states on the date of the separation, June 20, 1863. A ratio determined by population or land area would throw a larger share on West Virginia, but the relative resources of the *debtor populations[35 are generally recognized, we think, as affording a proper measure. It seems to us plain that slaves should be excluded from the valuation. The master's figures without them are, for Virginia, $300,887,367.74, and for West Virginia, $92,416,021.65. These figures are criticized by Virginia, but we see no sufficient reason for going behind them, or ground for thinking that we can get nearer to justice in any other way. It seems to us that Virginia cannot complain of the result. They would give the proportion in which the $33,897,073.82 was to be divided, but for a correction which Virginia has made necessary. Virginia, with the consent of her creditors, has cut down her liability to not more than two thirds of the debt, whereas, at the ratio shown by the figures,

her share, subject to mathematical correction, is about .7651. If our figures are correct, the difference between Virginia's share, say $25,931,261.47, and the amount that the creditors were content to accept from her, say $22,598,049.21, is $3,333,212.26; subtracting the last sum from the debt leaves $30,563,861.56 as the sum to be apportioned. Taking .235 as representing the proportion of West Virginia, we have $7,182,507.46 as her share of the principal debt.

We have given our decision with respect to the basis of liability and the share of the principal of the debt of Virginia that West Virginia assumed. In any event, before we could put our judgment in the form of a final decree, there would be figures to be agreed upon or to be ascertained by reference to a master. Among other things there still remains the question of interest. Whether any interest is due, and if due, from what time it should be allowed, and at what rate it should be computed, are matters as to which there is a serious controversy in the record, and concerning which there is room for a wide divergence of opinion. There are many elements to be taken into account on the one side and on the other. The circumstances of the asserted default 36]and *the conditions surrounding the failure earlier to procure a determination of the principal sum payable, including the question of laches as to either party, would require to be considered. A long time has elapsed. Wherever the responsibility for the delay might ultimately be placed, or however it might be shared, it would be a severe result to capitalize charges for half a century,—such a thing hardly could happen in a private case analogous to this. Statutes of limitation, if nothing else, would be likely to interpose a bar. As this is no ordinary commercial suit, but, as we have said, a quasi international difference, referred to this court in reliance upon the honor and constitutional obligations of the states concerned rather than upon ordinary remedies, we think it best at this stage to go no farther, but to await the effect of a conference between the parties, which, whatever the outcome, must take place. If the cause should be pressed contentiously to the end, it would be referred to a master to go over the figures that we have given provisionally, and to make such calculations as might become necessary. But this case is one that calls for forbearance upon both sides. Great states have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration to bring it to an end.

*UNITED STATES Petitioner, [37
v.
ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY.

(See S. C. Reporter's ed. 37-45.)

Master and servant — hours of telegraph operators — Federal regulation.

Requiring a railway telegraph operator to work five and one half hours, and then, after an interval, three and one half more hours in the same twenty-four, is not made unlawful by the provisions of the act of March 4, 1907 (34 Stat. at L. 1415, 1416, chap. 2939, U. S. Comp. Stat. Supp. 1909, pp. 1170, 1171), §§ 2, 3, forbidding common carriers to permit such employees to be on duty for a longer period than nine hours in any twenty-four-hour period in a place continuously operated night and day.

[For other cases, see Master and Servant, I. b, in Digest Sup. Ct. 1908.]

[No. 504.]

Argued February 28, 1911. Decided March 13, 1911.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, to review a judgment which reversed a judgment of the District Court for the Northern District of Illinois, Eastern Division, in favor of the government in an action to recover the penalty provided for a violation by a common carrier of the Federal statute prescribing the hours of labor for telegraph operators. Affirmed.

See same case below, 100 C. C. A. 534, 177 Fed. 114.

The facts are stated in the opinion.

Assistant to the Attorney General **Kenyon** argued the cause, and, with Attorney General Wickersham and Special Assistant United States Attorney Doherty, filed a brief for petitioner:

Courts have said that an injury is "continuous" if it recurs at repeated intervals (Wood v. Sutcliffe, 8 Eng. L. & Eq. 220, 2 Sim. N. S. 163, 21 L. J. Ch. N. S. 253, 16 Jur. 75); and that a ride is continuous if it is not interrupted for any considerable length of time (Garrison v. United R. & Electric Co. 97 Md. 347, 99 Am. St. Rep. 452, 55 Atl. 371).

The word "continuously" may be read in the sense of "regularly" or "habitually" or "customarily."

NOTE.—On legislative limitation of hours of labor—see notes to People v. Orange County Road Constr. Co. 65 L.R.A. 33; Ex parte Martin, 26 L.R.A.(N.S.) 242; People v. Williams, 12 L.R.A.(N.S.) 1130; and Atkin v. Kansas, 48 L. ed. U. S. 148.

United States Steel Corp. v. Hodge, 64 N. J. Eq. 807, 60 L.R.A. 742, 54 Atl. 1.

The word "period" carries with it the idea of a cycle, a term.

Sampson v. Peaslee, 20 How. 571, 15 L. ed. 1022; 22 Am. & Eng. Enc. Law, p. 678; Webster's Dict. "Period;" Standard Dict. Crabb's Eng. Synonyms, p. 799; People ex rel. Healy v. Leask, 67 N. Y. 521; State v. Strauss, 49 Md. 288; Re Becker, 39 Misc. 756, 80 N. Y. Supp. 1115.

A statute is to be construed with reference to its manifest object; and if the language is susceptible of two constructions, one of which will carry out and the other defeat the manifest object, it should receive the former construction.

Sutherland, Stat. Constr. 2d ed. §§ 369, 370.

Granting, for the sake of argument, that it is a penal statute, it does not follow that the forced and technical construction contended for by respondent should be given.

Northern Securities Co. v. United States, 193 U. S. 357, 48 L. ed. 708, 24 Sup. Ct. Rep. 436; United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37; United States v. Morris, 14 Pet. 464, 10 L. ed. 543; People v. Bartow, 6 Cow. 290; Heydon's Case, 3 Coke, 7; Endlich, Interpretation of Statutes, p. 135, § 103; Potter's Dwarr. Stat. Constr. p. 194, note.

The act is remedial; and therefore, despite its penal provisions, it is to be reasonably construed, so as to accomplish the purpose of its enactment.

Johnson v. Southern P. Co. 196 U. S. 1, 17, 49 L. ed. 363, 369, 25 Sup. Ct. Rep. 158; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 10, 51 L. ed. 681, 685, 27 Sup. Ct. Rep. 407; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272.

Mr. **Robert Dunlap** argued the cause, and, with Mr. Gardiner Lathrop, filed a brief for respondent:

The office in which the operators in question worked was not one "continuously operated night and day."

Standard Dict. "Continuously," 9 Enc. L. & P. 212; State v. Vanderbilt, 37 Ohio St. 598; Black v. Delaware & R. Canal Co. 22 N. J. Eq. 402; Garrison v. United R. & Electric Co. 97 Md. 347, 99 Am. St. Rep. 452, 55 Atl. 372; People v. Sullivan, 9 Utah, 195, 33 Pac. 701.

Provisos or exceptions are strictly construed in taking cases out of general provisions.

United States v. Dickson, 15 Pet. 158, 165, 10 L. ed. 696, 698; Dollar Sav. Bank v. United States, 19 Wall. 228, 22 L. ed. 80.

Courts cannot suppose that omissions were not intentional, and undertake to supply the same.

United States v. Colorado & N. W. R. Co. 15 L.R.A.(N.S.) 167, 85 C. C. A. 27, 157 Fed. 321, 13 A. & E. Ann. Cas. 893; State v. Cleveland, C. C. & St. L. R. Co. 157 Ind. 288, 61 N. E. 670; Re Hering, 133 App. Div. 293, 117 N. Y. Supp. 747; Sutherland Stat. Constr. § 328; Hobbs v. McLean, 117 U. S. 579, 580, 29 L. ed. 945, 6 Sup. Ct. Rep. 870; United States v. Illinois C. R. Co. 95 C. C. A. 628, 170 Fed. 549; Delaware, L. & W. R. Co. v. Interstate Commerce Commission, 166 Fed. 498, affirmed in 216 U. S. 531, 54 L. ed. 605, 30 Sup. Ct. Rep. 415; Konda v. United States, 22 L.R.A.(N.S.) 304, 92 C. C. A. 75, 166 Fed. 91.

The statute should be construed strictly.

Robinson v. Harmon, 157 Mich. 266, 278, 117 N. W. 661, 664, 122 N. W. 106; People v. Weinstock, 193 N. Y. 481, 86 N. E. 548; Nance v. Southern R. Co. 149 N. C. 366, 63 S. E. 116; United States v. Harris, 177 U. S. 305, 309, 44 L. ed. 780, 781, 20 Sup. Ct. Rep. 609; Bolles v. Outing Co. 175 U. S. 265, 268, 44 L. ed. 157, 158, 20 Sup. Ct. Rep. 94; Lau Ow Bew v. United States, 144 U. S. 59, 36 L. ed. 344, 12 Sup. Ct. Rep. 517; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 876; Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917.

Penalties are not to be extended by construction.

Atchison, T. & S. F. R. Co. v. People, 227 Ill. 278, 81 N. E. 342; State v. Cleveland, C. C. & St. L. R. Co. 157 Ind. 288, 61 N. E. 669.

For Congress to undertake to say that the hours of work can only be consecutive, and may not, by agreement of the parties, be distributed within the period of a day, would exceed the limit of police power, and seriously impinge upon the liberty of contract.

Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764.

It is the "hours of service" which are sought to be limited.

22 Ops. Atty. Gen. p. 62; United States v. Langston, 29 C. C. A. 379, 52 U. S. App. 504, 85 Fed. 613; United States v. McCrory, 56 C. C. A. 373, 119 Fed. 862.

A sensible construction should be adopted.

East v. Brooklyn Heights R. Co. 195

N. Y. 409, 23 L.R.A.(N.S.) 513, 88 N. E. 751; Opinion of Justices, — N. H. —, 72 Atl. 754; Washington Market Co. v. Hoffman, 101 U. S. 116, 25 L. ed. 783; United States v. Kirby, 7 Wall. 486, 19 L. ed. 280; Darlington Lumber Co. v. Missouri P. R. Co. 216 Mo. 658, 116 S. W. 530; Thompson v. State, 20 Ala. 62.

Mr. Justice Holmes delivered the opinion of the court:

This is an action to recover penalties for violation of the "Act to Promote the Safety of Employees and Travelers upon Railroads by Limiting the Hours of Service of Employees Thereon." March 4, 1907, chap. 2939, §§ 2, 3, 34 Stat. at L. 1415, 1416, U. S. Comp. Stat. Supp. 1909, pp. 1170, 1171. The government had a verdict in the district court, subject to exceptions, and the judgment was reversed by the circuit court of appeals. 100 C. C. A. 534, 177 Fed. 114.

The case is this: By § 2 it is made unlawful for common carriers subject to the act to permit any employee subject to the act to be on duty "for a longer period than sixteen consecutive hours," or, after that period, to go on duty again until he has had 43] at least ten consecutive hours off *duty, or eight hours after sixteen hours' work in the aggregate: Provided that no telegraph operator and the like shall be permitted to be "on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime," with immaterial exceptions. By § 3 there is a penalty of not exceeding $500 for each violation of § 2. The defendant was subject to the act. It had a station and telegraph office at Corwith, in the outer limits of Chicago, which was shut from 12 to 3 by day and by night, but open the rest of the time. The government contends that this was a place "continuously operated night and day." At this station the same telegraph operator was employed from half-past 6 o'clock in the morning until 12, and again from 3 P. M. to half-past 6, or nine hours, in all, of actual work. The government contends that when nine hours have passed from the moment of beginning work, the statute allows no more labor within twenty-four hours from the same time, even though the nine hours have not all of them been spent in work. According to the government's argument, the operator's nine hours expired at half-past 3 in the afternoon. These questions on the construction of the statute are the only ones that we have to decide.

We are of opinion that the government's argument cannot be sustained, even if it be conceded that Corwith was a place continuously operated night and day, as there are strong reasons for admitting. The antithesis is between places continuously operated night and day and places operated only during the daytime. We think that the government is right in saying that the proviso is meant to deal with all offices, and if so, we should go farther than otherwise we might in holding offices not *operated only during the daytime as[44 falling under the other head. A trifling interruption would not be considered, and it is possible that even three hours by night and three hours by day would not exclude the office from all operation of the law, and to that extent defeat what we believe was its intent.

But if we concede the government's first proposition, it is impossible to extract the requirement of fifteen hours' continuous leisure from the words of the statute by grammatical construction alone. The proviso does not say nine "consecutive" hours, as was said in the earlier part of the section, and if it had said so, or even "for a longer period than a period of nine consecutive hours," still the defendant's conduct would not have contravened the literal meaning of the words. A man employed for six hours and then, after an interval, for three, in the same twenty-four, is not employed for a longer period than nine consecutive hours. Indeed, the word "consecutive" was struck out when the bill was under discussion, on the suggestion that otherwise a man might be worked for a second nine hours after an interval of half an hour. In order to bring about the effect contended for it would have been necessary to add, as the section does add in the earlier part, a provision for the required number of consecutive hours off duty. The presence of such a provision in the one part and its absence in the other is an argument against reading it as implied. The government suggests that if it is not implied, a man might be set to work for two hours on and two hours off, alternately. This hardly is a practical suggestion. We see no reason to suppose that Congress meant more than it said. On the contrary, the reason for striking out the word "consecutive" in the proviso given, as we have mentioned, when the bill was under discussion, and the alternative reference in § 2 to "sixteen consecutive hours" and "sixteen hours in the aggregate," show that the obvious possibility of two periods of service *in the same twenty-four hours[45 was before the mind of Congress, and that

there was no oversight in the choice of words.

Judgment of Circuit Court of Appeals affirmed.

HIPOLITE EGG COMPANY, Claimant of Fifty Cans, More or Less, of Preserved Eggs, Plff. in Err. and Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 45–60.)

Pure food law — remedy in rem — shipment for use as raw material.

1. The remedy *in rem* in the Federal courts provided by the food and drugs act of June 30, 1906 (34 Stat. at L. 768, chap. 3915, § 10, U. S. Comp. Stat. Supp. 1909, p. 1193), where any article of food that is adulterated is being transported from one state to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, may be invoked where adulterated eggs have been shipped into the state, not for sale, but intended solely for use by the consignee in the bakery business.

[Adulterated Foods, see Food, in Digest Sup. Ct. 1908.]

Commerce — adulterated foods — confiscation in original packages.

2. Congress could lawfully enact the provisions of the food and drugs act of June 30, 1906, § 10, under which adulterated articles of food, the subjects of interstate commerce, may be confiscated by a proceeding *in rem* in the Federal courts after they have reached their destination, and there remain in the hands of the consignee in the original unbroken packages.

[Original Package Doctrine, see Commerce, IV, b, 3, in Digest Sup. Ct. 1908.]

Costs — in proceeding to confiscate adulterated food.

3. Costs *in personam* may be assessed against the claimant in the proceeding *in rem* under the food and drugs act of June 30, 1906, § 10, to confiscate adulterated articles of food, the subject of interstate commerce, even if the principles of the admiralty law are made applicable by the provision of that section that the proceedings shall conform as near as may be to the proceedings in admiralty.

[Matters as to Costs, see Costs and Fees, in Digest Sup. Ct. 1908.]

[No. 519.]

Submitted January 5, 1911. Decided March 13, 1911.

IN ERROR to, and APPEAL from, the District Court of the United States for the Southern District of Illinois, to review a decree confiscating adulterated eggs under the food and drugs act. Affirmed.

The facts are stated in the opinion.

Messrs. **Thomas E. Lannen** and **Edward T. Fenwick** submitted the cause for plaintiff in error and appellant:

Section 10 of the food and drugs act of June 30, 1906, does not apply to an article of food which has not been shipped for sale, but which has been shipped solely for use as raw material in the manufacture of some other food product.

United States v. Sixty Five Casks Liquid Extracts, 170 Fed. 449; United States v. Knowlton Danderine Co. 99 C. C. A. 667, 175 Fed. 1022; United States v. Forty-Six Packages & Bags of Sugar, 183 Fed. 642.

When goods shipped into a state have been so acted upon by the party in the state receiving them that they become mixed with the general property in the state, and the goods become incorporated with the mass of state property, they are no longer in interstate commerce.

Waring v. Mobile, 8 Wall. 110, 19 L. ed. 342; Low v. Austin, 13 Wall. 29, 20 L. ed. 517; Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015.

In a proceeding *in rem*, the court has no jurisdiction to assess the costs *in personam* against a claimant who simply files an answer, but who does not enter into a stipulation to pay the costs of the proceeding.

The Monte A, 12 Fed. 331.

Where the law provides only for a proceeding *in rem*, a proceeding *in rem* and a proceeding *in personam* cannot be joined in the same libel.

The Alida, 12 Fed. 343.

Assistant Attorney General **Fowler** submitted the cause for defendant in error and appellee:

The cans of eggs in question had not lost their identity as articles of interstate commerce.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10

Note.—On validity of statute or ordinance for the destruction of food products below the prescribed standard, or unfit for use—see note to Nelson v. Minneapolis, 29 L.R.A.(N.S.) 260.

On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

Sup. Ct. Rep. 681; Schollenberger v. Pennsylvania (Paul v. Pennsylvania) 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; McGregor v. Cone, 104 Iowa, 471, 39 L.R.A. 484, 65 Am. St. Rep. 522, 73 N. W. 1041.

The food and drugs act is a remedial statute, and § 10 thereof prescribes one of the methods of suppressing the frauds aimed at by the act, and such section should therefore be liberally construed.

Taylor v. United States, 3 How. 197, 210, 11 L. ed. 559, 564; Rankin v. Hoyt, 4 How. 327, 332, 11 L. ed. 996, 998; United States v. Stowell, 133 U. S. 1, 12, 33 L. ed. 555, 558, 10 Sup. Ct. Rep. 244; Anglo-California Bank v. Secretary of Treasury, 22 C. C. A. 527, 48 U. S. App. 27, 76 Fed. 742; Re Coy, 31 Fed. 794; Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 35, 23 L. ed. 196, 199; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; Endlich, Interpretation of Statutes, §§ 110, 333; Gray v. Bennett, 3 Met. 529; Reed v. Northfield, 13 Pick. 101, 23 Am. Dec. 662; Ellis v. Whitlock, 10 Mo. 781; Sickles v. Sharp, 13 Johns. 497; United States v. Freeman, 3 How. 556, 565, 11 L. ed. 724, 728.

The court did not err in adjudging the costs of the cause against plaintiff in error.

Jordan v. Agawam Woolen Co. 3 Cliff. 239, Fed. Cas. No. 7,516; The Mary H. Brockway, 49 Fed. 161; Aiken v. Smith, 6 C. C. A. 414, 13 U. S. App. 394, 57 Fed. 423; The Ethel, 13 C. C. A. 504, 30 U. S. App. 214, 66 Fed. 340; Du Bois v. Kirk, 158 U. S. 58, 67, 39 L. ed. 895, 899, 15 Sup. Ct. Rep. 729.

Mr. Justice **McKenna** delivered the opinion of the court:

The case is here on a question of jurisdiction certified by the district court.

On March 11, 1909, the United States instituted libel proceedings under § 10 of the act of Congress of June 30, 1906 (34 [50]Stat. at L. 768, *chap. 3915, U. S. Comp. Stat. Supp. 1909, p. 1193), against fifty cans of preserved whole eggs, which had been prepared by the Hipolite Egg Company of St. Louis, Missouri.

The eggs, before the shipment alleged in the libel, were stored in a warehouse in St. Louis for about five months, during which time they were the property of Thomas & Clark, an Illinois corporation engaged in the bakery business at Peoria, Illinois.

Thomas & Clark procured the shipment of the eggs to themselves at Peoria, and, upon the receipt of them, placed the shipment in their storeroom in their bakery factory along with other bakery supplies. The eggs were intended for baking purposes, and were not intended for sale in the original unbroken packages or otherwise, and were not so sold. The Hipolite Egg Company appeared as claimant of the eggs, intervened, filed an answer, and defended the case, but did not enter into a stipulation to pay costs.

Upon the close of libellant's evidence, and again at the close of the case, counsel for the egg company moved the court to dismiss the libel on the ground that it appeared from the evidence that the court, as a Federal court, had no jurisdiction to proceed against or confiscate the eggs, because they were not shipped in interstate commerce for sale, within the meaning of § 10 of the food and drugs act, and for the further reason that the evidence showed that the shipment had passed out of interstate commerce before the seizure of the eggs, because it appeared that they had been delivered to Thomas & Clark, and were not intended to be sold by them in the original packages or otherwise.

The motions were overruled and the court proceeded to hear and determine the cause, and entered a decree finding the eggs adulterated, and confiscating them. Costs were assessed against the egg company.

The decree was excepted to on the ground that the *court was without jurisdic-[51 tion *in rem* over the subject-matter, and on the further ground that the court was without jurisdiction to enter judgment *in personam* against the egg company for costs.

The jurisdiction of the district court being challenged, the case comes here directly.

Section 2 of the food and drugs act prohibits the introduction into any state or territory from any other state or territory, of any article of food or drugs which is adulterated, and makes it a misdemeanor for any person to ship or deliver for shipment such adulterated article, or who shall receive such shipment, or having received it, shall deliver it in original unbroken packages for pay or otherwise.

In giving a remedy, § 10 provides that if "any article of food . . . that is adulterated . . . and is being transported from one state . . . to another, for sale, or having been transported, remains unloaded, unsold, or in original unbroken packages, . . . shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. . . . The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty . . . and all such

proceedings shall be at the suit of and in the name of the United States."

The shipment to Thomas & Clark consisted of 130 separate cans, each can corked and sealed with wax. The eggs were intended to be used for baking purposes. The only can sold was that sold to the inspector for the purpose of having the eggs analyzed. They contained approximately two per cent of boric acid, which the court found was a deleterious ingredient, and adjudged that they were adulterated within the meaning of the food and drugs act of June 30, 1906 (34 Stat. at L. 771, chap. 3915, U. S. Comp. Stat. Supp. 1909, p. 1187).

The egg company, whilst not contending 52]that the *shipment of the eggs was not a violation of § 2 of the act, and a misdemeanor within its terms, and not denying the power of Congress to enact it, presents three contentions: (1) Section 10 of the food and drugs act does not apply to an article of food which has not been shipped for sale, but which has been shipped solely for use as raw material in the manufacture of some other product. (2) A United States district court has no jurisdiction to proceed *in rem* under § 10 against goods that have passed out of interstate commerce before the proceeding *in rem* was commenced. (3) The court had no jurisdiction to enter a personal judgment against the egg company for costs.

It may be said at the outset of these contentions that they insist that the remedies provided by the statute are not coextensive with its prohibitions, and hence that it has virtually defined the wrong, and provided no adequate means of punishing the wrong when committed. Premising this much, we proceed to their consideration in the order in which they have been presented. The following cases are cited to sustain the first contention: United States v. Sixty-five Casks of Liquid Extracts, 170 Fed. 449, affirmed by the circuit court of appeals in United States v. Knowlton Danderine Co. 99 C. C. A. 667, 175 Fed. 1022, and United States v. Forty-six Packages & Bags of Sugar, in the district court for the Southern district of Ohio, 183 Fed. 642.

The articles involved in the first case were charged with having been misbranded, and consisted of drugs in casks, which were shipped from Detroit, Michigan, to Wheeling, West Virginia, there to be received by the Knowlton Danderine Company in bulk in car-load lots, and manufactured into danderine, of which no sale was to be made until the casks should be emptied and the contents placed in properly marked bottles.

It was contended that the articles, not having been shipped in the casks for the 53]purpose of sale thus in bulk, *but shipped to the owner from one state to another, for the purpose of being bottled into small packages suitable for sale, and when so bottled to be labeled in compliance with the requirements of the act, were not transported for sale, and were therefore not subject to libel under § 10 of the act.

The contention submitted to the court the construction of the statute. The court, however, based its decision upon the want of power in Congress to prohibit one from manufacturing a product in a state and removing it to another state "for the purpose of personal use, and not sale, or for use in connection with the manufacture of other articles, to be legally branded when so manufactured;" and concluded independently, or as construing the statute, that the danderine company, being the owner of the property, shipped it to itself, and did not come within any of the prohibitions of the statute. The case was affirmed by the circuit court of appeals (99 C. C. A. 667, 175 Fed. 1022). The court, however, expressed no opinion as to the power of Congress. It decided that the facts did not exhibit a case within the purpose of the statute, saying: "No attempt to evade the law, either directly, indirectly, or by subterfuge, has been shown, it appearing that the manufacturer had simply transferred from one point to another the product he was manufacturing, for the purpose of completing the preparation of the same for the market. Under the circumstances disclosed in this case, having in mind the object of the Congress in enacting the law involved, we do not think the liquid extracts proceeded against should be forfeited. Reaching this conclusion, we do not find it necessary to consider other questions discussed by counsel and referred to in the opinion of the court below."

In United States v. Forty-six Packages & Bags of Sugar, the court construed the statute as applying only to transportation for the purpose of sale. To explain its view the court said: "Following the words having been *'transported' is an ellipse[54 —an omission of words necessary to the complete construction of the sentence. Those words are found in the preceding part of the section, and, when supplied, the clause under which this libel is filed reads and means, 'any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, having been transported from one state . . . to another *for sale* [italics ours], remains unloaded, unsold, or in original, unbroken packages, . . . shall be liable,'" etc. And the court was of opinion that this view was in accord with the other two cases which we have cited. This may be disputed. It may

well be considered that there is no analogy between an article in the hands of its owner, or moved from one place to another by him, to be used in the manufacture of articles subject to the statute, and to be branded in compliance with it, and an adulterated article *itself* the subject of sale, and intended to be used as adulterated, in contravention of the purpose of the statute.

A legal analogy might be insisted upon if cakes and cookies, which are the compounds of eggs and flour which the record presents, could be branded to apprise of their ingredients like compounds of alcohol. The object of the law is to keep adulterated articles out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destination, provided they remain unloaded, unsold, or in original unbroken packages. The situations are clearly separate, and we cannot unite or qualify them by the purpose of the owner to be a sale. It, indeed, may be asked, in what manner a sale? The question suggests that we might accept the condition, and yet the instances of this record be within the statute. All articles, compound or single, not intended for consumption by the producer, are designed for sale, and, because they are, it is the concern of the law to have them pure.

It is, however, insisted that "the pro-
55]ceeding *in personam* *authorized by the law was intended to, and no doubt is, capable of giving full force and effect to the law;" and, further, that a producer in a state is not interested in an article shipped from another state, which is not intended to be sold or offered for consumption until it is manufactured into something else. The argument is peculiar. It is certainly to the interest of a producer or consumer that the article which he receives, no matter whence it comes, shall be pure, and the law seeks to secure that interest, not only through personal penalties, but through the condemnation of the article if impure. There is nothing inconsistent in the remedies, nor are they dependent. The Three Friends, 166 U. S. 1, 49, 41 L. ed. 897, 913, 17 Sup. Ct. Rep. 495.

The first contention of the egg company is therefore untenable.

2. Under this contention it is said that "the jurisdiction of the food and drugs act in question can go no farther than the power given to Congress under which it was enacted," and that the district court, therefore, "had no jurisdiction *in rem*, because at the time of the seizure the eggs had passed into the general mass of property in the state, and out of the field covered by interstate commerce."

To support the contention, Waring v. Mobile, 8 Wall. 110, 19 L. ed. 342, is cited. That case involved the legality of a tax imposed by an ordinance of the city of Mobile upon merchants and traders of the city, equal to ½ of 1 per cent on the gross amount of their sales, whether the merchandise was sold at public or private sale. Waring was fined for nonpayment of the tax, and he brought suit to restrain the collection of the fine, alleging that he was exempt from the tax on the ground that the sales made by him were of merchandise in the original packages, as imported from a foreign country, and which was purchased by him, in entire cargoes, of the consignees of the importing vessels before their arrival, or while the vessels were *in the[56 lower harbor of the port. He obtained a decree in the trial court which was reversed by the supreme court of the state of Alabama. A writ of error was sued out from this court and the decree was affirmed, on the ground that Waring was not the shipper or consignee of the imported merchandise, nor the first vendor of it, and it was the settled law of the court "that merchandise in the original packages, once sold by the importer, is taxable as other property,"—citing Brown v. Maryland, 12 Wheat. 443, 6 L. ed. 687; Almy v. California, 24 How. 173, 16 L. ed. 645; Pervear v. Massachusetts, 5 Wall. 479, 18 L. ed. 609. This also was said:

"When the importer sells the imported articles, or otherwise mixes them with the general property of the state by breaking up the packages, the state of things changes, as was said by this court in the leading case, as the tax then finds the articles already incorporated with the mass of property by the act of the importer. Importers selling the imported articles in the original packages are shielded from any such state tax, but the privilege of exemption is not extended to the purchaser, as the merchandise, by the sale and delivery, loses its distinctive character as an import."

This case is clear as far as it goes, but the facts are not the same as those in the case at bar.

In the case at bar there was no sale of the articles after they were committed to interstate commerce, nor were the original packages broken. Indeed, it might be insisted that we need go no farther than that case for the rule of decision in this. It affirms the doctrine of original packages which was expressed and illustrated in previous cases and has been expressed and illustrated in subsequent ones. It is too firmly fixed to need or even to justify further discussion, and we shall not stop to affirm or deny its application to the special contention of the egg company.

We prefer to decide the case on another ground which is sustained by well-known principles.

57] *The statute declares that it is one "for preventing . . . the transportation of adulterated . . . foods . . . and for regulating traffic therein;" and, as we have seen, § 2 makes the shipper of them criminal, and § 10 subjects them to confiscation, and, in some cases, to destruction, so careful is the statute to prevent a defeat of its purpose. In other words, transportation in interstate commerce is forbidden to them, and, in a sense, they are made culpable as well as their shipper. It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce and be stealthily taken out again upon arriving at their destination, and be given asylum in the mass of property of the state. Certainly not, when they are yet in the condition in which they were transported to the state, or, to use the words of the statute, while they remain "in the original, unbroken packages." In that condition they carry their own identification as contraband of law. Whether they might be pursued beyond the original package we are not called upon to say. That far the statute pursues them, and, we think, legally pursues them, and to demonstrate this but little discussion is necessary.

The statute rests, of course, upon the power of Congress to regulate interstate commerce; and, defining that power, we have said that no trade can be carried on between the states to which it does not extend, and have further said that it is complete in itself, subject to no limitations except those found in the Constitution. We are dealing, it must be remembered, with illicit articles,—articles which the law seeks to keep out of commerce because they are debased by adulteration, and which punishes them (if we may so express ourselves) and the shipper of them. There is no denial that such is the purpose of the law, and the only limitation of the power to execute such purpose which is urged is that the articles must be apprehended in transit, 58]or before they have become a part *of the general mass of property of the state. In other words, the contention attempts to apply to articles of illegitimate commerce the rule which marks the line between the exercise of Federal power and state power over articles of legitimate commerce. The contention misses the question in the case. There is here no conflict of national and state jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found; and it certainly will not be contended that they are outside of the jurisdiction of the national government when they are within the borders of a state. The question in the case, therefore, is, What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the states by denying to them the facilities of interstate commerce. And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of the articles at their point of destination in the original, unbroken packages. The selection of such means is certainly within that breadth of discretion which we have said Congress possesses in the execution of the powers conferred upon it by the Constitution. M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Lottery Case (Champion v. Ames) 188 U. S. 321, 355, 47 L. ed. 492, 500, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561.

3. Had the court jurisdiction to adjudge costs against the egg company? This is contended, and in support of the contention the claimant assimilates this proceeding *to one in admiralty. In consequence,[59 it may be supposed of the provisions of § 10 of the food and drugs act that the proceedings "shall conform, as near as may be, to the proceedings in admiralty," and The Monte A, 12 Fed. 331, and The Alida, 12 Fed. 343, are cited as deciding that in a proceeding *in rem* the court has no jurisdiction to assess the costs *in personam*, against the claimant, who simply files an answer, but who does not enter into a stipulation to pay the costs of the proceeding. Too broad a deduction is made from these cases. They undoubtedly decide that a process *in rem* and *in personam* cannot be joined in admiralty in the same libel, but it was not held that this was because of a want of jurisdictional power in the court. Such view was disclaimed in The Monte A, and to show that the framing of a libel against the owner *in personam* and against the

vessel *in rem* was not jurisdictional, the court said that a breach of a contract of affreightment could have been so framed "long before the adoption of the Supreme Court rules in admiralty."

It is stated in Benedict's Admiralty, § 204, that "the distinction between proceedings *in rem* and *in personam* has no proper relation to the question of jurisdiction." It may be, as stated in § 359 of the same work, that "in a suit *in rem*, unless someone intervenes, the power and process of the court is confined to the thing itself, and does not reach either the person or property of the owner." If, however, the owner comes in, or an intervener does, his appearance is voluntary. He becomes an actor and subjects himself to costs, and this even if his ownership be averred in the libel. Waples, Proceedings in Rem, p. 100, § 73; United States v. 422 Casks of Wine, 1 Pet. 547, 7 L. ed. 257.

And such seems to be the necessary effect of admiralty rules 26 and 34. It is provided 60] (rule 34) that if a third *person intervene, for his own interest, he is required to give a stipulation with sureties to abide the final decree rendered in the original or appellate court. It is in effect conceded that if such a stipulation be given, a judgment for costs can be rendered. But, upon what theory? The concession confounds the relation between the stipulation and the judgment, and makes the security for the payment of the judgment the source of jurisdiction to render it,—jurisdiction, according to the contention, which the court does not have as a Federal court.

Even, therefore, upon the supposition that the principles of the admiralty law are to apply to the proceedings under § 10, we think the court had jurisdiction to render a judgment for costs against the egg company.

So far our discussion has been in deference to the contention of the egg company; but it is disputable if the certificate presents a question of jurisdiction as to costs. The district court gets its jurisdiction of the cause from § 10 of the food and drugs act; and whether the libel may be *in rem* and *in personam*, or whether a personal judgment for costs can be rendered, may be said to be simply a question of the construction of the section, and not one which involves the jurisdiction of the court. In other words, the rulings of the court may be error only, not in excess of its power. It certainly had jurisdiction of the person of the egg company.

Decree affirmed.

*STUART LINDSLEY, Appt., [61
v.
NATURAL CARBONIC GAS COMPANY, William S. Jackson, Attorney General of the State of New York, et al.

(See S. C. Reporter's ed. 61-83.)

Federal courts — following decisions of state courts — construction of statute.

1. The construction placed by the highest court of the state upon N. Y. Laws 1908, chap. 429, enacted to safeguard natural mineral springs against waste and impairment, must be accepted by the Federal courts in determining the validity of such statute under the Federal Constitution.

[For other cases, see Courts, 1744-1823, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — prohibiting waste of mineral waters.

2. A landowner engaged in collecting and vending as a separate commodity the carbonic acid gas contained in natural mineral waters existing in a common underground reservoir is not deprived of his property without due process of law, contrary to U. S. Const., 14th Amend., by the provisions of N. Y. Laws 1908, chap. 429, which, as construed by the state courts, forbid him from pumping or otherwise artificially drawing, by means of wells on his property, unnatural quantities of such waters from the common source of supply, and wasting them to the injury or impairment of the rights of other proprietors.

[For other cases, see Constitutional Law, 500-522, in Digest Sup. Ct. 1908.]

NOTE.—As to state decisions and laws as rules of decision in Federal courts—see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553; Griffin v. Overman Wheel Co. 9 C. C. A. 548; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; Clark v. Graham, 5 L. ed. U. S. 334; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; and Mitchell v. Burlington, 18 L. ed. U. S. 351.

On constitutionality of statutes to prevent waste of subterranean waters, natural gas, or oil—see note to Hathorn v. Natural Carbonic Gas Co. 23 L.R.A.(N.S.) 436.

As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to the validity of class legislation—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

Constitutional law — equal protection of the laws — classification — prohibiting waste of mineral waters.

3. The substantial difference in point of harmful result, which, so far as the case as made shows, may exist, affords a reasonable basis, under the equal-protection-of-the-laws clause of the Federal Constitution, for the exemption of pumping from wells not penetrating the rock, and such pumping as is done for other purposes than collecting and vending, as a separate commodity, the carbonic acid gas contained in mineral waters, from the operation of the provisions of N. Y. Laws 1908, chap. 429, prohibiting the pumping or artificially drawing of unnatural quantities of mineral waters from a common underground source of supply, and wasting them to the injury and impairment of other proprietors.

[For other cases, see Constitutional Law, 175–212, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — equal protection of the laws — statutory presumption.

4. Making the engaging in pumping mineral waters from wells bored or drilled into the rock for the purpose of collecting and vending as a separate commodity the carbonic acid gas contained therein prima facie evidence of the common underground source of supply and of injury to other proprietors, as is done by N. Y. Laws 1908, chap. 429, forbidding the pumping of the waters under such conditions, does not render the statute invalid, as infringing upon the guaranties in the Federal Constitution of due process of law and the equal protection of the laws.

[For other cases, see Constitutional Law, 774–778, in Digest Sup. Ct. 1908.]

[No. 260.]

Argued January 3 and 4, 1911. Decided March 13, 1911.

APPEAL from the Circuit Court of the United States for the Southern District of New York to review a decree sustaining demurrers to and dismissing a bill which seeks to enjoin the enforcement of a state statute enacted to safeguard natural mineral springs against waste and impairment. Affirmed.

See same case below, 170 Fed. 1023.

Statement by Mr. Justice **Van Devanter**:

By a bill in equity exhibited in the circuit court, the appellant, as owner and holder of capital stock and bonds of the Natural Carbonic Gas Company, sought a decree enjoining that company from obeying, and the other defendants from enforcing, a statute of the state of New York, approved May 20, 1908, entitled, "An Act for the Protection of the Natural Mineral Springs of the State, and to Prevent Waste and Impairment of Its Natural Mineral Waters," and containing, among others, this provision: "Pumping, or otherwise drawing by artificial appliance, from any well made by boring or drilling into the rock, that class of mineral waters holding in solution natural mineral salts and an excess of carbonic acid gas, or pumping, or by any artificial contrivance whatsoever in any manner producing, an unnatural flow of carbonic acid gas issuing from or contained in any well made by boring or drilling into the rock, for the purpose of extracting, *collecting, compressing, liqui-[63 fying, or vending such gas as a commodity otherwise than in connection with the mineral water and the other mineral ingredients with which it was associated, is hereby declared to be unlawful." Laws 1908, vol. 2, chap. 429, p. 1221.

In addition to what properly may be passed without special mention, the bill alleges that the gas company owns 21 acres of lands in Saratoga Springs, New York, which contain mineral waters of the class specified in the statute; that these waters are percolating waters, not naturally flowing to or upon the surface, and can be reached and lifted to the surface only by means of pumps or other artificial appliances; that the gas company is engaged in collecting natural carbonic acid gas from these waters, and in compressing and selling the gas as a separate commodity; that this business has come to be both large and lucrative, and as a necessary incident to its successful prosecution the gas company has sunk upon its land wells of great depth, made by boring or drilling into the underlying rock, and has fitted these wells with tubing, seals, and pumps, whereby it lifts the waters and the gas contained therein to the surface; that these pumps do not exercise any force of compulsion upon waters in or under adjoining lands, but lift to the surface only such waters as flow by reason of the laws of nature into the wells; that when the waters are lifted to the surface, the excess of carbonic acid gas therein naturally escapes and is caught and compressed preparatory to its sale, none thereof being wasted, and no process being employed to increase the natural separation of the excess of gas from the waters; and that many other landowners in Saratoga Springs have like wells, which are operated in a like way, with a like purpose.

It also is alleged that the gas company bottles and sells for drinking purposes and for use by invalids and others all of the mineral waters pumped from its wells "for *which there is any market or demand," [64 but there is no allegation of the extent of this market or demand, and it was conceded in argument that a large proportion of the

waters pumped from the company's wells is not used, but is suffered to run to waste.

In terms the bill predicates the right to the relief sought upon the claim that the state statute deprives the appellant and others of property without due process of law, and denies to them the equal protection of the laws, and therefore is violative of the 14th Amendment to the Constitution of the United States.

In the circuit court the defendants other than the gas company demurred to the bill. the demurrers were sustained (170 Fed. 1023), and a decree dismissing the bill was entered, whereupon this appeal was prayed and allowed.

Mr. **Guthrie B. Plante** argued the cause, and with Mr. Robert C. Morris, filed a brief for appellant:

The taking of percolating water by a landowner is in the exercise of a legal right which is without restriction or limitation, except where he uses his lands solely to obtain water from adjoining premises for purposes of transportation and sale.

Acton v. Blundell, 12 Mees. & W. 324, 13 L. J. Exch. N. S. 289, 15 Mor. Min. Rep. 168; Chasemore v. Richards, 7 H. L. Cas. 349, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685; Chatfield v. Wilson, 28 Vt. 49; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 72; Delhi v. Youmans, 45 N. Y. 362, 6 Am. Rep. 100; Bloodgood v. Ayers, 108 N. Y. 400, 2 Am. St. Rep. 443, 15 N. E. 433; Huber v. Merkel, 117 Wis. 368, 62 L.R.A. 589, 98 Am. St. Rep. 933, 94 N. W. 354; United States v. Alexander, 148 U. S. 186, 37 L. ed. 415, 13 Sup. Ct. Rep. 529; Smith v. Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 141, 32 App. Div. 257, 52 N. Y. Supp. 983, affirmed in 160 N. Y. 357, 45 L.R.A. 664, 54 N. E. 787; Merrick Water Co. v. Brooklyn, 32 App. Div. 454, 53 N. Y. Supp. 10, affirmed without opinion in 160 N. Y. 657, 55 N. E. 1097; Forbell v. New York, 47 App. Div. 371, 61 N. Y. Supp. 1005, affirmed in 164 N. Y. 522, 51 L.R.A. 695, 79 Am. St. Rep. 666, 58 N. E. 644; Stillwater Water Co. v. Farmer, 89 Minn. 67, 60 L.R.A. 875, 99 Am. St. Rep. 541, 93 N. W. 907; Frazier v. Brown, 12 Ohio St. 294; Greenleaf v. Francis, 18 Pick. 117; Ocean Grove Camp Meeting Asso. v. Asbury Park, 40 N. J. Eq. 447, 3 Atl. 168; Southern P. R. Co. v. Dufour, 95 Cal. 615, 19 L.R.A. 92, 30 Pac. 783; Haldeman v. Bruckhart, 45 Pa. 514, 84 Am. Dec. 511, 5 Mor. Min. Rep. 108; Wheatley v. Baugh, 25 Pa. 528, 64 Am. Dec. 721, 13 Mor. Min. Rep. 374; Davis v. Spaulding, 157 Mass. 431, 19 L.R.A. 102, 32 N. E. 650; Brown v. Spilman, 155 U. S. 665, 669, 670, 39 L. ed. 304–306, 15 Sup. Ct. Rep. 245; Kansas Natural Gas Co. v. Haskell, 172 Fed. 545; Westmoreland & C. Natural Gas Co. v. DeWitt, 130 Pa. 250, 5 L.R.A. 731, 18 Atl. 724; People's Gas Co. v. Tyner, 131 Ind. 277, 16 L.R.A. 443, 31 Am. St. Rep. 433, 31 N. E. 59, 17 Mor. Min. Rep. 481; Simpson v. Pittsburgh Plate Glass Co. 28 Ind. App. 352. 62 N. E. 753; Acme Oil & Min. Co. v. Williams, 140 Cal. 681, 74 Pac. 296; Com. v. Trent, 117 Ky. 46, 77 S. W. 390, 4 A. & E. Ann. Cas. 209; Brown & Bros. v. Illius, 27 Conn. 84, 71 Am. Dec. 49; Goodale v. Tuttle, 29 N. Y. 459; Phelps v. Nowlen, 72 N. Y. 40, 28 Am. Rep. 93; Van Wyeklen v. Brooklyn, 118 N. Y. 424, 24 N. E. 179; Ellis v. Dunean, 21 Barb. 230.

The same rule has been held to apply to petroleum, oil, and natural gas.

Preston v. White, 57 W. Va. 284, 50 S. E. 236; Lanyon Zinc Co. v. Freeman, 68 Kan. 696, 75 Pac. 995, 1 A. & E. Ann. Cas. 403; Federal Oil Co. v. Western Oil Co. 57 C. C. A. 428, 121 Fed. 675, 22 Mor. Min. Rep. 429; Brewster v. Lanyon Zinc Co. 72 C. C. A. 213, 140 Fed. 809; Ohio Oil Co. v. Indiana, 177 U. S. 190, 208, 44 L. ed. 729, 738, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466.

Decisions relating to oil and illuminating gas, and the statutes passed with respect thereto, form no absolute criterion for decision in this case, although such decisions, in many of the states, in regard to oil and illuminating gas, are particularly interesting and instructive, for they indicate clearly that even under the doctrines there applicable this statute would be absolutely and completely condemned.

Calor Oil & Gas Co. v. Franzell, 128 Ky. 715, — L.R.A.(N.S.) —, 109 S. W. 328; People's Gas Co. v. Tyner, 131 Ind. 277, 16 L.R.A. 443, 31 Am. St. Rep. 433, 31 N. E. 59, 17 Mor. Min. Rep. 481; Acme Oil & Min. Co. v. Williams, 140 Cal. 684, 74 Pac. 296; Com. v. Trent, 117 Ky. 46, 77 S. W. 390, 4 A. & E. Ann. Cas. 209; Richmond Natural Gas Co. v. Enterprise Natural Gas Co. 31 Ind. App. 231, 66 N. E. 782; Jones v. Forest Oil Co. 194 Pa. 382, 48 L.R.A. 748, 44 Atl. 1074, 20 Mor. Min. Rep. 350; Townsend v. State, 147 Ind. 624. 37 L.R.A. 294, 62 Am. St. Rep. 477, 47 N. E. 19; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466.

Every act must be judged not by what is being done under it, but by what may be done under its terms.

Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Lawton v. Steele, 152 U. S. 133–137, 38 L. ed. 385–388, 14 Sup. Ct. Rep. 499; Yick

Wo v. Hopkins, 118 U. S. 356, 373, 374, 30 L. ed. 220, 227, 228, 6 Sup. Ct. Rep. 1064; Stuart v. Palmer, 74 N. Y. 188, 30 Am. Rep. 289; Gilman v. Tucker, 128 N. Y. 200, 13 L.R.A. 304, 26 Am. St. Rep. 464, 28 N. E. 1040; Coxe v. State, 144 N. Y. 408, 39 N. E. 400; Colon v. Lisk, 153 N. Y. 194, 60 Am. St. Rep. 609, 47 N. E. 302; Kansas Natural Gas Co. v. Haskell, 172 Fed. 557.

The act here challenged does not itself furnish such due process of law as satisfies the constitutional limitation.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 241, 41 L. ed. 979, 986, 17 Sup. Ct. Rep. 581; Twining v. New Jersey, 211 U. S. 78, 100, 101, 53 L. ed. 97, 106, 107, 29 Sup. Ct. Rep. 14; Missouri P. R. Co. v. Humes, 115 U. S. 512, 519, 29 L. ed. 463, 465, 6 Sup. Ct. Rep. 110; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Scott v. McNeal, 154 U. S. 34, 46, 50, 38 L. ed. 896, 901, 903, 14 Sup. Ct. Rep. 1108; Smyth v. Ames, 169 U. S. 466–526, 42 L. ed. 819–842, 18 Sup. Ct. Rep. 418.

It is not simply physical property which is intended by the inhibition of the Constitution, and which may not be taken away without compensation or due process of law. Property does not consist alone in something that is tangible, but the right to use is as much property as the land itself.

Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 458, 38 L. ed. 970, 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; Westervelt v. Gregg, 12 N. Y. 209, 62 Am. Dec. 160; Forster v. Scott, 136 N. Y. 584, 18 L.R.A. 543, 32 N. E. 976.

Unless it is absolutely neeessary to the welfare, or health, or safety, or morals of the public in general that the pumping of waters containing carbonic acid gas should be stopped, the police power of the state cannot be exercised to prevent the doing of these acts, legal in themselves, which are not a cause of injury to any persons or to the state, and which are but the exercise of a lawful right of ownership of property.

Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; People v. Gillson, 109 N. Y. 399, 4 Am. St. Rep. 465, 17 N. E. 343; Wright v. Hart, 182 N. Y. 344, 2 L.R.A.(N.S.) 338, 75 N. E. 404, 3 A. & E. Ann. Cas. 263; Huber v. Merkel, 117 Wis. 355, 62 L.R.A. 589, 98 Am. St. Rep 933, 94 N. W. 354.

One of the first requirements of legislation defended under this power is that it must be reasonable, must be moderate, and have proportion in its means to the end sought to be reached.

Plessy v. Ferguson, 163 U. S. 537, 550, 41 L. ed. 256, 260, 16 Sup. Ct. Rep. 1138.

The power must be exercised subject to the provisions of both the Federal and state Constitutions, and the laws passed in the exercise of such power must tend, in a degree that is perceptible and clear, toward the lines of health or morals or the welfare of the community, as those words have been construed and used in many cases.

Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Wright v. Hart, 182 N. Y. 341, 2 L.R.A. (N.S.) 338, 75 N. E. 404, 3 A. & E. Ann. Cas. 263; Frank L. Fisher Co. v. Woods, 187 N. Y. 94, 12 L.R.A.(N.S.) 707, 79 N. E. 836; Health Dept. v. Trinity Church, 145 N. Y. 39, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833.

The act in question is unreasonable.

Freund, Pol. Power, p. 61.

The placing of the burden of proof upon one, and not upon his neighbor similarly situated, is forbidden by the 14th Amendment.

San Mateo County v. Southern P. R. Co. 8 Sawy. 238, 13 Fed. 733; Wynehamer v. People, 13 N. Y. 446; People v. Lyon, 27 Hun, 180; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527.

The act denies the equal protection of the laws in that it prohibits pumping for the purpose of vending the gas, while permitting the same for any other purpose or use, and prohibits pumping of wells that go into the rock, and permits pumping of wells that do not go into the rock.

Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 399, 38 L. ed. 1014, 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 41 L. ed. 666, 668, 17 Sup. Ct. Rep. 255; State v. Loomis, 115 Mo. 314, 21 L.R.A. 789, 22 S. W. 350; Vanzant v. Waddel, 2 Yerg. 270; Stratton Claimants v. Morris Claimants (Dibrell v. Lanier) 89 Tenn. 497, 12 L.R.A. 70, 15 S. W. 87; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; People ex rel. McPike v. Van De Carr, 91 App. Div. 20, 86 N. Y. Supp. 644, affirmed in 178 N. Y. 425, 66 L.R.A. 189, 102

Am. St. Rep. 516, 70 N. E. 965; People ex rel. Wineburgh Advertising Co. v. Murphy, 195 N. Y. 126, 21 L.R.A.(N.S.) 735, 88 N. E. 17; People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497; Lindsley v. Natural Carbonic Gas Co. 162 Fed. 960.

The statute violates § 1 of article 14 of the Constitution of the United States, in that it takes private property for private purposes.

Re Albany Street, 11 Wend. 151, 25 Am. Dec. 618; Bloodgood v. Mohawk & H. River R. Co. 18 Wend. 9, 31 Am. Dec. 313; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Gilmer v. Lime Point, 18 Cal. 229, 79 Am. Dec. 174; Tyler v. Beacher, 44 Vt. 656, 8 Am. Rep. 398; Cole v. La Grange, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416; Great Western Natural Gas & Oil Co. v. Hawkins, 30 Ind. App. 566, 66 N. E. 765; Huber v. Merkel, 117 Wis. 355, 62 L.R.A. 589, 98 Am. St. Rep. 933, 94 N. W. 354; Sedgw. Damages, 2d ed. p. 450.

Mr. **Edgar T. Brackett** also argued the cause and filed a brief for appellant:

The laws must bear equally upon all.

Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; Fraser v. McConway & T. Co. 82 Fed. 257; Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550; Railroad & Teleph. Cos. v. Board of Equalizers, 85 Fed. 317; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989.

Classification, to be sustained, must always bear a reasonable relation to the object sought to be attained by the law.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 41 L. ed. 666, 668, 17 Sup. Ct. Rep. 255; State v. Loomis, 115 Mo. 314, 21 L.R.A. 789, 22 S. W. 350; Vanzant v. Waddel, 2 Yerg. 270; Stratton Claimants v. Morris Claimants (Dibrell v. Lanier) 89 Tenn. 497, 12 L.R.A. 70, 15 S. W. 87; People ex rel. McPike v. Van De Carr, 91 App. Div. 29, 86 N. Y. Supp. 644; People ex rel. Appel v. Zimmerman, 102 App. Div. 105, 92 ... Y. Supp. 497; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924. 5 Sup. Ct. Rep. 357; Re Pell, 171 N. Y. 57, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 102, 46 L. ed. 92, 106, 22 Sup. Ct. Rep. 30; Yick Wo v. Hopkins, 118 U. S. 356, 367, 30 L. ed. 220, 225, 6 Sup. Ct. Rep. 1064; Hayes v. Missouri, 120 U. S. 68, 70, 30 L. ed. 578, 579, 7 Sup. Ct. Rep. 350; Ritchie v. People, 155 Ill. 105, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; Frorer v. People, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; Ramsey v. People, 142 Ill. 380, 17 L.R.A. 853, 32 N. E. 364.

Messrs. **Nash Rockwood** and **Charles C. Lester** argued the cause, and, with Mr. Edward R. O'Malley, Attorney General of New York, filed a brief for appellees:

This court will accept and follow the interpretation of the statute as given by the state tribunals; and the judgment of the state courts construing the meaning and scope of the act is conclusive here.

Palmer v. Texas, 212 U. S. 118–131, 53 L. ed. 435–440, 29 Sup. Ct. Rep. 230; United States v. Mason, 213 U. S. 115, 53 L. ed. 725, 29 Sup. Ct. Rep. 480; Stutsman County v. Wallace, 142 U. S. 293, 35 L. ed. 1018, 12 Sup. Ct. Rep. 227; Moores v. Citizens' Nat. Bank, 104 U. S. 625, 26 L. ed. 870; Bauserman v. Blunt, 147 U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466; Fairfield v. Gallatin County, 100 U. S. 47, 25 L. ed. 544.

Construed, then, as it must be, as in no wise an invasion of property rights, the statute in question cannot be said to be violative of the fundamental law.

People v. New York Carbonic Acid Gas Co. 196 N. Y. 421, 90 N. E. 441; Hathorn v. Natural Carbonic Gas Co. 194 N. Y. 326, 23 L.R.A.(N.S.) 436, 128 Am. St. Rep. 555, 87 N. E. 504, 16 A. & E. Ann. Cas. 989; Forbell v. New York, 164 N. Y. 522, 51 L.R.A. 695, 79 Am. St. Rep. 666, 58 N. E. 644; People ex rel. New York Electric Lines Co. v. Squire, 107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820; Smith v. Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 141; Hathorn v. Dr. Strong's Saratoga Springs Sanitarium, 55 Misc. 445, 106 N. Y. Supp. 553.

The doctrine enunciated by the court of appeals in the cases arising under the present statute is not a new doctrine, but has been stated in successive decisions, and recognized as the law of the state of New York.

Forbell v. New York, 164 N. Y. 526, 51 L.R.A. 695, 79 Am. St. Rep. 666, 58 N. E. 644; Smith v. Brooklyn, 18 App. Div. 344, 46 N. Y. Supp. 141; Phelps v. Nowlen, 72 N. Y. 40, 28 Am. Rep. 93; Merrick Water Co. v. Brooklyn, 32 App. Div. 454, 53 N. Y. Supp. 10.

The foundation of this rule of common ownership of percolating waters is recognized by high authority as applicable to this state.

Westphal v. New York, 75 App. Div. 252, 78 N. Y. Supp. 56, affirmed in 177 N. Y.

140, 69 N. E. 369; State v. Ohio Oil Co. 150 Ind. 21, 47 L.R.A. 632, 49 N. E. 809; Westmoreland & C. Natural Gas Co. v. DeWitt, 130 Pa. 235, 5 L.R.A. 731, 18 Atl. 724; Jones v. Forest Oil Co. 194 Pa. 379, 48 L.R.A. 748, 44 Atl. 1074, 20 Mor. Min. Rep. 350; Brown v. Vandergrift, 80 Pa. 142; Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. Rep. 655; American Exp. Co. v. People, 133 Ill. 649, 9 L.R.A. 139, 23 Am. St. Rep. 641, 24 N. E. 758; Phelps v. Racey, 60 N. Y. 10, 19 Am. Rep. 140; Magner v. People, 97 Ill. 333; Com. v. Chapin, 5 Pick. 199, 16 Am. Dec. 386; McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248; Vinton v. Welsh, 9 Pick. 87; Com. v. Essex Co. 13 Gray, 239; Smith v. Levinus, 8 N. Y. 472; Holyoke Water-Power Co. v. Lyman, 15 Wall. 500, 21 L. ed. 133; Gentile v. State, 29 Ind. 409; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466.

The act creates no class of persons deprived of the equal protection of the laws.

State v. Hogan, 63 Ohio St. 202, 52 L.R.A. 863, 81 Am. St. Rep. 626, 58 N. E. 572; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; Jones v. Brim, 165 U. S. 184, 41 L. ed. 679, 17 Sup. Ct. Rep. 282; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 29, 32 L. ed. 586, 9 Sup. Ct. Rep. 207; Soon Hing v. Crowley, 113 U. S. 705, 28 L. ed. 1146, 5 Sup. Ct. Rep. 730; State v. Sehlemmer, 42 La. Ann. 1166, 10 L.R.A. 135, 8 So. 307; Sutton v. State, 96 Tenn. 696, 33 L.R.A. 589, 36 S. W. 697; People v. Havnor, 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; Mssouri v. Lewis (Bowman v. Lewis) 101 U. S. 22–30, 25 L. ed. 989–992; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; People ex rel. Armstrong v. Warden, 183 N. Y. 223, 2 L.R.A.(N.S.) 859, 76 N. E. 11, 5 A. & E. Ann. Cas. 325; Des Moines v. Keller, 116 Iowa, 648, 57 L.R.A. 243, 93 Am. St. Rep. 268, 88 N. W. 827.

But if the statute creates classes, its classification is reasonable, and neither unnecessary nor arbitrary.

Welch v. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; Hayes v Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; Columbus Southern R. Co. v. Wright, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396; Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; Bacon v. Walker, 204 U. S. 316, 51 L. ed. 501, 27 Sup. Ct. Rep. 289.

The act is a valid exercise of the police power vested in the legislature of the state of New York. Its purpose and effect are to prevent the waste and destruction of the natural resources of the state.

Cooley, Const. Lim. 572; People ex rel. New York Electric Lines Co. v. Squire, 107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820; Com. v. Alger, 7 Cush. 85; Meffert v. State Bd. of Medical Registration (Meffert v. Packer) 66 Kan. 710, 1 L.R.A.(N.S.) 811, 72 Pac. 247, 195 U. S. 625, 49 L. ed. 350, 25 Sup. Ct. Rep. 790; People v. King, 110 N. Y. 418, 1 L.R.A. 293, 6 Am. St. Rep. 389, 18 N. E. 245; Barbier v. Connolly, 113 U. S. 31, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; Chicago B. & Q. R. Co. v. Illinois, 200 U. S. 592, 50 L. ed. 609, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625; Mugler v. Kansas, 123 U. S. 623–660, 31 L. ed. 205–210, 8 Sup. Ct. Rep. 273; Booth v. Illinois, 184 U. S. 425–429, 46 L. ed. 623–626, 22 Sup. Ct. Rep. 425; Welch v. Swasey, 214, U. S. 91–105, 53 L. ed. 923–929, 29 Sup. Ct. Rep. 567; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Hunter v. Pittsburgh, 207 U. S. 161–176, 52 L. ed. 151–158, 28 Sup. Ct. Rep. 40; Forsyth v. Hammond, 166 U. S. 506–518, 41 L. ed. 1095–1100, 17 Sup. Ct. Rep. 665; Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; Kelly v. Pittsburgh, 104 U. S. 78–81, 26 L. ed. 658, 659; Wilson v. North Carolina, 169 U. S. 586–593, 42 L. ed. 865–870, 18 Sup. Ct. Rep. 435; Claiborne County v. Brooks, 111 U. S. 400–410, 28 L. ed. 470–474, 4 Sup. Ct. Rep. 489; Pleasant v. Beekwith, 100 U. S. 514, 25 L. ed. 699; Laramie County v. Albany County, 92 U. S. 307, 23 L. ed. 552; Covington v. Kentueky, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. Rep. 383.

And in the exercise of this power, there is no taking of property in the sense in which the Constitution requires compensation to be made therefor.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226–255, 41 L. ed. 979–991, 17 Sup. Ct. Rep. 581; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561–583, 50 L. ed. 596–605, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; West Chicago Street R. Co.

v. Illinois, 201 U. S. 506–526, 50 L. ed. 845–853, 26 Sup. Ct. Rep. 518.

Nor is property taken without due process of law.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Kidd v. Pearson, 128 U. S. 1–15, 32 L. ed. 346–348, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6.

The public have such an interest in the mineral waters of Saratoga as justifies the interposition of the legislature for their protection.

Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Hudson County Water Co. v. McCarter, 209 U. S. 349–355, 52 L. ed. 828–831, 28 Sup. Ct. Rep. 529, 14 A. & E. Ann. Cas. 560; Hathorn v. Natural Carbonic Gas Co. 194 N. Y. 349, 23 L.R.A. (N.S.) 436, 128 Am. St. Rep. 555, 87 N. E. 504, 16 A. & E. Ann. Cas. 989; Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; License Cases, 5 How. 504, 12 L. ed. 256; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; People ex rel. Hill v. Hesterberg, 184 N. Y. 135, 3 L.R.A.(N.S.) 163, 128 Am. St. Rep. 528, 76 N. E. 1032, 6 A. & E. Ann. Cas. 353; People ex rel. New York Electric Lines Co. v. Squire, 107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820, affirmed in 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880; Smith v. Maryland, 18 How. 71, 15 L. ed. 269.

The act of 1908 is a reasonable enactment for the accomplishment of the object sought.

Hathorn v. Natural Carbonic Gas Co. 194 N. Y. 343, 23 L.R.A.(N.S.) 436, 128 Am. St. Rep. 555, 87 N. E. 504, 16 A. & E. Ann. Cas. 989.

Mr. Justice **Van Devanter**, having made the foregoing statement, delivered the opinion of the court:

The statute against whose enforcement the suit is directed contains several restrictive provisions more or less directly connected with the purpose suggested by its title, but we are concerned with only the one before set forth, because the court of appeals of the state has pronounced 73]*the others invalid, and counsel have treated them as thereby eliminated from the statute and from present consideration.

Coming to the provision in question, it is necessary to inquire what construction has been put upon it by the highest court of the state, for that construction must be accepted by the courts of the United States, and be regarded by them as a part of the provision when they are called upon to determine whether it violates any right secured by the Federal Constitution. Weightman v. Clark, 103 U. S. 256, 260, 26 L. ed. 392, 393; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 166, 36 L. ed. 925, 928, 13 Sup. Ct. Rep. 54; Olsen v. Smith, 195 U. S. 333, 342, 49 L. ed. 224, 229, 25 Sup. Ct. Rep. 52. The court of appeals of the state had the statute before it in Hathorn v. Natural Carbonic Gas Co. 194 N. Y. 326, 23 L.R.A.(N.S.) 436, 128 Am. St. Rep. 555, 87 N. E. 504, 16 A. & E. Ann. Cas. 989, and again in People v. New York Carbonic Acid Gas Co. 196 N. Y. 421, 90 N. E. 441, and the elaborate opinions then rendered disclose that the court, having regard to the title of the act and to the doctrine of correlative rights in percolating waters which prevails in that state, as recognized in Forbell v. New York, 164 N. Y. 522, 51 L.R.A. 695, 79 Am. St. Rep. 666, 58 N. E. 644, construed this provision, not as prohibiting the specified acts absolutely or unqualifiedly, but only when the mineral waters are drawn from a source of supply not confined to the lands of the actor, but extending into or through the lands of others, and then only when the draft made upon that source of supply is unreasonable or wasteful, considering that there is a coequal right in all the surface owners to draw upon it. In other words, the court, by processes of interpretation having its approval, read into the provision an exception or qualification making it inapplicable where the waters are not drawn from a common source of supply, and also where, if they be drawn from such a source, no injury is done thereby to others having a like right to resort to it.

As so interpreted, the statute presupposes (1) the existence, in porous rock beneath the lands of several proprietors, *of a[74 supply of mineral waters of the class specified; (2) a right in each proprietor to penetrate the underlying rock or natural reservoir and to draw upon the supply therein; and (3) a practice or tendency on the part of proprietors who exercise this right in the manner and for the purpose specified, that is, by boring or drilling wells into the rock and pumping or artifically drawing the waters for the purpose of collecting and vending the gas as a separate commodity, to make excessive or wasteful drafts upon the common supply, to the injury and impairment of the rights of other proprietors. And what is thus presupposed is treated in several decisions of the courts of the state and in other public papers as having actual

existence and as being widely recognized. It is to prevent or avoid the injury and waste suggested that the statute was adopted. It is not the first of its type. One in principle quite like it was considered by this court in Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466. There oil and gas in a commingled form were contained in a stratum of porous rock underlying the lands of many owners, and because these fluids were inclined to shift about in the common reservoir in obedience to natural laws, one surface owner could not excessively or wastefully exercise his right of tapping the reservoir and drawing from its contents without injuriously affecting the like right of each of the others. The oil and gas were both of value, but as the greater value attached to the oil, some surface owners whose wells tapped the common reservoir and brought to the surface both oil and gas, collected and used only the oil, and suffered the gas to disperse in the air. This and kindred practices resulted in the adoption of a statute declaring them unlawful, and the validity of the statute was called in question. The objections urged against it were much the same as those now pressed upon our attention, but upon full consideration all were overruled. After commenting upon the peculiar attributes of oil and gas 75]*which cause them to be excepted from the principles generally applied to minerals having a fixed situs, and also upon the prevailing rule that each surface owner in an oil and gas area has the exclusive right on his own land to seek the oil and gas in the reservoir beneath, but has no fixed or certain ownership of them until he reduces them to actual possession, this court said:

"They [meaning the surface owners] could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a coequal right in them all to take from a common source of supply the two substances, which, in the nature of things, are united, though separate. It follows, from the essence of their right and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of the others, or by waste by one or more, to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners by securing a just distribution to arise from the enjoyment by them of their privilege to reduce to possession, and to reach the like end by preventing waste. . . . Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law . . . which is here attacked because it is asserted that it devested private property without due compensation, in substance is a statute protecting private property, and preventing it from being taken by one of the common owners without regard to the enjoyment of the others."

And, taking up subordinate contentions advanced in support of the principal one, the court also said:

"First. It is argued that as the gas, before being allowed *to disperse in the[76 air, serves the purpose of forcing up the oil, therefore it is not wasted, hence is not subject to regulation. Second. That the answer averred that the defendant was so situated as not to be able to use or dispose of the gas which comes to the surface with the oil; from which it follows that the gas must either be stored or dispersed in the air. Now, the answer further asserted that when the gas is stored and not used, the back pressure on the best-known pump would, if not arresting its movement, at least greatly diminish its capacity. Hence, it is said, the law, by making it unlawful to allow the gas to escape, made it practically impossible to profitably extract the oil. That is, as the oil could not be taken at a profit by one who made no use of the gas, therefore he must be allowed to waste the gas into the atmosphere, and thus destroy the interest of the other common owners in the reservoir of gas. These contentions but state in a different form the matters already disposed of. They really go not to the power to make the regulations, but to their wisdom. But with the lawful discretion of the legislature of the state we may not interfere."

If the statute there assailed did not work a deprivation of property without due process of law, it is difficult to perceive that there is any such deprivation in the present case. The mineral waters and carbonic acid gas exist in a commingled state in the underlying rock, and neither can be drawn out without the other. They are of value in their commingled form and also when separated, but the greater demand is for the gas alone. Influenced by this demand, some surface owners, having wells bored or drilled into the rock, engage in extensive pumping operations for the purpose of collecting the gas and vending it as a separate commodity. Uusually where this is done an undue proportion of the commingled waters and gas is taken from the common supply,

and a large, if not the larger, portion of the waters from which the gas is collected 77]*is permitted to run to waste. Thus these pumping operations generally result in an unreasonable and wasteful depletion of the common supply and in a corresponding injury to others equally entitled to resort to it. It is to correct this evil that the statute was adopted, and the remedy which it applies is an enforced discontinuance of the excessive and wasteful features of the pumping. It does not take from any surface owner the right to tap the underlying rock and to draw from the common supply, but, consistently with the continued existence of that right, so regulates its exercise as reasonably to conserve the interests of all who possess it. That the state, consistently with due process of law, may do this, is a necessary conclusion from the decision in the case cited. But were the question an open one, we still should solve it in the same way.

We do not overlook the statement in appellant's brief that the mineral waters reached by the gas company's wells do not exist in any underground reservoir, and do not come from any common source, but we cannot give it any effect. It is contrary to what the courts of the state apparently regard as the real situation at Saratoga Springs, and is without support in the present record. While the bill alleges that the waters are percolating waters, not naturally flowing to or upon the surface, that description of them is not inconsistent with their existence in a natural reservoir of porous rock underlying the lands of several owners. Besides, if we accepted it as true that they do not constitute a common source of supply, that is, one to which other surface owners have an equal right to resort, it then would have to be held that the gas company's acts are not within the prohibition of the statute, as construed by the court of appeals of the state, and therefore that the appellant, as owner and holder of capital stock and bonds of the company, is not harmed by the statute, and is not entitled to draw in question or test its 78]validity. *Clark v. Kansas City, 176 U. S. 114, 118, 44 L. ed. 392, 396, 20 Sup. Ct. Rep. 284; Tyler v. Registration Ct. Judges, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; Turpin v. Lemon, 187 U. S. 51, 60, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736.

Neither do we overlook the allegation in the bill that the gas company's pumps do not exert any force upon waters in or under adjoining lands, but lift to the surface only such waters "as flow by reason of the laws of nature into the wells;" but we regard it as of little importance, because if the wells reach a common source of supply, excessive or wasteful pumping from them may affect injuriously the rights of other surface owners, although the force exerted by the pumps does not reach their lands.

Because the statute is directed against pumping from wells bored or drilled into the rock, but not against pumping from wells not penetrating the rock, and because it is directed against pumping for the purpose of collecting the gas and vending it apart from the waters, but not against pumping for other purposes, the contention is made that it is arbitrary in its classification, and consequently denies the equal protection of the laws to those whom it affects.

The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One *who assails the classification in[79 such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. Bachtel v. Wilson, 204 U. S. 36, 41, 51 L. ed. 357, 359, 27 Sup. Ct. Rep. 243; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 256, 52 L. ed. 195, 197; 28 Sup. Ct. Rep. 89; Munn v. Illinois, 94 U. S. 113, 132, 24 L. ed. 77, 86; Henderson Bridge Co. v. Henderson, 173 U. S. 592, 615, 43 L. ed. 823, 831, 19 Sup. Ct. Rep. 553.

Unfortunately, the allegations of the bill shed but little light upon the classification in question. They do not indicate that pumping from wells not penetrating the rock appreciably affects the common supply therein, or is calculated to result in injury to the rights of others, and neither do they indicate that such pumping as is done for purposes other than collecting and vending the gas apart from the waters is excessive or wasteful, or otherwise operates to im-

pair the rights of others. In other words, for aught that appears in the bill, the classification may rest upon some substantial difference between pumping from wells penetrating the rock and pumping from those not penetrating it, and between pumping for the purpose of collecting and vending the gas apart from the waters and pumping for other purposes, and this difference may afford a reasonable basis for the classification.

In thus criticizing the bill, we do not mean that its allegations are alone to be considered, for due regard also must be had for what is within the range of common knowledge and what is otherwise plainly subject to judicial notice. Brown v. Piper, 91 U. S. 37, 43, 23 L. ed. 200, 202; Brown v. Spilman, 155 U. S. 665, 670, 39 L. ed. 304, 305, 15 Sup. Ct. Rep. 245; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51, 51 L. ed. 78, 86, 27 Sup. Ct. Rep. 1; Illinois ex rel. McNichols v. Pease, 207 U. S. 100, 111, 52 L. ed. 121, 126, 28 Sup. Ct. Rep. 58. But we rest our criticism upon the fact that the bill is silent in respect of some matters which, although essential to the success of the present contention, are neither within the range of common knowledge nor otherwise plainly subject to judicial notice. So, applying the rule that one who assails the classification **80**]in such a law must carry the *burden of showing that it is arbitrary, we properly might dismiss the contention without saying more. But it may be well to mention other considerations which make for the same result.

From statements made in the briefs of counsel and in oral argument, we infer that wells not penetrating the rock reach such waters only as escape naturally therefrom through breaks or fissures; and if this be so, it well may be doubted that pumping from such wells has anything like the same effect—if, indeed, it has any—upon the common supply or upon the rights of others, as does pumping from wells which take the waters from within the rock, where they exist under great hydrostatic pressure.

As respects the discrimination made between pumping for the purpose of collecting and vending the gas apart from the waters, and pumping for other purposes, this is to be said: The greater demand for the gas alone, and the value which attaches to it in consequence of this demand, furnish a greater incentive for exercising the common right excessively and wastefully when the pumping is for the purpose prescribed than when it is for other purposes; and this suggestion becomes stronger when it is reflected that the proportion of gas in the commingled fluids as they exist in the rock is so small that to obtain a given quantity of gas involves the taking of an enormously greater quantity of water, and to satisfy appreciably the demand for the gas alone involves a great waste of the water from which it is collected. Thus, it well may be that in actual practice the pumping is not excessive or wasteful save when it is done for the purpose prescribed.

These considerations point with more or less persuasive force to a substantial difference, in point of harmful results, between pumping from wells penetrating the rock, and pumping from those not penetrating it, and between pumping for the purpose of collecting and vending the gas apart from the waters, and pumping for other purposes. *If there be such a difference, it justi-[**81** fies the classification, for plainly a police law may be confined to the occasion for its existence. As is said in Carroll v. Greenwich Ins. Co. 199 U. S. 401, 411, 50 L. ed. 246, 250, 26 Sup. Ct. Rep. 66: "If an evil is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms."

In conclusion upon this point, it suffices to say that the case as presented, instead of plainly disclosing that the classification is arbitrary, tends to produce the belief that it rests upon a reasonable basis.

Another objection urged against the statute arises out of a ruling of the court of appeals of the state, to the effect that, in proceedings for enforcement of the statute, one who, for the purpose of collecting and vending the gas as a separate commodity, engages in pumping such waters from wells bored or drilled into the rock, is prima facie within the prohibition of the statute, and must take the burden of showing that he comes within the exception or qualification before mentioned, whereby the statute is made inapplicable where the waters are not drawn from a common source of supply, and also where, if they be drawn from such a source, no injury is done thereby to others having a right to resort to it. Because of this ruling, which is treated as if read into the statute, it is insisted that the latter impinges upon the guaranties of due process of law and equal protection of the laws. But we think the insistence is untenable, and for these reasons:

Each state possesses the general power to prescribe the evidence which shall be received and the effect which shall be given to it in her own courts, and may exert this power by providing that proof of a particular fact, or of several taken collectively, shall be prima facie evidence of another

fact. Many such exertions of this power 82]are *shown in the legislation of the several states, and their validity, as against the present objection, has been uniformly recognized save where they have been found to be merely arbitrary mandates, or to discriminate invidiously between different persons in substantially the same situation. Bailey v. Alabama, 219 U. S. 219, 238, ante, 191, 31 Sup. Ct. Rep. 145; Board of Excise v. Merchant, 103 N. Y. 143, 148, 57 Am. Rep. 705, 8 N. E. 484. The validity of such a statute was brought in question in the recent case of Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 43, ante, 78, 31 Sup. Ct. Rep. 136, and it was there said by this court:

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. If a legislative provision, not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

The statute now before us, as affected by the ruling mentioned, makes proof of certain designated facts prima facie, but not conclusive, evidence of the common source of the waters and of the injurious effect of the pumping; that is to say, it establishes a rebuttable presumption, but neither prevents the presentation of other evidence to overcome it nor cuts off the right to make a full defense. As respects the source of the waters, the presumption appropriately may be regarded as prompted by the 83]*fact, now well recognized, that the pervious rock in which the waters exist usually is of such extent as to reach much beyond the lands of a single proprietor and to constitute a common source of supply; and, as respects the effect of the pumping, the presumption appropriately may be regarded as prompted by the fact, before stated, that pumping from a common supply in the rock for the purpose of collecting and vending the gas as a separate commodity usually is carried on in a manner which is calculated to affect injuriously, and does so affect, the rights of others to take from that supply. Regarding the presumption as prompted by these considerations, as we think should be done, it cannot be said that there is not a rational connection between the designated facts which must be proved and the facts which are to be presumed therefrom until the contrary is shown. What we have said upon the subject of classification sufficiently answers the suggestion or claim that, by reason of the presumption, the statute discriminates invidiously between different persons in substantially the same situation.

For these reasons none of the objections urged against the statute can be sustained, and so the decree dismissing the bill is affirmed.

IN THE MATTER OF THE EASTERN CHEROKEES, Petitioners.

(See S. C. Reporter's ed. 83-89.)

Appeal — enforcing compliance with mandate — laches.

A delay of more than three years after the court of claims decreed, with all the parties before it, that the mandate of the Federal Supreme Court modifying a prior decree of the court of claims, awarding the Cherokee Indians the amounts due from the United States under treaty stipulations, required a distribution *per capita*, is such laches as bars mandamus to require the court of claims to conform to such mandate, which, it is contended, directed a *per stirpes* distribution, and such delay is not excused on the theory that the remedy by mandamus was only available when the roll of those Indians entitled to share in the award, prepared in accordance with the order of the court of claims, was approved, because until that time there was uncertainty as to what the court might do.

[For other cases, see Appeal and Error, 5584-5598, in Digest Sup. Ct. 1908.]

[No. 15, Original.]

Argued February 20, 1911. Decided March 20, 1911.

PETITION for a Writ of Mandamus to the Court of Claims to require it to conform to a decree of the Federal Supreme Court, modifying a decree of the Court of Claims, making an award to the Cherokee Indians of the amounts due from the United States under treaty stipulations. Rule discharged and petition dismissed.

The facts are stated in the opinion.

NOTE.—On enforcement of decree of appellate court by mandamus—see note to Ex parte Chicago Title & T. Co. 77 C. C. A. 409.

Mr. **John B. Daish** argued the cause, and, with Mr. Joseph D. Sullivan, filed a brief for petitioners.

Mr. **George M. Anderson** argued the cause, and, with Mr. John Q. Thompson, filed a brief for respondent.

Mr. Justice **McKenna** delivered the opinion of the court:

Petition for mandamus to the court of claims to require it to conform to a decree of this court modifying a decree of that court in the case of the United States v. Cherokee Indians, 202 U. S. 101, 50 L. ed. 949, 26 Sup. Ct. Rep. 588.

A rule to show cause was issued, to which a response has been made by the court of claims.

A recitation of the facts of the litigation between the Eastern Cherokees and the United States need not be made. They are set out in 202 U. S. 101. We are only concerned with the decree and what took place in accordance with it in the court of claims. It is enough to say that the Eastern Cherokees, under the authority of acts of Congress, brought suit against the United States for certain sums alleged to be due under treaties with the United States, and the court of claims decreed May 18, 1905, 85]*that, after deducting counsel fees, costs, and expenses, the sum of $1,111,284.70, among other sums, with interest, should be paid to the Secretary of the Interior, to be by him received and held for the use and purpose of paying costs and expenses as stated, and the remainder to be distributed "directly to the Eastern and Western Cherokees, who were parties to the treaty of New Echota, as proclaimed May 23, 1836 [7 Stat. at L. 478], or to the treaty of Washington of August 6, 1846 [9 Stat. at L. 871], as individuals, whether east or west of the Mississippi river, or to the legal representatives of such individuals."

We held that the decree, "in directing that the distribution be made to 'the Eastern and Western Cherokees,'" was "perhaps liable to misconstruction," though limited by a reference to the treaties, and decided that the decree should be modified "so as to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi, parties to the treaties of 1835–36 and 1846, exclusive of the Old Settlers." As modified, the decree was affirmed.

We also decided that the amount of the decree "should be paid to the Secretary of the Interior, to be distributed directly to the parties entitled to it."

Upon the going down of the mandate, the court of claims modified its decree, as directed, by explicitly excluding the Old Settlers in terms from its operation, and distributing the fund "to the Eastern Cherokees as individuals," omitting the words "or to the legal representatives of such individuals." And the court directed the Secretary of the Interior to prepare or have prepared a roll of the Cherokees entitled to share in the amount of the decree, and to "accept as a basis for the distribution of said fund the rolls of 1851, upon which the *per capita* payment to the Eastern Cherokees was made, and make such distribution in pursuance of article 9 of the treaty of 1846."

*It is stated in the response of the[86 court of claims to the rule to show cause that the special agent appointed by the Secretary encountered difficulties in making up the roll "upon a *per capita* basis and otherwise," and that the Secretary of the Interior called the attention of the court to the difficulties and asked the following questions: "First. Shall the rolls of 1851 be used as the exclusive basis for the present distribution? Second. Shall the distribution be *per stirpes* or *per capita*? Third. If *per capita*, what disposition shall be made of those portions for which there have been no applications?"

The court, considering that its decree, as modified by our mandate, directed a *per capita* distribution, ordered the commissioner named for the purpose to "enroll as entitled to share in the fund arising from said decree of May 28, 1906, all such individual Eastern Cherokee Indians by blood, living on May 28, 1906, as shall establish the fact that they were members of the Eastern Cherokee tribe of Indians at the date of the treaties of 1835–36 and 1846, or are descendants of such persons, and who shall further establish the fact that they have not been affiliated with any tribe of Indians other than the Eastern Cherokees or the Cherokee Nation."

The court subsequently (as appears from its response to the rule to show cause), "at the written request of the Secretary of the Interior and sundry other persons who petitioned therefor, as well as at the request of counsel engaged in said cause," vacated the order which directed the Secretary of the Interior to prepare the roll, and employed Guion Miller, who had theretofore been employed by the Secretary, to prepare the roll under its supervision. The roll was prepared as directed, to which exceptions were filed, most of which were overruled, and on March 7, 1910, it was approved.

Miller was also designated as a special commissioner to receive from the Treasury Department all the warrants *for the[87 persons enrolled, and to visit the various

localities where the Indians resided, as he had done in preparing the roll, and to deliver the warrants, which he did prior to the filing of the petition herein for mandamus, the response of the court stating as follows:

"The money arising from said judgment was long prior to October 17, 1910, the date of the filing of said petition for said mandate to show cause, distributed and paid to practically all of those on said roll, so that of the 30,827 enrolled, only 313 remained unpaid, as we are advised by said commissioner, who was also intrusted, under the order of the court, with the delivery of the warrants issued by the Treasury Department to the parties so enrolled, respectively. Since which time 44 additional payments have been made, leaving 269 unpaid on October 28, 1910."

The court further states that on the authority of the special report of Miller, made for its information, persons of the same name as those signing the power of attorney authorizing the filing of the petition for mandamus were enrolled, as were those whom they claimed to represent, and have been paid their respective shares for which they receipted in full.

It is contended by petitioners that the treaties of 1835–36 and 1846 required the court of claims to make a distribution *per stirpes*, and that in its original decree of May 18, 1905, it was so provided. And it is further contended that the mandate of this court so required, and that such interpretation was put upon it by the court of claims and the commissioner appointed by the Secretary of the Interior. It is insisted that, in consequence of the error of the court, the roll prepared in accordance with its orders contains the names of numerous persons not entitled under the mandate of this court to participate in the fund.

The respondent opposes these contentions 88]and makes *the counter one that petitioners have been guilty of laches, which, if it be justified, makes a notice of other contentions unnecessary. A summary of the proceedings shows that the contention is justified. The first decree of the court, as we have seen, distributed the fund to the Eastern and Western Cherokees *as individuals, or to the legal representatives of such individuals.* The decree, as modified by this court, limited the distribution to the Eastern Cherokees, and omitted the words "or to the legal representatives of such individuals." A question arose as to whether the mandate of this court directed a *per capita* or *per stirpes* distribution, and, on March 5, 1907, the court of claims gave notice that it would hear the parties on the question.

The matter came on for hearing April 8, 1907, all parties being represented, and a *per capita* distribution of the judgment was ordered, and a commissioner appointed to prepare the roll of those entitled to share under the decree.

This was done, and a report made to the court, to which exceptions were filed, which "in the main" were overruled. On March 10, 1910, the report as corrected was approved, and the amount of the decree distributed, as we have seen, to the persons entitled thereto.

This summary demonstrates the laches of petitioners. If it be conceded that the mandate of this court and the decree of the court of claims as modified in accordance with it were ambiguous, the court of claims decided, as early as April 28, 1907, that it required a *per capita* distribution. The petitioners took no action against the decision nor the order of distribution based on it. They permitted the distribution to be made. And they might have taken action. Re Sanford Fork & Tool Co. 160 U. S. 247, 259, 40 L. ed. 414, 417, 16 Sup. Ct. Rep. 291. Mandamus was available then, as now, and the circumstances condemn the delay. The amount of the judgment was to be distributed among *many thousands[89 of persons. Such persons were to be ascertained, their names enrolled, and payment made to them. Every step involved expense, and the fund, once disbursed, could not be recovered, and the United States might be required to pay a second time.

In explanation of these circumstances, which, on their face, make a clear demonstration of negligence on the part of petitioners, they urge that after the modification on April 28, 1907, of the final decree, there were other proceedings, instancing as such the ruling, on March 7, 1910, on exceptions to the roll, and urge that "within eighty-five days thereafter" they "secured counsel and invoked the jurisdiction of this court for the protection of their rights." They further urge that "until the roll had been approved there was uncertainty what the court of claims might do," and that "when the final order had been taken the petitioners were then only at liberty to institute the present proceeding."

This overlooks that they attack the principle upon which distribution was decreed by the court of claims; in other words, their contention is that a *per capita* instead of a *per stirpes* distribution of the fund was directed by the decree of April 28, 1907, the consequence of which was that "numerous persons not entitled under the mandate of this court" were made participants in the fund, and their (petitioners') shares thereby "much lessened." Petitioners are

mistaken, therefore, when they say that they were "only at liberty to institute the present proceeding" when the roll was approved. The decree constituted their grievance, if they had any, and if it did not execute the mandate of this court, the action of the court of claims in rendering it could have been reviewed and corrected by appeal or mandamus. Re Sanford Fork & Tool Co. supra.

Rule discharged and petition dismissed.

90]*MARGARET E. TAYLOR, in her Own Right and as Executrix of Thomas Taylor, Deceased, Appt.,
v.
MARY J. LEESNITZER, Elizabeth E. Padgett, and Franklin C. Padgett.

(See S. C. Reporter's ed. 90–93.)

Appeal — dismissal — defect of parties.

The omission of one of the adverse parties from the supersedeas bond does not justify the court of appeals of the District of Columbia in dismissing on motion an appeal to that court, where such motion was not made within the time prescribed by a court rule for moving to dismiss for want of a bond, and then was not based upon the defect in the bond, but upon a defect of parties to the appeal, which the bond is supposed to disclose, but which could not in fact exist, because the appeal was taken in open court.

[For other cases, see Appeal and Error, 2929-2934; 3012-3021, in Digest Sup. Ct. 1908.]

[No. 45.]

Argued March 8, 1911. Decided March 20, 1911.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which dismissed an appeal from a decree of the Supreme Court of the District. Reversed.

See same case below, 31 App. D. C. 92.

The facts are stated in the opinion.

Mr. J. J. Darlington argued the cause, and, with Mr. J. Nota McGill, filed a brief for appellant:

The appeal was taken in open court, and its allowance noted in the very decree appealed from, which circumstance obviates the necessity of citation (Milner v. Meek, 95 U. S. 252, 24 L. ed. 444; Chicago & P. R. Co. v. Blair, 100 U. S. 661, 25 L. ed. 587; Dodge v. Knowles, 114 U. S. 430, 29 L. ed. 144, 5 Sup. Ct. Rep. 1108, 1197; Shepherd v. Pepper, 133 U. S. 644, 645, 33 L. ed. 713, 714, 10 Sup. Ct. Rep. 438; Leonard v. Rodda, 5 App. D. C. 263), and of summons or severance (McNulta v. West Chicago Park, 39 C. C. A. 545, 99 Fed. 328; James H. Rice Co. v. Libbey, 45 C. C. A. 78, 105 Fed. 825; 3 Foster, Fed. Pr. 4th ed. 2056).

A clerical error of this description in no way affects the appeal.

Leonard v. Rodda, 5 App. D. C. 262.

The dismissal was fatally erroneous because founded on grounds wholly outside the record.

Norment v. Edwards, 6 App. D. C. 107; Ogden City v. Weaver, 47 C. C. A. 485, 108 Fed. 566; Keeley v. Ophir Hill Consol. Min. Co. 95 C. C. A. 96, 169 Fed. 600; York v. Washburn, 64 C. C. A. 132, 129 Fed. 566; Townsend v. Beatrice Cemetery Asso. 70 C. C. A. 521, 138 Fed. 381; Pacific Sheet Metal Works v. Californian Canneries Co. 91 C. C. A. 108, 164 Fed. 980; Williams v. Norris, 12 Wheat. 117, 6 L. ed. 571; Rector v. Ashley, 6 Wall. 143, 18 L. ed. 733; Kentucky Life & Acci. Ins. Co. v. Hamilton, 11 C. C. A. 42, 22 U. S. App. 386, 548, 63 Fed. 94; New Orleans, M. & C. R. Co. v. New Orleans, 14 Fed. 376; State v. Ramsburg, 43 Md. 332; Woods v. Fuller, 61 Md. 460; Martin v. Evans, 85 Md. 9, 36 L.R.A. 218, 60 Am. St. Rep. 292, 36 Atl. 258; Buckingham's Appeal, 60 Conn. 160, 22 Atl. 509; 15 Enc. Pl. & Pr. p. 309; England v. Gebhardt, 112 U. S. 502, 28 L. ed. 811, 5 Sup. Ct. Rep. 287.

An appeal bond approved by the court inures to the protection of all the appellees, although the names of some of them are omitted from it.

Scruggs v. Memphis & C. R. Co. 131 U. S. ccix. Appx. and 26 L. ed. 741.

The court's denial of its discretionary power to permit amendment of the bond was error.

Seymour v. Freer, 5 Wall. 822, 18 L ed. 564; Brobst v. Brobst, 2 Wall. 96, 17 L. ed. 905; Metropolitan R. Co. v. Moore, 121 U. S. 558, 574, 575, 30 L. ed. 1022, 1027, 7 Sup. Ct. Rep. 1334; Slater v. Hamacher, 15 App. D. C. 294; Knickerbocker L. Ins. Co. v. Pendleton, 115 U. S. 339, 29 L. ed. 432, 6 Sup. Ct. Rep. 74; Shepherd v. Pepper, 133 U. S. 626, 644, 645, 33 L. ed. 706, 713, 714, 10 Sup. Ct. Rep. 438; Inland & Seaboard Coasting Co. v. Tolson, 136 U. S. 572, 34 L. ed. 539, 10 Sup. Ct. Rep. 1063.

No appeal bond at all was essential to the validity of the appeal.

Peugh v. Davis, 110 U. S. 227, 228, 28 L. ed. 127, 128, 4 Sup. Ct. Rep. 17; Edmonson v. Bloomshire, 7 Wall. 306, 19 L. ed. 91.

Mr. Edmund Burke argued the cause and filed a brief for appellees:

Each court is the best judge of the rules which it has adopted, and an appellate

court will regard the construction placed upon its own rules by an inferior court as conclusive, and will not interfere except in case of gross and palpable abuse.

18 Enc. Pl. & Pr. pp. 1262, 1263, note 1; Duncan v. United States, 7 Pet. 435, 451, 452, 8 L. ed. 739, 745.

The action of the court of appeals was plainly right in the premises.

United States use of Davis v. Draper, 8 Mackey, 88; Young v. Russell, 60 Tex. 684; Hall Music Co. v. Hall, — Tex. Civ. App. —, 120 S. W. 904; Senter v. De Bernal, 38 Cal. 637; Thompson v. Ellsworth, 1 Barb. Ch. 624; Brown v. Levins, 6 Port. (Ala.) 414; McCrindell's Succession, 13 La. Ann. 231; Kennedy's Succession, 20 La. Ann. 292; Weigel's Succession, 21 La. Ann. 149.

The appeal bond must be in favor of all the persons in interest which the appeal is intended to bring before the court; otherwise there can be no decree for or against them; and where the appeal bond was in favor of one only of several appellees, there was no authority in the court to allow the appellant to amend, where the effect would be to bring new parties before the court. In such case there was no sufficient bond to bring the parties before the court to act upon them for any purpose, and the appeal was dismissed.

The City of Lincoln, 19 Fed. 460.

Decisions resting upon the discretionary power of this court under provisions of the Revised Statutes of the United States (§§ 1000, 1005, 1007, U. S. Comp. Stat. 1901, pp. 712, 714), which are in the nature of statutes of jeofails allowing amendments, have no applicability to the court of appeals of the District of Columbia.

United States ex rel. Mulvihill v. Clabaugh, 21 App. D. C. 440; Darlington v. Turner, 24 App. D. C. 573.

The motion to dismiss the appeal was not made too late.

Grigsby v. Purcell, 99 U. S. 506, 25 L. ed. 354.

In the following cases this court dismissed the appeals *sua sponte* for failure to comply with the rules and requirements respecting appeals to this court:

The S. S. Osborne (Winslow v. Wilcox) 105 U. S. 447, 451, 26 L. ed. 1065, 1066; Hilton v. Dickinson, 108 U. S. 165, 168, 27 L. ed. 688, 689, 2 Sup. Ct. Rep. 424; Estis v. Trabue, 128 U. S. 225, 230, 32 L. ed. 437, 438, 9 Sup. Ct. Rep. 58; Dolan v. Jennings, 139 U. S. 385, 35 L. ed. 217, 11 Sup. Ct. Rep. 584.

The action of the court of appeals in dismissing the appeal for failure to perfect it in not giving the required bond is sustained by the following cases in this court:

Veitch v. Farmers' Bank, 6 Pet. 777, 8 L. ed. 578; Boyce v. Grundy, 6 Pet. 777, 8 L. ed. 579; Bank of Alexandria v. Swann, 9 Pet. 33, 9 L. ed. 40; The S. S. Osborne (Winslow v. Wilcox) 105 U. S. 447, 451, 26 L. ed. 1065, 1066; Hilton v. Dickinson, 108 U. S. 165, 166, 168, 27 L. ed. 688, 689, 2 Sup. Ct. Rep. 424; Dolan v. Jennings, 139 U. S. 385–388, 35 L. ed. 217, 218, 11 Sup. Ct. Rep. 584.

In Green v. Elbert, 137 U. S. 621, 34 L. ed. 795, 11 Sup. Ct. Rep. 188, this court dismissed the appeal because of the failure of the appellant to make the deposit of the fees of the clerk within the time required by the rule of this court, although the fees were subsequently paid and the cause docketed.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an appeal from a decree of the court of appeals of the District of Columbia, dismissing an appeal from a *degree[91 of the supreme court. The bill was brought by the appellee Leesnitzer, as one of the heirs of Thomas Taylor, for a partition between herself and the other heirs of lands acquired by Taylor after the execution of his last will. By the will, Taylor left all his estate, both real and personal, to his widow, the appellant. See Bradford v. Matthews, 9 App. D. C. 438; Crenshaw v. McCormick, 19 App. D. C. 494; D. C. Code § 1628 [31 Stat. at L. 1433, chap. 854]; Hardenbergh v. Ray, 151 U. S. 112, 38 L. ed. 93, 14 Sup. Ct. Rep. 305. The bill, of course, was adverse to the appellant's right under the will, and also prayed that she might be declared barred of her dower. See Clark v. Roller, 199 U. S. 541, 545, 50 L. ed. 300, 302, 26 Sup. Ct. Rep. 141. After a trial there was a decree for the plaintiff "unless the defendant, Margaret E. Taylor, shall perfect her appeal from this decree, which is prayed by her in open court and allowed, by giving a supersedeas bond in the penal sum of $1,000." The decree was filed on May 28, 1907. On June 3, 1907, an appeal bond was filed, but, in accordance with the rules, under ordinary conditions, was not printed in the transcript of the record sent to the court of appeals. The record was filed in that court on July 17, 1907. On February 12, 1908, the plaintiff Leesnitzer filed a motion that the appeal be dismissed, because (1) Elizabeth E. Padgett, an heir and one of the defendants, "has not been joined either as an appellee or appellant or as a party hereto. (2) That there has been no summons and severance, or

service of notification of appeal upon said Elizabeth E. Padgett. Edmund Burke, solicitor for appellee." This motion was granted, on the ground that Mrs. Padgett was not made a party to the appeal.

Thereupon the appellant moved to modify the decree by allowing the appellant to correct her appeal by citing the omitted parties, and for such further proceedings as might be necessary to a decision of the cause upon its merits. The court held that as Mrs. Padgett had admitted the allegations of the bill, and had arrayed herself 92]*on the plaintiff's side, and as she had got all that she could expect by the decree, the appellant did not need to obtain a severance, but that the appeal should have been taken against her as well as against the plaintiff, and that the supersedeas bond should have run to both, which "an inspection of the bond in office of the clerk below" showed not to have been the case. It was objected that the court could not look beyond the record before it, which, as we have indicated, contained only a memorandum that a bond had been filed. But the record was entitled, "Margaret E. Taylor, etc. v. Mary J. Leesnitzer," until within a few days before the case was called for hearing, when the appellant *ex parte* caused the cover of the printed record to be changed so as to name also Elizabeth E. Padgett and Franklin Padgett as appellees. It was said that if the court should confine itself to the record, the presumption was that the title of the appeal followed the obligation of the bond. On this ground the court, with expressions of regret, considered itself not at liberty to entertain a motion for leave to file an additional bond.

We generally are slow to overrule the decisions of courts other than courts of the United States upon matters of local practice. But as the court of appeals unwillingly yielded a consideration of the merits to what, in the circumstances, probably was little more than form, we feel less hesitation than otherwise we might in acting upon our opinion that it took too strict a view of its own powers. The first decision went on the ground that Mrs. Padgett was not made a party to the appeal, and, if we correctly understand the second, it also seems to have stood on the same notion, deduced as a conclusion from the form of the bond, as disclosed by inspection or presumed. No other was open under the motion except one discarded by the court, as we have shown, and no other was or was likely to be taken by the court of appeals. But this ground 93]cannot be taken on the record, *because the decree in the supreme court states that an appeal was prayed in open court.

When an appeal is taken in open court, it does not need the formalities of ancient law to indicate that it is taken against all adverse interests. All parties are present in fact or in law, and they have notice then and there. No citation is required. Chicago & P. R. Co. v. Blair, 100 U. S. 661, 25 L. ed. 587; Brockett v. Brockett, 2 How. 238, 11 L. ed. 251. The requirement of a bond by a rule of the court of appeals does not go to the essence of the appeal, as is shown by the condition in the rule that the motion to dismiss for want of one must be "made within the first twenty days next after the receipt of the transcript in this court." Rule X. As the parties in this case had notice of the appeal, they were put upon inquiry as to the scope of the bond, and if, as the court of appeals says, there is a presumption that the title of the transcript follows the obligation of the bond, they had actual notice of its form. But the bond cannot create a retrospective presumption as to the effect of the words spoken in open court on the scope of the appeal. That was settled when the appeal was claimed. It follows that no excuse is shown for not objecting to the form of the bond within twenty days. The motion to dismiss was not made until more than six months after the receipt of the transcript, and then was not based on the defect of the bond, but on supposed defects in the appeal. It was not made on behalf of the party aggrieved by the omission from the bond. The time has gone by when the appellant can be turned out of court because Mrs. Padgett was not joined as obligee, but if, as we have tried to show, the proper parties were all before the higher court, no doubt leave would be given to file an additional bond if an amendment were desired.

Decree reversed.

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*BALTIMORE & OHIO SOUTHWEST-[94
ERN RAILROAD COMPANY, Plff. in Err.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 94–106.)

Carriers — requiring unloading of live stock during transit — number of penalties.

1. The number of the penalties recoverable under the act of June 29, 1906 (34 Stat. at L. 607, chap. 3594, U. S. Comp. Stat. Supp. 1909, p. 1178), making twenty-

Note.—On statutory duties of carrier of live stock with reference to care of stock during transportation—see note to Chesapeake & O. R. Co. v. American Exch. Bank, 44 L.R.A. 449.

eight hours the limit of confinement of live stock in transit without unloading, and prescribing a penalty for every failure of the carrier to comply with this provision, is not measured by the number of shipments on the same train, nor is the train the unit of offense, but where the same train contains live stock loaded at different periods, one penalty accrues when the period of lawful confinement for the cattle first loaded expires, and other separate and distinct penalties accrue as the time for the lawful confinement of the cattle loaded at later periods successively expires.

[For other cases, see Carriers, III., in Digest Sup. Ct. 1908.]

Carriers — requiring unloading of live stock during transit — number of penalties.

2. But one penalty may be recovered against a carrier violating the provisions of the act of June 29, 1906, making twenty-eight hours the limit of confinement of live stock in transit without unloading, unless extended by request of the owner to thirty-six hours, and prescribing a penalty for every failure of the carrier to comply with this provision, where the time for the required unloading of two shipments loaded at different times coincides, because one shipment was forwarded under the thirty-six-hour rule, and the other was made eight hours later, under the twenty-eight-hour rule, from a different station.

[For other cases, see Carriers, III., in Digest Sup. Ct. 1908.]

Appeal — jurisdictional amount — consolidated suit.

3. The aggregate sum of the possible penalties sued for in several actions brought by the United States against a carrier under the act of June 29, 1906, requiring the unloading of live stock during transit, and consolidated, is the amount in dispute for the purpose of sustaining the appellate jurisdiction of the Federal Supreme Court.

[For other cases, see Appeal and Error, I. f, 4, in Digest Sup. Ct. 1908.]

Action — for penalty — consolidation.

4. A Federal circuit court may properly consolidate, under U. S. Rev. Stat. § 921, U. S. Comp. Stat. 1901, p. 685, several actions brought by the United States against a carrier to recover the penalty prescribed by the act of June 29, 1906, for violations of its requirement as to unloading live stock during transit.

[For other cases, see Action or Suit, II., in Digest Sup. Ct. 1908.]

[Nos. 7, 8.]

Argued March 4, 1910. Affirmed by divided court, March 14, 1910. Rehearing granted April 4, 1910. Reargued January 5 and 6, 1911. Decided Mareh 20, 1911.

IN ERROR to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which, reversing the judgment of the District Court for the Southern District of Ohio, held that the shipment was the unit of offense in actions by the United States to recover a statutory penalty for failing to unload live stock during transit. Modified by holding that the times of loading determine the number of offenses, and as so modified, affirmed.

See same case below, 86 C. C. A. 223, 159 Fed. 33.

Statement by Mr. Justice Lamar:

"The act to prevent cruelty to animals while in transit," approved June 29, 1906 (34 Stat. at L. 607, chap. 3594, U. S. Comp. Stat. Supp. 1909, p. 1178), provides:

"Sec. 1. That no railroad . . . whose road forms *any part of a line of[95 road over which cattle . . . or other animals shall be conveyed . . . [in interstate commerce] . . . shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens, for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by . . . unavoidable causes . . . Provided, That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated. . . .

"Sec. 2. That animals so unloaded shall be properly fed and watered during such rest. . . .

"Sec. 3. That any railroad . . . who knowingly and wilfully fails to comply with the provisions of the two preceding sections shall, for every such failure, be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars. . . .

"Sec. 4. That the penalty created by the preceding section shall be recovered by civil action in the name of the United States. . . ."

Under this act eleven actions were instituted in the southern district of Ohio against the Baltimore & Ohio Southwestern Railroad Company.

The complaint in each case gave the name of the station in Illinois from which the animals were shipped to *Cincinnati,[96

the marks of the cars in which they were shipped, the hour on February 2, 1907, when they were loaded, and the various periods of confinement, which varied from thirty-seven to forty-five hours. The separate shipments consisted of one, two, three, and four car-load lots, aggregating twenty-one cars, containing several hundred cattle and hogs. Most of the shipments were loaded at different times; but because one (1872) was forwarded under the thirty-six hour rule, the time for its unloading was the same as that of another shipment (1871), made eight hours later under the twenty-eight hour rule, from a different station. At another station there were three shipments of one car load each of cattle belonging to different owners, loaded at the same time, but two (1869, 1873) of the cars were forwarded under the twenty-eight hour rule, and the other (1874) under the thirty-six hour rule.

The railroad company filed a separate plea in each case, admitting the allegations of the complaint, but setting up that "the shipment therein was forwarded to Cincinnati on its train No. 98, on which there were also loaded and forwarded other cattle, referred to in each of the other suits, and in the said several causes the said plaintiff is entitled to recover but one penalty, not to exceed $500, which it is ready and willing to pay, and it pleads the said separate suits in bar to the recovery of more than $500 for all of the same."

The district attorney's motions for separate judgments on the admission in the several pleas were overruled. The court sustained the company's motion to consolidate the causes, entered judgment for a single penalty, and ordered "that the within order in case 1866 shall apply to, operate upon, and be conclusive of, all the rights of the plaintiff in each of the several causes, to wit, 1867–1874, 1880 and 1884." The government sued out a writ of error in case 1866, and, apparently out of abundant cau-
97]tion, *another in 1867, later entering into a stipulation in the circuit court of appeals that the result in these two cases should control all the others.

The circuit court of appeals for the sixth circuit (86 C. C. A. 223, 159 Fed. 33) held that the order of consolidation was proper, but reversed the judgment on the ground that the United States were entitled to recover eleven penalties, or one for each of the eleven shipments.

Mr. Edward Colston argued the cause, and, with Messrs. Judson Harmon, A. W. Goldsmith, and George Hoadly, filed a brief for plaintiff in error:

Congress knew when enacting this law that the old law had been interpreted to mean that the penalty did not multiply by either the number of cattle, or by the number of cars, or by the number of shipments.

United States v. Boston & A. R. Co. 15 Fed. 209; United States v. St. Louis & S. F. R. Co. 107 Fed. 870.

It must be presumed that Congress intended that the construction placed upon the penalty clause should remain, and that there should not be as many penalties as there were head of cattle, or cars of cattle, or shipments of cattle.

Mason v. Fearson, 9 How. 258, 13 L. ed. 129; United States v. G. Falk & Bro. 204 U. S. 143, 51 L. ed. 411, 27 Sup. Ct. Rep. 191; United States v. Cereeedo Hermanos y Compañia, 209 U. S. 339, 52 L. ed. 821, 28 Sup. Ct. Rep. 532; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 401, 50 L. ed. 525, 26 Sup. Ct. Rep. 272.

The rule for the interpretation of penal statutes is against the conclusion reached by the court of appeals.

United States v. Corbett, 215 U. S. 233, 54 L. ed. 173, 30 Sup. Ct. Rep. 81; United States v. Sheldon, 2 Wheat. 119, 4 L. ed. 199; United States v. Wiltberger, 5 Wheat. 95, 5 L. ed. 42; Elliott v. East Pennsylvania R. Co. 99 U. S. 576, 25 L. ed. 293; France v. United States, 164 U. S. 682, 683, 41 L. ed. 597, 598, 17 Sup. Ct. Rep. 219; Bolles v. Outing Co. 175 U. S. 262, 265, 44 L. ed. 156, 157, 20 Sup. Ct. Rep. 94; United States v. Harris, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609; Werckmeister v. American Tobacco Co. 207 U. S. 381, 52 L. ed. 256, 28 Sup. Ct. Rep. 124.

One offense cannot be split into many, and penalties thereby multiplied.

1 Bishop, New Crim. Law, p. 479, §§ 793, 1061; Nichols v. Com. 78 Ky. 180; State v. Fayetteville, 6 N. C. (2 Murph.) 371; Crepps v. Durden, Cowp. pt. 2, p. 640; State v. Stevens, 81 Vt. 454, 70 Atl. 1060; Bishop, Statutory Crimes, 2d ed. chap. 61, § 1121; Fontaine v. State, 6 Baxt. 514; Woodford v. People, 62 N. Y. 117, 20 Am. Rep. 464; United States v. Patty, 9 Biss. 429, 2 Fed. 664; Com. v. O'Brien, 107 Mass. 208; State v. Batson, 108 La. 479, 32 So. 478; Ward v. State, 90 Miss. 249, 43 So. 466; 12 Cyc. Law & Proc. p 289; 22 Cyc. Law & Proc. p 383; 25 Cyc. Law & Proc. p. 61; Friedeborn v. Com. 113 Pa. 244, 57 Am. Rep. 464, 6 Atl. 160; Com. v. Robinson, 126 Mass. 260, 30 Am. Rep. 674, 3 Am. Crim. Rep. 143; Hurst v. State, 86 Ala. 604, 11 Am. St. Rep. 79, 6 So. 120; Hoiles v. United States, 3 MacArth. 371, 36 Am. Rep. 106; State v. Hennessey, 23

Ohio St. 347, 13 Am. Rep. 253; Smith v. State, 59 Ohio St. 357, 52 N. E. 826.

The effect of the consolidation of all the eleven cases into one case makes the amount in controversy $5,500.

Beadles v. Smyser, 209 U. S. 393, 52 L. ed. 849, 28 Sup. Ct. Rep. 522.

Mr. Edward Colston also filed a separate brief for plaintiff in error:

The penalty incurred was a single penalty.

Sturgis v. Spofford, 45 N. Y. 446; Fisher v. New York C. & H. R. R. Co. 46 N. Y. 644; Parks v. Nashville, C. & St. L. R. Co. 13 Lea, 1, 49 Am. Rep. 655; Westfall v. State, 4 Ga. App. 834, 62 S. E. 558; Hill v. Williams, 14 Serg. & R. 287; Central R. Co. v. Green, 86 Pa. 431, 27 Am. Rep. 718; Com. v. Borden, 61 Pa. 277; State ex rel. McClurg v. Cleveland, C. C. & St. L. R. Co. 8 Ohio C. C. 604, 4 Ohio C. D. 372.

Solicitor General **Bowers** argued the cause and filed a brief for defendant in error.

Assistant Attorney General **Denison** argued the cause on reargument, and filed a brief for defendant in error:

Four theories as to the unit of offense have been suggested from time to time. They are: The individual animal, the carload, the trainload, and the shipment. The individual animal theory appears to have no support in the language of the act, and it was early rejected.

United States v. Boston & A. R. Co. 15 Fed. 209.

The carload theory was also rejected.

United States v. St. Louis & S. F. R. Co. 107 Fed. 870.

The trainload theory has had no substantial support in the lower courts.

The shipment theory has been upheld by all the courts in which it has been involved, excepting the district court below.

United States v. St. Louis & S. F. R. Co. R. Co. 86 C. C. A. 223, 159 Fed. 33; United States v. New York, C. & St. L. R. Co. 94 C. C. A. 76, 168 Fed. 699; Southern P. Co. v. United States, 96 C. C. A. 252, 171 Fed. 360, 162 Fed. 412; New York C. & H. R. R. Co. v. United States, 91 C. C. A. 519, 165 Fed. 833; United States v. Oregon R. & Nav. Co. 163 Fed. 642; United States v. Atchison, T. & S. F. R. Co. 166 Fed. 160.

The cases at bar are therefore very different from the "continuing offense" line of cases.

Re Snow, 120 U. S. 274, 30 L. ed. 658, 7 Sup. Ct. Rep. 556; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428.

If each item of an illegal doing of business is made a separate offense, penalties may be recovered for each.

State v. Broeder, 90 Mo. App. 169; State v. Heard, 107 La. 60, 31 So. 384; State v. Shafer, 20 Kan. 226; Benson v. State, — Tex. Crim. Rep. —, 44 S. W. 168; United States v. St. Louis Southwestern R. Co. 184 Fed. 28; People v. New York C. R. Co. 13 N. Y. 78; Chicago & A. R. Co. v. People, 82 Ill. App. 679; Southern R. Co. v. State, 165 Ind. 613, 75 N. E. 272.

A single act or omission denounced by the statute, occurring at a single time and place, constitutes only one offense, no matter how many items it may affect, unless, perhaps, as in larceny cases, they belong to different owners. But if there are different (or even similar) acts or omissions at different times and different places, then there are different offenses.

Nichols v. Com. 78 Ky. 180; United States v. Patty, 9 Biss. 429, 2 Fed. 664; Flemister v. United States, 207 U. S. 373, 52 L. ed. 253, 28 Sup. Ct. Rep. 129; State v. Temple, 194 Mo. 228, 92 S. W. 494; Augustine v. State, 41 Tex. Crim. Rep. 59, 96 Am. St. Rep. 765, 52 S. W. 77; Kelly v. State, 42 Tex. Crim. Rep. 40, 62 S. W. 915; People v. Ochotski, 115 Mich. 601, 73 N. W. 889; Baker v. Com. 20 Ky. L. Rep. 879, 47 S. W. 864; 12 Cyc. Law & Proc. p. 289; Sadberry v. State, 39 Tex. Crim. Rep. 466, 46 S. W. 639; Bliss v. United States, 44 C. C. A. 324, 105 Fed. 508; United States v. Randenbush, 8 Pet. 288, 8 L. ed. 948; United States v. Miner, 11 Blatchf. 511, Fed. Cas. No. 15,780; Miller v. State, — Tex. Crim. Rep. —, 72 S. W. 856; Collins v. State, 39 Tex. Crim. Rep. 30, 44 S. W. 846; Stevens v. State, — Tex. Crim. Rep. —, 58 S. W. 96; State v. Burlingame, 146 Mo. 207, 48 S. W. 72; Com. v. Hazlett, 10 Pa. Super. Ct. 534; Com. v. Rockafellow, 3 Pa. Super. Ct. 588.

An incidental policy of the act is to protect the interests of the owners of the cattle.

United States v. Pere Marquette R. Co. 171 Fed. 586; United States v. Oregon R. & Nav. Co. 163 Fed. 640; United States v. Sioux City Stock Yards Co. 162 Fed. 556; United States v. Lousville & N. R. Co. 18 Fed. 480.

Mr. Justice **Lamar**, after making the foregoing statement, delivered the opinion of the court:

The consolidated record of the eleven cases shows that several hundred cattle and hogs of eleven different owners, shipped in twenty-one cars, loaded at different stations at various hours on February 2, 1907, were in one train at the time of the expiration of the successive periods for the unload-

ing required by the act of 1906, "to prevent cruelty to animals in transit." The question is as to the number of penalties for which, in such a case, the carrier is liable.

Under the nearly identical act of 1873 (Rev. Stat. 4386, U. S. Comp. Stat. 1901, p. 2996), it was held that the penalties were not to be measured by the number of cattle in the shipment, nor the number of cars in which they were transported. United States v. Boston & A. R. Co. 15 Fed. 209; United States v. St. Louis & S. F. R. Co. 107 Fed. 870. And the company contends that, as the cattle here were in one train, the failure to unload was one offense, punishable by one penalty. In support of its position it relies, among others, on authorities which hold that in larceny, if the goods stolen at one time belong to several persons, the offense is single; and that, on conviction for working on Sunday, there is only one breach of the statute, the penalty for which cannot be multiplied by the number of items of work done on the day of rest.

104] *But this does not mean that if the thief should, at a different time, steal property from the same place, he could not be punished for the new transaction, nor that because a man had been convicted for working on one Sunday, he could not be convicted and punished for subsequently working on a different Sunday. For every penal statute must have relation to time and place, and corporations whose operations are conducted over a large territory, by many agents, may commit offenses at the same time in different places, or at the same place at different times.

Here the twenty-one cars, loaded at different periods, had been gathered into one train. As the period of lawful confinement of the cattle first loaded expired, there was a failure to unload. For that failure the statute imposed a penalty. But there was then no offense whatever as to the animals in the other twenty cars of the same train, which, up to that time, had not been confined for twenty-eight hours.

When, however, later in the day, at the same or a different place, the time for the lawful confinement of the animals in the other twenty cars successively expired, there were similar but distinct and separate failures then and there to unload. They were separately punishable, since the provision that "for every such failure" the company shall be liable to a penalty prevented a merger. If the period of lawful confinement of several car loads of cattle expires at the same time and place, and the company fails to unload them, as required by the statute, and if these cattle all belong to one owner, it is conceded that there is only one offense. It is not different if the same cattle, at the same time and place, had belonged to various owners, or had been shipped under different consignments.

Several expressions in the statute, and particularly the provision that, in estimating the period of lawful confinement, "the time consumed in loading and unloading shall not be considered," recognize that the proper loading *or unloading of a[105 number of animals may be treated as a single act, and there is nothing to indicate that it is to be treated as more than one act because the animals happen to belong to different persons. The loading of numerous cars might proceed concurrently; or, if not discontinuous or unduly prolonged, several cars of cattle of the same consignor might be loaded at the same time, within the meaning of the act, in which event the period of their lawful confinement on the same train would end at the same time and place. There would in this latter case be coincidence between the one shipment and the one offense.

But, in determining whether the number of penalties is always to be measured by the number of shipments on the same train, even when the animals were loaded at different times, it is to be remembered that the statute is general. It applies to the transportation of a train load of cattle belonging to one owner; to the more usual case where animals belonging to one or more owners are loaded into different cars at different times; and also to those instances where one or a few horses or other animals are shipped, and at a different time or farther on during the journey other animals are loaded into the same car. These differences in shipments do not affect the duty of the carrier to the animals, but only the time when the duty to unload is to be performed. The number of consignors, the consent of the owner or agent in charge of the particular shipment that the cattle might be confined for thirty-six hours, the number of bills of lading, and the particulars of the shipment, are immaterial, except as they serve to fix the limit of lawful confinement.

To illustrate: It appears in this record that several hundred animals belonging to one owner and consigned to one dealer were loaded into four cars at the same time. The twenty-eight hours of their lawful confinement necessarily expired at the same time. The simultaneous failure to unload these four cars was single, and punishable as a single *offense. But the duty and of-[106 fense in this transaction would not have been quadrupled if the company had issued to the owner four bills of lading instead of

one. Nor would there have been an increase of duty if these same cattle had been received from four consignors instead of one.

The statute was not primarily intended for the benefit of the owners. Indeed, it is restrictive of their rights. The penalty does not go to the consignor, but to the United States for each failure to unload cattle, regardless of who may own them, and even if the owner consented to their confinement beyond a period of thirty-six hours. The title of the act is "to prevent cruelty to animals in transit," its declared "intent being to prohibit their continuous confinement beyond a period of twenty-eight hours, except upon the contingencies hereinbefore stated." Regardless of the number of shipments, at any time and place where they are wilfully and knowingly confined beyond the lawful period, there is a violation of the statute as to the animal or animals then and there in custody for transit in interstate commerce.

The point is made in the brief that this court has no jurisdiction, because the amount involved in the cases embraced in these writs of error was only $1,000. The court, we think properly, consolidated all the cases (Rev. Stat. § 921, U. S. Comp. Stat. 1901, p. 685), and, as consolidated, the amount of the possible penalties sued for in the eleven actions was fifty-five hundred dollars. The company is liable for nine penalties, because nine times it failed to unload as required by the statute. One penalty should be imposed as to animals referred to in cases numbered 1871 and 1872, and one as to those in 1869 and 1873, where the time for the required unloading respectively coincided. In other respects the judgment of the Circuit Court of Appeals, reversing the judgment of the District Court, is affirmed.

107]*STELLA P. FLINT, as General Guardian of the Property of Samuel N. Stone, Junior, a Minor, Appt.,

v.

STONE TRACY COMPANY et al. (No. 407.)

WYCKOFF VAN DERHOEFF, Appt.,

v.

CONEY ISLAND & BROOKLYN RAILROAD COMPANY et al. (No. 409.)

FRANCIS L. HINE, Appt.,

v.

HOME LIFE INSURANCE COMPANY et al. (No. 410.)

FRED W. SMITH, Appt.,

v.

NORTHERN TRUST COMPANY, A. C. Bartlett, William A. Fuller, et al. (No. 411.)

WILLIAM H. MINER, Appt.,

v.

CORN EXCHANGE NATIONAL BANK OF CHICAGO, Charles H. Wacker, Martin A. Ryerson, et al. (No. 412.)

CEDAR STREET COMPANY, Appt.,

v.

PARK REALTY COMPANY. (No. 415.)

LEWIS W. JARED, Appt.,

v.

AMERICAN MULTIGRAPH COMPANY et al. (No. 420.)

JOSEPH E. GAY, Appt.,

v.

BALTIC MINING COMPANY et al. (No. 425.)

PERCY BRUNDAGE, Appt.,

v.

BROADWAY REALTY COMPANY et al. (No. 431.)

PAUL LACROIX, Appt.,

v.

MOTOR TAXIMETER CAB COMPANY et al. (No. 432.)

ARTHUR LYMAN and Arthur T. Lyman, as Trustees under the Last Will and Testament of George Baty Blake, Deceased, Appts.,

v.

INTERBOROUGH RAPID TRANSIT COMPANY et al. (No. 442.)

GEORGE WENDELL PHILLIPS, Appt.,

v.

FIFTY ASSOCIATES et al. (No. 443.)

OSCAR MITCHELL, Appt.,

v.

CLARK IRON COMPANY. (No. 446.)

WILLIAM H. FLUHRER, Albert W. Durand, and Howard H. Williams, Appts.

v.

NEW YORK LIFE INSURANCE COMPANY. (No. 456.)

KATHERINE CARY COOK, Harriet Huntington Cook, and Ellenor Richardson Cook, by Anna H. R. Cook, Their Guardian and Next Friend, Appts.,

v.

BOSTON WHARF COMPANY et al. (No. 457.)

(See S. C. Reporter's ed. 107–177.)

Statutes — origin of revenue bills — amendment by Senate.

1. The substitution in the Senate of a tax

NOTE.—As to what are acts for raising revenue which must originate in the lower branch of the legislature—see note to Northern Counties Invest. Trust v. Sears, 35 L.R.A. 188.

on corporations in lieu of the plan of inheritance taxation contained in a general bill for the collection of revenue as it came from the House of Representatives, where the bill originated, was not forbidden by the provisions of U. S. Const. art. 1, § 7, that all bills for the raising of revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments, as on other bills.

[For other cases, see Statutes, I. a, in Digest Sup. Ct. 1908.]

Internal revenue — Federal corporation tax — excise or direct tax.

2. An excise upon the carrying on or the doing of business in a corporate or quasi corporate capacity is what was imposed by the act of August 5, 1909 (36 Stat. at. L. 11, 112–117, chap. 6. U. S. Comp. Stat. Supp. 1909, pp. 659, 844–849), § 38, providing that insurance companies and all corporations, joint stock companies, or associations organized for profit, and having a capital stock represented by shares, shall be subject annually to a special excise tax with respect to the carrying on or doing business, equivalent to 1 per centum upon the entire net income over and above $5,000 received from all sources during the year, with certain allowances and deductions.

[For other cases, see Internal Revenue, I. a, in Digest Sup. Ct. 1908.]

Internal revenue — validity of Federal corporation tax — apportionment.

3. The tax measured by net annual income, imposed by the act of August 5, 1909, § 38, upon the carrying on or doing of business in a corporate or quasi corporate capacity, being an excise, and not a direct tax, is not invalid because not apportioned among the several states according to population.

[For other cases, see Internal Revenue, 18–36, in Digest Sup. Ct. 1908.]

Internal revenue — Federal taxation of state agencies — excise on corporation.

4. The excise imposed by the act of August 5, 1909, § 38, upon the carrying on or the doing of business in a corporate or quasi corporate capacity, is not invalid because the business taxed is done in pursuance of the authority granted by a state, in the creation of private corporations.

[For other cases, see Internal Revenue, III.; States, IV. e, in Digest Sup. Ct. 1908.]

Internal revenue — excise on corporation — uniformity.

5. Taxing a business when carried on by a corporation, and exempting a similar business when carried on by a partnership or by a private individual, as is done by the act of August 5, 1909, § 38, imposing an excise upon the carrying on or the doing of business in a corporate or quasi corporate capacity, does not invalidate the tax, since the only limitation upon the power of Congress is uniformity in laying the tax, and this is a geographical uniformity, which does not require the equal application of the tax to all persons or corporations who may come within its operation.

[For other cases, see Internal Revenue, 13–15, 37–42, in Digest Sup. Ct. 1908.]

Constitutional law — discrimination — taxation of corporations.

6. There is such a substantial difference between the carrying on of business by corporations and the same business when conducted by a private firm or individual as would justify—even were the principles of the 14th Amendment to the Federal Constitution applicable—the excise imposed by the act of August, 5 1909, § 38, upon the carrying on or the doing of business in a corporate or quasi corporate capacity.

[For other cases, see Constitutional Law, 299–312, in Digest Sup. Ct. 1908.]

Internal revenue — excise on corporations — measure of tax.

7. Measuring the excise imposed by the act of August 5, 1909, § 38, upon the carrying on or the doing of business in a corporate or quasi corporate capacity by the entire net income from all sources does not invalidate the tax, although a part of such income may be derived from property in itself not taxable.

[For other cases, see Internal Revenue, III., in Digest Sup. Ct. 1908.]

Internal revenue — excise on corporations — measure of tax.

8. The measurement by the net corporate income from all sources of the excise imposed by the act of August 5, 1909, § 38, upon the doing or carrying on of business in a corporate or quasi corporate capacity, is not so arbitrary and baseless as to fall outside of the authority of the taxing power.

[For other cases, see Internal Revenue, III., in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — Federal excise on corporations.

9. Property is not taken without due process of law by the imposition, under the act of August 5, 1909, § 38, of an excise, measured by the net corporate income, upon the doing or the carrying on of business in a corporate or quasi corporate capacity.

[For other cases, see Constitutional Law, 523–553, in Digest Sup. Ct. 1908.]

Internal revenue — excise on corporations — possible results as affecting validity.

10. The possibility that the rights of the several states to create corporations may practically be destroyed by the exercise of the power assumed by Congress in the act of August 5, 1909, § 38, to impose an ex-

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On the constitutionality of an income tax —see note to Alderman v. Wells, 27 L.R.A. (N.S.) 864.

On constitutional equality in the United States in relation to corporate taxation—see note to Bacon v. State Tax Comrs. 60 L.R.A. 321.

On due process of law in revenue proceedings—see note to Read v. Dingess, 8 C. C. A. 398.

On limitations on taxing power from mutual independence of Federal and state governments—see note to Grether v. Wright, 23 C. C. A. 515.

cise upon the doing or the carrying on of business in a corporate or quasi corporate capacity, furnishes no ground for judicial interference with the tax.

[For other cases, see Internal Revenue, I. b, in Digest Sup. Ct. 1908.]

Internal revenue — excise on corporations — doing business — real estate companies.

11. Corporations organized for and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of the act of August 5, 1909, § 38, imposing an excise upon the doing or the carrying on of business in a corporate or quasi corporate capacity.

[For other cases, see Internal Revenue, III., in Digest Sup. Ct. 1908.]

Internal revenue — excise on corporations — doing business — taximeter company.

12. A corporation owning and leasing taxicabs and collecting rents therefrom is engaged in business within the meaning of the act of August 5, 1909, § 38, imposing an excise upon the doing or carrying on of business in a corporate or quasi corporate capacity.

[For other cases, see Internal Revenue, III., in Digest Sup. Ct. 1908.]

Internal revenue — Federal taxation of state agencies — excise on public-service corporations.

13. Public-service corporations, such as street railway companies created under state laws, may constitutionally be subjected to the excise imposed by the act of August 5, 1909, § 38, upon the doing or carrying on of business in a corporate or quasi corporate capacity.

[For other cases, see Internal Revenue, III.; States, IV. e, in Digest Sup. Ct. 1908.]

Internal revenue — excise on corporations — exemptions.

14. Exempting corporations whose net annual incomes are under $5,000 from the excise imposed by the act of August 5, 1909, § 38, upon the doing or the carrying on of business in a corporate or quasi corporate capacity, does not invalidate the tax.

[For other cases, see Internal Revenue, III., in Digest Sup. Ct. 1908.]

Internal revenue — excise on corporations — exemptions.

15. Labor, agricultural, and horticultural organizations, fraternal and benevolent societies, and organizations for religious, charitable or educational purposes, could be excepted from the operation of the excise imposed by the act of August 5, 1909, § 38, upon the doing or the carrying on of business in a corporate or quasi corporate capacity, without invalidating the tax.

[For other cases, see Internal Revenue, III., in Digest Sup. Ct. 1908.]

Internal revenue — excise on corporations — validity of deductions.

16. The excise measured by net annual income, imposed by the act of August 5, 1909, § 38, upon the doing or the carrying on of business in a corporate or quasi corporate capacity, is not invalid because a deduction of interest payments is permitted only in case of interest paid by banks and trust companies on deposits, and interest actually paid within the year on bonded or other indebtedness to an amount not exceeding the paid-up capital stock.

[For other cases, see Internal Revenue, III., in Digest Sup. Ct. 1908.]

Internal revenue — excise on corporations — inequality of application.

17. Inequality of application, owing to different local conditions, does not invalidate the excise imposed by the act of August 5, 1909, § 38, upon the doing or the carrying on of business in a corporate or quasi corporate capacity.

[For other cases, see Internal Revenue, 37–42, in Digest Sup. Ct. 1908.]

Internal revenue — Federal tax on state agencies — excise on corporations.

18. Corporations acting as trustees, guardians, etc., under the authority of the laws or courts of a state, are not the agents of the state government in such a sense as to be exempt from the imposition, under the act of August 5, 1909, § 38, of an excise measured by net income upon the doing or the carrying on of business in a corporate or quasi corporate capacity.

[For other cases, see Internal Revenue, III.; States, IV. e, in Digest Sup. Ct. 1908.]

Searches and seizures — excise on corporation — making tax returns public.

19. Making the returns for the assessment of the excise imposed by the act of August 5, 1909, § 38, on the doing or the carrying on of business in a corporate or quasi corporate capacity, public documents and open to inspection as such, under certain restrictions, as is done by subsec. G of that act, as amended by the act of June 17, 1910 (36 Stat. at L. 494, chap. 297), does not do violence to the constitutional protection against unreasonable searches and seizures.

[For other cases, see Searches and Seizures, in Digest Sup. Ct. 1908.]

Statutes — when validity may be assailed.

20. No objections to the validity of a statute will be considered which do not properly arise in the case before the court.

[For other cases, see Statutes, I. d, 3, in Digest Sup. Ct. 1908.]

[Nos. 407, 409, 410, 411, 412, 415, 420, 425, 431, 432, 442, 443, 446, 456 and 457.]

Argued March 17 and 18, 1910. Ordered for reargument before full bench May 31, 1910. Reargued January 17, 18 and 19, 1911. Decided March 13, 1911.

APPEAL from the Circuit Court of the United States for the District of Vermont to review a decree sustaining a demurrer to and dismissing a bill which sought to restrain the directors of a cor-

poration from complying with the Federal corporation tax. Affirmed. Also

SEVEN APPEALS from the Circuit Court of the United States for the Southern District of New York; THREE APPEALS from the Circuit Court of the United States for the District of Massachusetts; TWO APPEALS from the Circuit Court of the United States for the Northern District of Illinois; AN APPEAL from the Circuit Court of the United States for the Northern District of Ohio; and AN APPEAL from the Circuit Court of the United States for the District of Minnesota, —all bringing up similar decrees for review. Affirmed.

The facts are stated in the opinion.

Mr. **Maxwell Evarts** argued the cause, and, with Mr. John G. Sargent, Attorney General of Vermont, and Mr. Henry S. Wardner, filed a brief for appellant in No. 407:

A state cannot tax an instrumentality of the Federal government.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481; Dobbins v. Erie County, 16 Pet. 435, 10 L. ed. 1022; New York ex rel. Bank of Commerce v. Tax Comrs. 2 Black, 620, 17 L. ed. 451.

For the same reason, and because a state is as independent a sovereignty within its sphere as the national government, Congress cannot pass any law taxing an instrumentality of a state.

Day v. Buffinton, 3 Cliff. 376, Fed. Cas. No. 3,675, s. c. 11 Wall. 113, 20 L. ed. 122; United States v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673.

The Federal courts have assumed, and the highest state courts have decided, that a state cannot tax patents granted by the general government (M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565; Allen v. Riley, 203 U. S. 347, 51 L. ed. 216, 27 Sup. Ct. Rep. 95, 8 A. & E. Ann. Cas. 137; Re Sheffield, 64 Fed. 833; Com. v. Westinghouse Electric & Mfg. Co. 151 Pa. 265, 24 Atl. 1107, 1111; People ex rel. Edison Electric Illuminating Co. v. Board of Assessors, 156 N. Y. 417, 42 L.R.A. 290, 51 N. E. 269). A patent is a franchise (Bloomer v. McQuewan, 14 How. 539, 14 L. ed. 532) that can be granted concurrently by both the state and the United States (Livingston v. Van Ingen, 9 Johns. 507; 1 Robinson, Patents, § 45), and is clearly not an instrumentality of either state or Federal government.

This court has held that a state cannot tax the franchise granted to a Federal corporation, and the decision is placed not upon the ground that the corporation is an instrumentality of the government, but because the franchise emanates from, and is a portion of, the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers, of the government, and repugnant to its paramount sovereignty.

California v. Central P. R. Co. 127 U. S. 1, 41, 32 L. ed. 150, 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073.

Inasmuch as the principle of the decision that a state cannot tax a Federal instrumentality was held to apply when the question was reversed, and Congress undertook to tax a state instrumentality, it would seem to follow that the reasons and principles for the decision that a state cannot tax a Federal corporate franchise would also apply to an attempt by the general government to tax a corporate franchise granted by a state.

If we run through the cases decided by this court, we find expressions—not decisions, it is true, but expressions—indicating that, in American jurisprudence, the power to tax a corporate franchise rests only with the state which creates it.

West River Bridge Co. v. Dix, 6 How. 548, 12 L. ed. 552; State Tax on R. Gross Receipts, 15 Wall. 296, 21 L. ed. 169; Baltimore & O. R. Co. v. Maryland, 21 Wall. 473, 22 L. ed. 684; Re Greene, 52 Fed. 112; Hale v. Henkel, 201 U. S. 43, 86, 50 L. ed. 652, 670, 26 Sup. Ct. Rep. 370.

The law puts the burden on the power of the state to create corporations. The mere phraseology used in the statute—"special excise tax with respect to the carrying on or doing business"—counts for little as against the substance and effect when the constitutionality of the law is attacked.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 580, 581, 39 L. ed. 759, 818, 819, 15 Sup. Ct. Rep. 673; Knowlton v. Moore, 178 U. S. 41, 81, 44 L. ed. 969, 985, 20 Sup. Ct. Rep. 747; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 411, 48 L. ed. 496, 501, 24 Sup. Ct. Rep. 376; Craig v. Missouri, 4 Pet. 410, 433, 7 L. ed. 903, 911.

Classifying corporations by Congress for the imposition of Federal taxes and other special burdens takes their property without due process of law and without just compensation.

Holden v. Hardy, 169 U. S. 366, 389, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383;

Leeper v. Texas, 139 U. S. 462, 468, 35 L. ed. 225, 227, 11 Sup. Ct. Rep. 579; Bank of Columbia v. Okely, 4 Wheat. 235, 244, 4 L. ed. 559, 561; Twining v. New Jersey, 211 U. S. 78, 101, 102, 53 L. ed. 97, 107, 29 Sup. Ct. Rep. 14; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 276, 15 L. ed. 372, 374; Sinking Fund Cases, 99 U. S. 700, 718, 25 L. ed. 496, 501; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 599, 39 L. ed. 759, 825, 15 Sup. Ct. Rep. 673; Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 Sup. Ct. Rep. 261; Magoun v. Illinois Trust & Sav. Bank 170 U. S. 283, 301, 42 L. ed. 1037, 1045, 18 Sup. Ct. Rep. 594.

The denial of the equal protection of the laws and the taking of property without due process of law are, so far as this case is concerned, the same thing, because the injury complained of lies in the enforcement of a statute which is unequal and arbitrary.

Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 241, 41 L. ed. 979, 986, 17 Sup. Ct. Rep. 581; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

Even in tax statutes the Federal Constitution cannot be utterly disregarded.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 92, 45 L. ed. 102, 103, 21 Sup. Ct. Rep. 43; Billings v. Illinois, 188 U. S. 97, 101, 47 L. ed. 400, 402, 23 Sup. Ct. Rep. 272; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 A. & E. Ann. Cas. 1247.

The corporation tax is a direct tax on the franchise, and therefore unconstitutional, because not apportioned.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; Nicol v. Ames, 173 U. S. 509, 520, 43 L. ed. 786, 793, 19 Sup. Ct. Rep. 522; California v. Central P. R. Co. 127 U. S. 1, 41, 42, 32 L. ed. 150, 157, 158, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Beale, Foreign Corp. § 508, p. 665; Lumberville Delaware Bridge Co. v. State Assessors, 55 N. J. L. 537, 25 L.R.A. 134, 26 Atl. 711.

The joint stock companies stand on the same basis as the corporations as far as the corporation tax is concerned.

Liverpool & L. Life & F. Ins. Co. v. Massachusetts (Liverpool & L. Life & F. Ins. Co. v. Oliver) 10 Wall. 566, 19 L. ed. 1029; Atty. Gen. v. Mercantile M. Ins. Co. 121 Mass. 524; People ex rel. Platt v. Wemple, 117 N. Y. 136, 6 L.R.A. 303, 2 Inters. Com. Rep. 735, 22 N. E. 1046.

Mr. **Richard V. Lindabury** argued the cause, and, with Messrs. Charles W. Pierson and Robert Lynn Cox, filed a brief for appellants in Nos. 409 and 410:

The tax is not an excise tax upon business or occupation, but is either (a) a corporate franchise tax, or (b) an income tax.

Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376; Maine v. Grand Trunk R. Co. 142 U. S. 217, 227, 35 L. ed. 994, 995, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; Fairbank v. United States, 181 U. S. 283, 293, 45 L. ed. 862, 866, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; Thomas v. United States, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305; Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; State Tax on Foreign-held Bonds, 15 Wall. 300, 319, 21 L. ed. 179, 186; Pollock v. Farmers' Loan & T. Co. 157 U. S. 580–583, 39 L. ed. 818–820, 15 Sup. Ct. Rep. 673; Galveston, H. & S. A. R. Co. v. Texas, 210, U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638.

If the tax be construed as a franchise tax, it constitutes, so far as state corporations are concerned, an interference with sovereign powers and functions of the states not surrendered to the general government, and expressly reserved to the states by the 10th Amendment.

Home Ins. Co. v. New York, 134 U. S. 594, 600, 601, 33 L. ed. 1025, 1029, 1030, 10 Sup. Ct. Rep. 593, Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897; Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907; Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; Horn Silver Min. Co. v. New York, 143 U. S. 305, 313, 36 L. ed. 164, 167, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; People ex rel. United States Aluminium Printing Plate Co. v. Knight, 174 N. Y. 475, 63 L.R.A. 87, 67 N. E. 65; Briscoe v. Bank of the Commonwealth, 11 Pet. 257, 317, 9 L. ed. 709, 732; Union P. R. Co. v. Peniston, 18 Wall. 5, 30, 21 L. ed. 787, 791; Mercantile Nat. Bank v. New York, 121 U. S. 138, 162, 30 L. ed. 895, 904, 7 Sup.

Ct. Rep. 826; United States v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597; The Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122; Ambrosini v. United States, 187 U. S. 1, 47 L. ed. 49, 23 Sup. Ct. Rep. 1, 12 Am. Crim. Rep. 699; Cooley, Const. Lim. 7th ed. p. 684; Fifield v. Close, 15 Mich. 509; California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Chisholm v. Georgia, 2 Dall. 419, 1 L. ed. 440; Weston v. Charleston, 2 Pet. 449, 467, 7 L. ed. 481, 487; Mercantile Nat. Bank v. New York, 121 U. S. 138, 162, 30 L. ed. 895, 904, 7 Sup. Ct. Rep. 826; Dobbins v. Erie County, 16 Pet. 435, 10 L. ed. 1022; Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670; People ex rel. Edison Electric Illuminating Co. v. Board of Assessors, 156 N. Y. 417, 42 L.R.A. 290, 51 N. E. 269; People ex rel. A. J. Johnson Co. v. Roberts, 159 N. Y. 70, 45 L.R.A. 126, 53 N. E. 685; Re Sheffield, 64 Fed. 833; Com. v. Westinghouse Electric & Mfg. Co. 151 Pa. 265, 24 Atl. 1107, 1111; Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565; Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 504, 33 L. ed. 687, 690, 10 Sup. Ct. Rep. 341.

The fact that a tax is on property does not render it constitutional if it nevertheless involves an interference with sovereign powers or instrumentalities of a state.

The Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122; United States v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597.

If the tax is on franchises as property, it is a tax imposed on real or personal property, and is void under art. 1, §§ 2 and 9 of the Constitution, as being a direct tax not apportioned according to population.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, rehearing 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912.

The tax ordained by the act in question is nonuniform, arbitrary, and unequal; and, if imposed and enforced, would deprive the corporations and joint stock associations against which it is levied of their property without due process of law, contrary to the provisions of the 5th Amendment of the Constitution.

Cooley, Tax. p. 259; Pollock v. Farmers' Loan & T. Co. 157 U. S. 598, 39 L. ed. 825, 15 Sup. Ct. Rep. 673; People ex rel. Farrington v. Mensching, 187 N. Y. 8, 10 L.R.A.(N.S.) 625, 79 N. E. 884, 10 A. & E. Ann. Cas. 101; 1 Hamilton's Works, 1885, ed. 270; Dill. Mun. Corp. §§ 736, 737; Desty, Tax. § 10; People ex rel. Detroit & H. R. Co. v. Salem, 20 Mich. 452, 4 Am. Rep. 400; State ex rel. White House School Dist. No. 7 v. Readington Twp. 36 N. J. L. 70; State, Agens, Prosecutor, v. Newark, 37 N. J. L. 421, 18 Am. Rep. 729; Durach's Appeal, 62 Pa. 494; Santa Clara R. Tax Case, 9 Sawy. 170, 18 Fed. 388; Citizens Sav. & L. Asso. v. Topeka, 29 Wall. 655, 663, 22 L. ed. 455, 461; Hurtado v. California, 110 U. S. 517, 534, 28 L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Re Kemmler, 136 U. S. 436, 448, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930; Leeper v. Texas, 139 U. S. 462, 468, 35 L. ed. 225, 227, 11 Sup. Ct. Rep. 579; Giozza v. Tiernan, 148 U. S. 657, 662, 37 L. ed. 599, 601, 13 Sup. Ct. Rep. 721; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 151, 154, 159, 41 L. ed. 667–669, 17 Sup. Ct. Rep. 255.

Mr. **Edward Osgood Brown** argued the cause, and, with Messrs. Orville Peckham, George Packard, and Vincent J. Walsh, filed a brief for appellants in Nos. 411 and 412:

Despite the attempt of its framers by mere phraseology to negative the idea that the tax is an income tax, it remains so because of its essential character and substance.

Stockard v. Morgan, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 A. & E. Ann. Cas. 1101; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638.

While a tax in certain cases may be laid on an intangible right or privilege in proportion to the value of some other property without being a tax on that property (as held in Michigan C. R. Co. v. Collector [Michigan C. R. Co. v. Slack] 100 U. S. 595, 25 L. ed. 647; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; Delaware Railroad Tax, 18 Wall. 206, 21 L. ed. 888; New York v. Roberts, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58), this is only true (1) where the value of the property by which the tax is gauged is a reasonable measure of the value of the intangible right or privilege, or (2) where the intangible right might be altogether taken away by the taxing government, and may therefore be conceded only on such conditions as that government pleases.

The selection of the persons to be taxed for the privilege of existence or of doing business is so "arbitrary and confiscatory" that it transcends the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems. Therefore this court should interfere.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

The corporations created by the states are to the United States in the same relation as natural persons who are citizens of those states, and cannot be arbitrarily selected for taxation on the privilege of existing or doing business.

Louisville, C. & C. R. Co. v. Letson, 2 How. 497, 11 L. ed. 353; Marshall v. Baltimore & O. R. Co. 16 How. 314, 14 L. ed. 953; Ohio & M. R. Co. v. Wheeler, 1 Black, 286, 17 L. ed. 130; Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; St. Louis v. Wiggins Ferry Co. 11 Wall. 423, 20 L. ed. 192; San Bernardino County v. Southern P. R. Co. 118 U. S. 417, 30 L. ed. 125, 6 Sup. Ct. Rep. 1144; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255.

As the right or privilege of existing as a corporation or as a joint stock company or as an insurance company, and the right or privilege of doing business as any one of them, are very different things in one state from what they are in another, because of the differing laws of the states (for example, freedom of a corporation stockholder from individual liability exists in New Jersey, but not in California), and as this court takes judicial notice on this appeal of the laws of all the states (Hanley v. Donoghue, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757; Case v. Kelly, 133 U. S. 21, 33 L. ed. 513, 10 Sup. Ct. Rep. 216; Mills v. Green, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132), the corporation tax is, within the judicial knowledge of the court, unequal and wanting in uniformity between the states.

The corporation tax is unconstitutional, whether direct or indirect, and whether uniform or not, because it is an attempted interference with the instrumentalities of the states.

M'Culloch v. Maryland, 4 Wheat. 316 4 L. ed. 579; The Collector v. Day (Buffington v. Day), 11 Wall. 113, 20 L. ed. 122; United States v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597; Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787; California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Ambrosini v. United States, 187 U. S. 1, 47 L. ed. 49, 23 Sup. Ct. Rep. 1, 12 Am. Crim. Rep. 699.

Power to grant acts of incorporation is practically unlimited in the states, and incident to the sovereignty.

Briscoe v. Bank of the Commonwealth, 11 Pet. 257, 9 L. ed. 709.

Congress has not the power to tax and thus destroy the right of existence of a corporation. Such a power would be tantamount to a power to tax the right to create such an existence.

California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; The Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122; Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151–178, 29 L. ed. 845–854, 6 Sup. Ct. Rep. 670.

Whatever may be said of other corporations, public-service corporations in private hands, furnishing transportation, water, light, or performing other public or semipublic functions, are instrumentalities of the state in the strictest sense, and for that reason are given the power of eminent domain; the functions of many of them are indeed governmental; *e. g.*, the functions of water companies.

Rogers Park Water Co. v. Fergus, 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. Rep. 490; Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; Danville Water Co. v. Danville City, 180 U. S. 619, 45 L. ed. 696, 21 Sup. Ct. Rep. 505.

The income of municipal bonds to a very large amount is included in the income on which the Northern Trust Company threatens to pay 1 per centum as a tax; such income from instrumentalities of state governments has been explicitly declared by this court untaxable by Congress, directly or indirectly, for any purpose whatever (Pollock v. Farmers' Loan & T. Co. 157 U. S. 584, 39 L. ed. 820, 15 Sup. Ct. Rep. 673, et seq.), and this threatened action should be enjoined independently of all other considerations.

Mr. **Julien T. Davis** argued the cause, and, with Mr. Frederic D. McKenney, filed a brief for appellant in No. 415:

The fact that the tax is denominated a "special excise tax with respect to the carrying on or doing business" is not controlling.

Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Collins v. New Hampshire, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678;

Pollock v. Farmers' Loan & T. Co. 157 U. S. 581, 39 L. ed. 819, 15 Sup. Ct. Rep. 673.

The natural and reasonable effect of the corporation tax law is to tax net income.

Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Collins v. New Hampshire, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673.

The Federal government and the government of the states are, within their respective spheres of action, mutually independent, and, because of such independence, the taxing power of each is limited, in that neither may tax the agencies of the other.

The Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481; Dobbins v. Erie County, 16 Pet. 435, 10 L. ed. 1022; New York ex rel. Bank of Commerce v. Tax Comrs. 2 Black, 620, 17 L. ed. 451; The Banks v. New York (New York ex rel. Bank of N. Y. Nat. Bkg. Asso. v. Connelly) 7 Wall. 17, 19 L. ed. 57; Bank of New York v. New York County, 7 Wall. 26, 19 L. ed. 60; Texas v. White, 7 Wall. 725, 19 L. ed. 237; Cooley, Const. Lim. 7th ed. p. 683; United States v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Ambrosini v. United States, 187 U. S. 1, 47 L. ed. 49, 23 Sup. Ct. Rep. 1, 12 Am. Crim. Rep. 699; Jones v. Keep, 19 Wis. 390; Swift v. Cornes, 20 Wis. 398; Sayles v. Davis, 22 Wis. 227; Fifield v. Close, 15 Mich. 505; State ex rel. Lakey v. Garton, 32 Ind. 1, 2 Am. Rep. 315.

The franchise to be a corporation is a means employed by the state government in the exercise of its powers and functions.

M'Culloch v. Maryland, 4 Wheat. 410, 4 L. ed. 602; Angell & A. Priv. Corp. 10th ed. p. 23; Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; California v. Southern P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073.

The corporation tax law, if the tax falls upon "carrying on or doing business," must fail for want of equality and uniformity in the tax thereby imposed.

State, Agens, Prosecutor, v. Newark, 37 N. J. L. 415, 18 Am. Rep. 729; Re Washington Ave. 69 Pa. 352, 8 Am. Rep. 255; Kentucky R. Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Michigan C. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459; Adams v. Kuykendall, 83 Miss. 571, 35 So. 830; State v. Ide, 35 Wash. 576, 67 L.R.A. 280, 102 Am. St. Rep. 914, 77 Pac. 961, 1 A. & E. Ann. Cas. 634.

The corporation tax law is unequal in its operation, in that it taxes corporations, joint stock companies and associations, and exempts individuals and co-partnerships carrying on the same business and deriving net income from the same sources as in the case of such bodies.

Knowlton v. Moore, 178 U. S. 109, 44 L. ed. 996, 20 Sup. Ct. Rep. 747; State v. Ide, 35 Wash. 576, 67 L.R.A. 280, 102 Am. St. Rep. 914, 77 Pac. 961, 1 A. & E. Ann. Cas. 634.

Requiring a corporation to make a return under penalty for failure to do so constitutes a search within the meaning of the 4th Amendment.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; Clinton v. Phillips, 58 Ill. 102, 11 Am. Rep. 52.

To engage in interstate commerce is a constitutional right, and not a privilege; therefore Congress cannot prohibit the exercise of such right.

Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232.

The power to regulate does not include the power to prohibit.

Miller v. Jones, 80 Ala. 89; Bronson v. Oberlin, 41 Ohio St. 476, 52 Am. Rep. 90; Ex parte Patterson, 42 Tex. Crim. Rep. 256, 51 L.R.A. 654, 58 S. W. 1011; Duckwall v. New Albany, 25 Ind. 283; McConvill v. Jersey City, 39 N. J. L. 38; People v. Gadway, 61 Mich. 285, 1 Am. St. Rep. 578, 28 N. W. 101; Mernaugh v. Orlando, 41 Fla. 433, 27 So. 34; Re Hauck, 70 Mich. 396, 38 N. W. 275; State v. DeBar, 58 Mo. 395; Sweet v. Wabash, 41 Ind. 7; Andrews v. State, 3 Heisk. 165, 8 Am. Rep. 8; Ex parte Byrd, 84 Ala. 17, 5 Am. St. Rep. 328, 4 So. 397; State, Mühlenbrinck, Prosecutor, v. Long Branch, 42 N. J. L. 364.

If Congress cannot tax the business of in-

terstate commerce or interstate commerce itself, it is hard to conceive how it can tax the privilege of doing such business.

Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190.

Mr. **J. B. Foraker** argued the cause and filed a brief for appellant in No. 420:

The measure of the tax must have some natural, legal, appropriate relation to the thing taxed; otherwise there may result inequality and injustice. This, of itself, is sufficient reason for refusing so to construe this law as to lay the tax on the corporation, or its franchise, or its facility, the result of which would, of necessity, be the grossest inequality.

Knowlton v. Moore, 178 U. S. 76, 44 L. ed. 983, 20 Sup. Ct. Rep. 747.

If the law be construed to lay the tax on the corporation, its franchise, or its facility to transact business, we cannot possibly have uniformity of operation.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 159, 41 L. ed. 669, 17 Sup. Ct. Rep. 255.

If the law be construed to lay the tax on the franchise to be a corporation, then at once arises the question whether it is not unconstitutional because of an infringement upon the sovereign right of the state to grant franchises to be corporations.

California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Veazie Bank v. Fenno, 8 Wall. 547, 19 L. ed. 487.

Corporations and their franchises, created by the states, to act as agencies or instrumentalities of state governments, cannot be made the subject of Federal taxation, either directly or indirectly.

The Binghamton Bridge (Chenango Bridge Co. v. Binghamton Bridge Co.) 3 Wall. 51, 18 L. ed. 137; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 663, 29 L. ed. 521, 6 Sup. Ct. Rep. 252.

To say that a business shall be taxed, as an occupation, when found in the hands of a corporation, and that it shall go exempt from taxation when found next door, in the hands of a copartnership or an individual, is purely arbitrary and manifestly unreasonable and unjust.

American Sugar Ref. Co. v. Louisiana, 179 U. S. 92, 45 L. ed. 103, 21 Sup. Ct. Rep. 43; Billings v. Illinois, 188 U. S. 102, 47 L. ed. 403, 23 Sup. Ct. Rep. 272; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 155, 41 L. ed. 668, 17 Sup. Ct. Rep. 255.

Mere words and names will not be allowed to change the legal effect of a plain statutory provision, or alter the familiar rules of construction.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 580, 39 L. ed. 818, 15 Sup. Ct. Rep. 673; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638.

The search and seizure provided for in this corporation tax measure are unreasonable.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Entick v. Carrington, 19 How. St. Tr. 1029; Hale v. Henkel, 201 U. S. 43, 44, 50 L. ed. 652, 653, 26 Sup. Ct. Rep. 370; Re Pacific R. Commission, 32 Fed. 250; Re Comingore, 96 Fed. 557, affirmed in 177 U. S. 470, 44 L. ed. 850, 20 Sup. Ct. Rep. 701.

Messrs. Alton C. Dustin, George B. Siddall, Aruthur F. Odlin, and Richard Inglis also filed a brief for appellant in No. 420:

The name whereby a tax is called is not controlling.

Nichol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Snyder v. Bettman, 190 U. S. 249, 47 L. ed. 1035, 23 Sup. Ct. Rep. 803; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Home Sav. Bank v. Des Moines, 205 U. S. 503, 51 L. ed. 901, 27 Sup. Ct. Rep. 571; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Powers v. Detroit, G. H. & M. R. Co. 201 U. S. 543, 50 L. ed. 860, 26 Sup. Ct. Rep. 556; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 30 Sup. Ct. Rep. 1118; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015; Almy v. California, 24 How. 169, 16 L. ed. 644; Dobbins v. Erie County, 16 Pet. 435, 10 L. ed. 1022; Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678.

The tax is an income tax.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; Nicol v. Ames, 173 U. S. 509, 519, 520, 43 L. ed. 786, 793, 19 Sup. Ct. Rep. 522; Knowlton v. Moore, 175 U. S. 41, 52, 53, 79–83, 44 L. ed. 969, 974, 975, 984–986, 20 Sup. Ct. Rep. 747; Fairbank v. United States, 181 U. S. 283, 296, 45 L. ed. 862, 868, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; Patton v. Brady, 184 U. S. 608, 618, 46 L. ed. 713, 718, 22 Sup. Ct. Rep.

493; Thomas v. United States, 192 U. S. 363, 370, 48 L. ed. 481, 483, 24 Sup. Ct. Rep. 305; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376; Hafemann v. Gross, 199 U. S. 342, 350, 50 L. ed. 220, 225, 26 Sup. Ct. Rep. 80.

It is necessary to recognize that the Pollock Case repudiated the principle upon which Hylton v. United States, 3 Dall. 171, 1 L. ed. 556, and also Springer v. United States, 102 U. S. 586, 26 L. ed. 253, were decided.

With these two cases out of the way, the remaining decisions fall naturally into two classes and the constitutional classification becomes fairly clear.

Pacific Ins. Co. v. Soule, 7 Wall. 433, 19 L. ed. 95; Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482; Scholey v. Rew, 23 Wall. 331, 23 L. ed. 99; Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack) 100 U. S. 595, 25 L. ed. 647; Merchants' Nat. Bank v. United States, 101 U. S. 1, 25 L. ed. 979; Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Treat v. White, 181 U. S. 264, 45 L. ed. 853, 21 Sup. Ct. Rep. 611; Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; Thomas v. United States, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376; Cornell v. Coyne, 192 U. S. 418, 48 L. ed. 504, 24 Sup. Ct. Rep. 383; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 A. & E. Ann. Cas. 561.

The distinction between all of the above taxes and the present tax is that each of the above taxes was laid with respect to some particular thing. They were specific, while this is general. They were imposed because of the exercise of some particular right or privilege, while this tax is upon income generally, imposed solely by reason of ownership.

Thomas v. United States, 192 U. S. 363, 370, 48 L. ed. 481, 483, 24 Sup. Ct. Rep. 305.

The states cannot interfere with the full and free exercise of the powers delegated to the national government.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481; New York ex rel. Bank of Commerce v. Tax Comrs. 2 Black, 620, 17 L. ed. 451; Bank Tax Case (New York ex rel. Bank of Commonwealth v. Tax & A. Comrs.) 2 Wall. 200, 17 L. ed. 793; The Banks v. New York (New York ex rel. Bank of N. Y. Nat. Bkg. Asso. v. Connelly) 7 Wall. 16, 19 L. ed. 57; Dobbins v. Erie County, 16 Pet. 435, 10 L. ed. 1022; California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Union P. R. Co. v. Peniston, 18 Wall. 5, 29–31, 21 L. ed. 787, 791, 792.

The national government cannot interfere with the full and free exercise of the powers reserved to the states.

The Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122; United States v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 584, 39 L. ed. 759, 820, 15 Sup. Ct. Rep. 673; Ambrosini v. United States, 187 U. S. 1, 47 L. ed. 49, 23 Sup. Ct. Rep. 1, 12 Am. Crim. Rep. 699; Texas v. White, 7 Wall. 700, 725, 19 L. ed. 227, 237; Briscoe v. Bank of the Commonwealth 11 Pet. 317, 9 L. ed. 732.

The powers of the separate states within their own spheres are as complete as are the sovereignty and independence of the general government within its sphere.

Cooley, Const. Lim. 7th ed. p. 64; United States v. Baltimore & O. R. Co. 17 Wall. 322, 327, 21 L. ed. 597, 599; License Tax Cases, 5 Wall. 462, 471, 18 L. ed. 497, 500.

If classification of subjects for taxation is not founded upon reason, but is wholly arbitrary, it takes the property of the citizen without due process of law, contrary to the 5th Amendment.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 236, 33 L. ed. 892, 894, 10 Sup. Ct. Rep. 533; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 151, 160, 41 L. ed. 667, 670, 17 Sup. Ct. Rep. 255; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 295, 42 L. ed. 1037, 1042, 1043, 18 Sup. Ct. Rep. 594; Nicol v. Ames, 173 U. S. 509, 520, 43 L. ed. 786, 793, 19 Sup. Ct. Rep. 522.

Mr. **John G. Johnson** argued the cause, and, with Messrs. Frederic Jesup Stimson, Lawrence M. Stockton, and Harris Livermore, filed a brief for appellants in Nos. 425 and 457:

Both the 5th and 14th Amendments to the Federal Constitution presuppose equality before the law.

Harding v. People, 160 Ill. 459, 32 L.R.A. 447, 52 Am. St. Rep. 344, 43 N. E. 624; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 410, 50 L. ed. 246, 26 Sup. Ct. Rep. 66; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 506, 38 L. ed. 793, 800, 14 Sup. Ct. Rep. 968; Cooley, Const. Lim. 6th ed. pp. 479–483, 490.

The states cannot, directly or indirectly, burden the exercise by Congress of the powers committed to it by the Constitution, nor may Congress burden the agencies

or instrumentalities employed by the states in the exercise of their powers.

The Collector v. Day (Buffington v. Day) 11 Wall. 113–124, 20 L. ed. 122–126; Fifield v. Close, 15 Mich. 505; Cooley, Const. Lim. 6th ed. p. 592.

A state may not tax the corporate franchise of a Federal corporation (M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; California v. Central P. R. Co. 127 U. S. 41, 32 L. ed. 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073), nor may it tax its business if it be a Federal function, such, for instance, as interstate commerce; nor can a state impose a franchise tax even on the stock of corporations incorporated in other states and doing business in the state imposing the tax, if it do not tax its own corporations in the same manner.

Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 A. & E. Ann. Cas. 1247; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190.

The creation of a corporation appertains to sovereignty.

M'Culloch v. Maryland, 4 Wheat. 410, 4 L. ed. 602.

Mr. **Frederic Jesup Stimson** also argued the cause on reargument, and with Messrs. John G. Johnson, Lawrence M. Stockton, Harris Livermore, and J. Grant Forbes, filed a brief for appellants, in Nos. 425 and 457:

The states are not subordinate, not "a part" of the Federal government in the sense of being a part of a homogeneity, but are sovereignties of equal dignity, indestructible, equally important, and in their own demesne equally supreme.

Texas v. White, 7 Wall. 700, 725, 19 L. ed. 227, 237; Lane County v. Oregon, 7 Wall. 71, 76, 19 L. ed. 101, 104; New York ex rel. Bank of Commerce v. Tax Comrs. 2 Black, 620, 623, 17 L. ed. 451, 452; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 583, 584, 39 L. ed. 759, 820, 15 Sup. Ct. Rep. 673; The Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122.

The United States have no power under the Constitution to tax either the instrumentalities or the property of a state.

Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151, 155, 29 L. ed. 845, 846, 6 Sup. Ct. Rep. 670; Cooley, Const. Law, 3d ed. p. 61.

Is there anything in the reasoning of Mr. Justice Bradley in California v. Central P. R. Co. 127 U. S. 1, 40, 41, 32 L. ed. 150, 157, 158, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073, which indicates that it is to be applied to the state government taxing a Federal corporate franchise, and not to the converse proposition?

A tax on the income or traffic made under the franchise is not different from a tax on the franchise.

Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593.

Unless the Federal government is given wider and other powers of taxation by the Constitution, despite the 5th Amendment, than are given to the commonwealth by the practically unlimited provisions for taxation in the Constitution of Massachusetts, the decisions of the supreme court of Massachusetts are decisive of the point that the "commodity" of having a capital stock represented by assignable shares is not taxable.

Gleason v. McKay, 134 Mass. 419; O'Keeffe v. Somerville, 190 Mass. 110, 112 Am. St. Rep. 316, 76 N. E. 457, 5 A. & E. Ann. Cas. 684; Minot v. Winthrop, 162 Mass. 113, 26 L.R.A. 259, 38 N. E. 512; Opinions of Justices, 196 Mass. 603, 85 N. E. 545.

Mr. Frederic R. Coudert filed a brief for appellants in Nos. 431 and 432:

The tax is one upon the franchise or right to be a corporation, granted by the state.

Mercantile Nat. Bank v. New York, 121 U. S. 138, 160, 30 L. ed. 895, 7 Sup. Ct. Rep. 826; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897; Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907.

Neither the state courts nor the legislatures, by giving the tax a particular name, or by the use of some form of words, can take away our duty to consider its nature and effect.

Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 227, 52 L. ed. 1037, 28 Sup. Ct. Rep. 638.

To characterize the tax as an occupation or business excise is to pervert history. Such taxes are a special class, common in England and the United States.

Dowell, History of Taxation; Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; Chesebrough v. United States, 192 U. S. 253, 48 L. ed. 432, 24 Sup. Ct. Rep. 262; Thomas v. United States, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305.

Where the Federal government has an exclusive right of control or regulation, that right cannot be taxed by a state.

M'Culloch v. Maryland, 4 Wheat. 316,

435, 4 L. ed. 579, 608; Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; New York ex rel. Bank of Commerce v. Tax Comrs. 2 Black, 620, 17 L. ed. 451; The Banks v. New York (New York ex rel. Bank of N. Y. Nat. Bkg. Asso. v. Connelly) 7 Wall. 16, 19 L. ed. 57; Moran v. New Orleans, 112 U. S. 69, 28 L. ed. 653, 5 Sup. Ct. Rep. 38; Harman v. Chicago, 147 U. S. 396, 37 L. ed. 216, 13 Sup. Ct. Rep. 306; California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Dobbins v. Erie County, 16 Pet. 435, 10 L. ed. 1022; People ex rel. Edison Electric Light Co. v. Campbell, 138 N. Y. 543, 20 L.R.A. 453, 34 N. E. 370; Com. v. Westinghouse Electric & Mfg. Co. 151 Pa. 265, 24 Atl. 1107, 1111.

The cases in which this court has applied the same principle to the protection of the state governments against the Federal government are:

The Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122; United States v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597; Mercantile Nat. Bank v. New York, 121 U. S. 138, 162, 30 L. ed. 895, 904, 7 Sup. Ct. Rep. 826; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Ambrosini v. United States, 187 U. S. 1, 47 L. ed. 49, 23 Sup. Ct. Rep. 1, 12 Am. Crim. Rep. 699; South Carolina v. United States, 199 U. S. 437, 449, 468, 50 L. ed. 264, 272, 26 Sup. Ct. Rep. 110, 4 A. & E. Ann. Cas. 737.

See also, as to other inherent limitations upon Federal legislation:

United States v. Dewitt, 9 Wall. 41, 19 L. ed. 593; Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 A. & E. Ann. Cas. 1066.

If the precise case here has not before arisen, its exact converse has, and if it be admitted, as it always has been, and still must be, that this principle of immunity is reciprocal, then indeed it must be conceded that this court has adjudicated the very question here involved.

California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073.

Even as a tax on franchises it is a tax on property, and hence direct. It is the settled law of this court that a corporate franchise is personal property.

Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26; Postal Teleg. Cable Co. v. Adams, 155 U. S. 696, 39 L. ed. 315, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817.

Mr. **Richard Reid Rogers** argued the cause and filed a brief for appellants in No. 442:

A grant of a corporate franchise is the exercise of a sovereign faculty.

California v. Central P. R. Co. 127 U. S. 1, 40, 32 L. ed. 150, 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073.

And this power was not alienated by the several states to the national government.

Briscoe v. Bank of the Commonwealth, 11 Pet. 257, 9 L. ed. 709.

The states cannot even indirectly tax a corporate franchise granted by the national government.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Osborn v. Bank of United States, 9 Wheat. 768, 6 L. ed. 211; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481; New York ex rel. Bank of Commerce v. Tax Comrs. 2 Black, 628, 17 L. ed. 454; Bank Tax Case (New York ex rel. Bank of Commonwealth v. Tax & A. Comrs.) 2 Wall. 200, 17 L. ed. 793; Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537; First Nat. Bank v. Stone, 174 U. S. 438, 43 L. ed. 1038, 19 Sup. Ct. Rep. 876; California v. Central P. R. Co. 127 U. S. 41, 32 L. ed. 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 573, 591, 18 L. ed. 229, 237.

In the respect stated, the state and Federal governments are upon an equal footing.

The Collector v. Day (Buffington v. Day) 11 Wall. 113, 128, 20 L. ed. 122, 127; Union P. R. Co. v. Peniston, 18 Wall. 5, 30, 21 L. ed. 787, 791; Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151, 162, 29 L. ed. 845, 849, 6 Sup. Ct. Rep. 670; Income Tax Cases (Pollock v. Farmers' Loan & T. Co.) 157 U. S. 584, 39 L. ed. 820, 15 Sup. Ct. Rep. 673; Knowlton v. Moore, 178 U. S. 41, 59, 44 L. ed. 969, 977, 20 Sup. Ct. Rep. 747; Plummer v. Coler, 178 U. S. 115, 117, 44 L. ed. 998, 999, 20 Sup. Ct. Rep. 829; Ambrosini v. United States, 187 U. S. 1, 7, 47 L. ed. 49, 52, 23 Sup. Ct. Rep. 1, 12 Am. Crim. Rep. 699; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 A. & E. Ann. Cas. 737.

The act of Congress is unconstitutional in so far as it attempts to impose a tax upon the franchises of foreign corporations, or, at least, upon their right to carry on a purely intrastate business,—a matter over which the Federal government has no control.

License Tax Cases, 5 Wall. 462, 471, 18 L. ed. 497, 500; Covington & C. Bridge

Co. v. Kentucky, 154 U. S. 204, 210, 38 L. ed. 962, 965, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087.

The tax is so unequal that, by definition, it is not a tax within the delegated power of Congress to impose.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 159, 41 L. ed. 666, 669, 17 Sup. Ct. Rep. 255; Southern R. Co. v. Greene, 216 U. S. 400, 417, 54 L. ed. 536, 541, 30 Sup. Ct. Rep. 287, 17 A. & E. Ann. Cas. 1247.

Messrs. Charles H. Tyler, Owen D. Young, Burton E. Eames, and Randolph Frothingham filed a brief for appellant in No. 443:

The care and management of real estate investments by a corporation do not constitute the carrying on or doing business.

People ex rel. Parker Mills v. Tax Comrs. 23 N. Y. 242; Re Alabama & C. R. Co. 9 Blatchf. 390, Fed. Cas. No. 124.

The act is invalid as laying a burden upon an instrumentality of the state.

California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787; The Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122; Fifield v. Close, 15 Mich. 505; Smith v. Short, 40 Ala. 385; Warren v. Paul, 22 Ind. 276; Jones v. Keep, 19 Wis. 369; Union Bank v. Hill, 3 Coldw. 325; Moore v. Quirk, 105 Mass. 49, 7 Am. Rep. 499; United States v. Owens, 100 Fed. 70.

The act is invalid because of lack of equality.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

Messrs. Jed L. Washburn, William D. Bailey, and Oscar Mitchell filed a brief for appellant in No. 446:

As an excise tax, the same is invalid, not only as not being uniform throughout the United States, whether we say intrinsically or geographically, but because it is so fraught with discriminations, inequalities, and arbitrary exemptions as to be without the taxing power, and is obnoxious to the fundamental principles of our government.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Pacific Ins. Co. v. Soule, 7 Wall. 433, 19 L. ed. 95.

The tax that will fall upon the defendant, the Clark Iron Company, and operate to deplete the revenues distributable to its stockholders, falls upon its income by way of rentals and royalties from the use and occupation of its lands, and is therefore, within the decisions of this court, a tax upon the land itself,—a direct tax, unconstitutional and void.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; State v. Evans, 99 Minn. 223, 108 N. W. 958, 9 A. & E. Ann. Cas. 520; Bainbridge, Mines & Minerals, Am. ed. p. 197; United States v. Gratiot, 14 Pet. 526, 10 L. ed. 573; 2 Snyder, Mines, chap. 2, p. 932; Offerman v. Starr, 2 Pa. St. 394, 44 Am. Dec. 211, 10 Mor. Min. Rep. 614; Moore v. Miller, 8 Pa. 273; Hyatt v. Vincennes Nat. Bank, 113 U. S. 408, 28 L. ed. 1009, 5 Sup. Ct. Rep. 573; Lehigh Zinc & I. Co. v. Bamford, 150 U. S. 665, 37 L. ed. 1215, 14 Sup. Ct. Rep. 219; Tennessee Oil, Gas & Mineral Co. v. Brown, 65 C. C. A. 524, 131 Fed. 696; Raynolds v. Hanna, 55 Fed. 783; Co. Litt. 53–b; Clegg v. Rowland, L. R. 2 Eq. 160, 35 L. J. Ch. N. S. 396, 14 L. T. N. S. 217, 14 Week. Rep. 530, 17 Eng. Rul. Cas. 725, 8 Mor. Min. Rep. 520.

As a tax laid only when the income is received by corporations, it is also subject to the charge that it is, in effect, an attempt to levy a tax upon the corporate franchises of such corporations, and, as such, it cannot be sustained.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; The Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122; Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481; California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341; Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; West River Bridge Co. v. Dix, 6 How. 507, 12 L. ed. 535; San Bernardino County v. Southern P. R. Co. 118 U. S. 417, 30 L. ed. 125, 6 Sup. Ct. Rep. 1144; Pollock v. Farmers' Loan & T. Co. 157 U. S. 584, 39 L. ed. 820, 15 Sup. Ct. Rep. 673.

The law not only denies equal protection, but operates to deprive parties of their property without due process of law, and ignores the provision that excessive fines shall not be imposed.

Cooley, Const. Lim. 6th ed. p. 434; Harding v. People, 160 Ill. 459, 32 L.R.A. 445, 52 Am. St. Rep. 344, 43 N. E. 624; Bank of Columbia v. Okely, 4 Wheat. 244, 4 L. ed. 561; San Bernardino County v. Southern P. R. Co. 118 U. S. 423, 30 L. ed. 127, 6 Sup. Ct. Rep. 1144; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas. 764.

Mr. Charles Howard Williams argued the cause and filed a brief for appellants in No. 456:

The tax imposed is an income tax, pure and simple; for, although the name is changed, the court will regard the substanee rather than the name. The tax is therefore invalid.

Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 27, 54 L. ed. 355, 366, 30 Sup. Ct. Rep. 190; Home Sav. Bank v. Des Moines, 205 U. S. 510, 51 L. ed. 906, 27 Sup. Ct. Rep. 571; Ineome Tax Cases (Pollock v. Farmers' Loan & T. Co.) 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Polloek v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912.

Considered as an exeise, the tax is not uniform. It does not apply to all of a class alike, neither is it imposed on all of a elass throughout the United States. It is therefore invalid.

Polloek v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; United States v. Singer, 15 Wall. 111, 121, 21 L. ed. 49, 51; Head Money Cases (Edye v. Robertson) 112 U. S. 580, 594, 28 L. ed. 798, 802, 5 Sup. Ct. Rep. 247; Cooley, Taxn. p. 215; M'Culloeh v. Maryland, 4 Wheat. 316, 435, 4 L. ed. 579, 608.

The tax is not equal on all members of the elasses it seeks to reaeh, exempting without basis some and taxing others. It is therefore invalid.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Cooley, Const. Lim. pp. 598, 607, 615; People ex rel. Detroit & H. R. Co. v. Salem, 20 Mich. 473, 4 Am. Rep. 400; Albany City Nat. Bank v. Maher, 20 Blatchf. 341, 9 Fed. 884; Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Coe v. Errol, 116 U. S. 517, 524, 529, 29 L. ed. 715, 717, 719, 6 Sup. Ct. Rep. 475; Soon Hing v. Crowley, 113 U. S. 703, 709, 28 L. ed. 1145, 1147, 5 Sup. Ct. Rep. 730; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 560, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431; Cook v. Marshall County, 196 U. S. 274, 49 L. ed. 476, 25 Sup. Ct. Rep. 233; Seaboard Air Line R. Co. v. Seegers, 207 U. S. 76, 52 L. ed. 109, 28 Sup. Ct. Rep. 28.

In the same way the tax offends the due-process clause of the Constitution. It in effect assesses certain eorporations for the benefit of others which are exempted. It is therefore invalid.

Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Hurtado v. California, 110 U. S. 516, 535, 28 L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 202; Leeper v. Texas, 139 U. S. 462, 468, 35 L. ed. 225, 227, 11 Sup. Ct. Rep. 579; Giozza v. Tiernan, 148 U. S. 657, 662, 37 L. ed. 599, 601, 13 Sup. Ct. Rep. 721; Caldwell v. Texas, 137 U. S. 692, 697, 34 L. ed. 816, 818, 11 Sup. Ct. Rep. 224; Bank of Columbia v. Okely, 4 Wheat. 235, 244, 4 L. ed. 559, 561; Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251.

The effect of the tax under the provisions of the present law is to ereate favored elasses, eontrary to the provisions of the Constitution.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Leeper v. Texas, 139 U. S. 462, 468, 35 L. ed. 225, 227, 11 Sup. Ct. Rep. 579.

The present tax cannot stand as an excise on the privilege to exist, for that right eomes from the state, and is not taxable by the Federal government.

Ambrosini v. United States, 187 U. S. 1, 47 L. ed. 49, 23 Sup. Ct. Rep. 1, 12 Am. Crim. Rep. 699; Texas v. White, 7 Wall. 700, 19 L. ed. 227; The Collector v. Day (Buffington v. Day) 11 Wall. 113, 127, 20 L. ed. 122, 126; Pollock v. Farmers' Loan & T. Co. 157 U. S. 584, 39 L. ed. 820, 15 Sup. Ct. Rep. 673; South Carolina v. United States, 199 U. S. 453, 50 L. ed. 266, 26 Sup. Ct. Rep. 110, 4 A. & E. Ann. Cas. 737.

The administrative features of the aet are invalid beeause they offend the provisions of artieles 4 and 5 of the Amendment to the Constitution.

Boyd v. United States, 116 U. S. 627, 29 L. ed. 749, 6 Sup. Ct. Rep. 524; People ex rel. Ferguson v. Reardon, 197 N. Y. 244, 27 L.R.A.(N.S.) 141, 134 Am. St. Rep. 871, 90 N. E. 829; Robson v. Doyle, 191 Ill. 566, 61 N. E. 435; Counselman v. Hitchcock, 142 U. S. 562, 35 L. ed. 1113, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; People ex rel. Taylor v. Forbes, 143 N. Y. 219, 38 N. E. 303; People ex rel. Lewisohn v. O'Brien, 176 N. Y. 253, 68 N. E. 353, 15 Am. Crim. Rep. 97; Emery's Case, 107 Mass. 172, 9 Am. Rep. 22.

Mr. Howard H. Williams also filed a brief for appellants in No. 456.

Solicitor General Bowers argued the eause, and, with Attorney General Wickersham, filed a brief (by special leave) for the United States:

Numerous decisions of this eourt show that this tax is an excise upon the conduct or transaction of business. They may be put for eonvenienee into five groups:

(1) A case identical with the present, holding that a tax declared in the statute to be laid on business in an amount "equivalent to" a certain percentage of ineome is an excise on the transaction of the business.

Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376.

(2) Cases even stronger than the Spreckels Case, in that they hold that a tax laid in terms on the income of a business—instead of being laid in terms upon the business in an amount equal or equivalent to a percentage of the income—is still an excise upon the business.

Pacific Ins. Co. v. Soule, 7 Wall. 433, 19 L. ed. 95; Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack) 100 U. S. 595, 25 L. ed. 647; United States v. Erie R. Co. 106 U. S. 327, 27 L. ed. 151, 1 Sup. Ct. Rep. 223; Springer v. United States, 102 U. S. 586, 26 L. ed. 253.

(3) Cases holding various taxes to be excises on business, though they are laid in terms upon property engaged in the business.

Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904; Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482; United States v. Singer, 15 Wall. 111, 21 L. ed. 49; Merchants' Nat. Bank v. United States, 101 U. S. 1, 25 L. ed. 979.

(4) A case exhibiting an excise on business under a statute which, instead of laying the tax in terms on property engaged in the business, required the tax to be equal to a certain percentage of property so engaged.

Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897.

(5) Cases which, while not relating to business, classify as excises various taxes imposed by Congress upon special transactions concerning property, or upon the enjoyment or exercise of particular privileges or advantages connected with property.

Scholey v. Rew, 23 Wall. 331, 23 L. ed. 99; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; Murdock v. Ward, 178 U. S. 139, 44 L. ed. 1009, 20 Sup. Ct. Rep. 775; United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; Snyder v. Bettman, 190 U. S. 249, 47 L. ed. 1035, 23 Sup. Ct. Rep. 803; Thomas v. United States, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736; Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522.

The established rule that the states may tax property used in interstate commerce, though they may not tax the business of interstate commerce or income from that business, shows that a tax upon the business is different from a tax upon the property employed in that business, and so is not direct.

Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498.

A tax on the business of the company is not, in legal view, a tax on the shares of the company's stock or on the income from those shares.

Logan County v. United States, 169 U. S. 255, 42 L. ed. 737, 18 Sup. Ct. Rep. 361; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; Murdock v. Ward, 178 U. S. 139, 44 L. ed. 1009, 20 Sup. Ct. Rep. 775; United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; Snyder v. Bettman, 190 U. S. 249, 47 L. ed. 1035, 23 Sup. Ct. Rep. 803.

Even a tax laid directly on corporate property is not a tax on the separate shares of the corporation's stock.

Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537; New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905; Home Sav. Bank v. Des Moines, 205 U. S. 503, 51 L. ed. 901, 27 Sup. Ct. Rep. 571.

The converse proposition, that a tax on shares is not a tax on the property of the company, is also settled.

Van Allen v. Assessors (Churchill v. Utica), 3 Wall. 573, 18 L. ed. 229; New York v. Tax & A. Comrs. 4 Wall. 244, 18 L. ed. 344; Bradley v. Illinois, 4 Wall. 459, 18 L. ed. 433; First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; Cleveland Trust Co. v. Lander, 184 U. S. 111, 46 L. ed. 456, 22 Sup. Ct. Rep. 394.

The tax does not become direct in the special case of a company engaged mainly, or even solely, in the business of handling or dealing in real estate.

Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376; Com. v. Hamilton Mfg. Co. 12 Allen, 298; Scholey v. Rew, 23 Wall. 331, 23 L. ed. 99; Thomas v. United States, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305.

The tax is not an infraction of the general power of the states to authorize the

formation of corporations and joint stock companies.

Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack) 100 U. S. 595, 25 L. ed. 647; United States v. Erie R. Co. 106 U. S. 327, 27 L. ed. 151, 1 Sup. Ct. Rep. 223; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376; Veazie Bank v. Fenno, 8 Wall. 533, 547, 19 L. ed. 482, 487; Knowlton v. Moore, 178 U. S. 41, 59–61, 44 L. ed. 969, 977, 978, 20 Sup. Ct. Rep. 747; Thomas v. United States, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305; Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 A. & E. Ann. Cas. 737.

The adjudications of this court concerning state taxation of the business or franchises of a corporate agent of the United States are irrelevant to the question of the power of the United States to tax the business or franchises of miscellaneous corporations formed under state laws.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Thomson v. Union P. R. Co. 9 Wall. 579, 19 L. ed. 792; Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787; California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067.

Even if a state should actually assume the operation of a railroad, whether directly or indirectly, through a special corporate agency, or should assume to do any other kind of business, the operations of the state in the business would be taxable by the United States.

South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 A. & E. Ann. Cas. 737.

If the business of a public-service company, incorporated by a state, could be deemed an activity of the state itself, and even if such activity of the state could be held to be beyond the taxing power of the United States unless the state should assent to the tax, still such assent by the state to taxation of the business by the United States would be inferred, in the absence of legislative declaration to the contrary by the state.

Reagan v. Mercantile Trust Co. 154 U. S. 413, 38 L. ed. 1028, 4 Inters. Com. Rep. 575, 14 Sup. Ct. Rep. 1060.

The tax is not imposed upon state or municipal bonds, or upon the income of such bonds, forming part of the business assets of the company whose business is taxed; and the company's income from such bonds is to be included in the computation of its net income.

. Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897; Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904; Merchants' Nat. Bank v. United States, 101 U. S. 1, 25 L. ed. 979; Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Murdock v. Ward, 178 U. S. 139, 44 L. ed. 1009, 20 Sup. Ct. Rep. 775; Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 573, 18 L. ed. 229; New York v. Tax & A. Comrs. 4 Wall. 244, 18 L. ed. 344; Bradley v. Illinois, 4 Wall. 459, 18 L. ed. 433; First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; Cleveland Trust Co. v. Lander, 184 U. S. 111, 46 L. ed. 456, 22 Sup. Ct. Rep. 394; Ficklen v. Taxing Dist. 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; Tiernan v. Rinker, 102 U. S. 127, 26 L. ed. 104.

The constitutional requirement of uniformity in "all duties, imposts, and excises" imposed by Congress (clause 1 of § 8 of art. 1, of the Constitution) calls for no more than geographical uniformity.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

The propriety of classifying corporations and joint stock companies together, for like taxation, is illustrated, and indeed concluded, by Liverpool & L. Life & F. Ins. Co. v. Massachusetts (Liverpool & L. Life & F. Ins. Co. v. Oliver) 10 Wall. 566, 19 L. ed. 1029.

An excise is least amenable, of all taxes, to the rule of uniformity; and in the enactment of excises the greatest freedom of classification has been immemorially exercised both by Congress and by other legislatures.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Murdock v. Ward, 178 U. S. 139, 44 L. ed. 1009, 20 Sup. Ct. Rep. 775; United States v. Singer, 15 Wall. 111, 21 L. ed. 49; Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; Thomas v. United States, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305; Cornell v. Coyne, 192 U. S. 418, 48 L. ed. 504, 24 Sup. Ct. Rep. 383; Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; Liverpool & L. Life & F. Ins. Co. v. Massachusetts (Liverpool & L. Life & F. Ins. Co. v. Oliver)

10 Wall. 566, 19 L. ed. 1029; Beers v. Glynn, 211 U. S. 477, 53 L. ed. 290, 29 Sup. Ct. Rep. 186; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705, 4 A. & E. Ann. Cas. 381; Savannah, T. & I. of H. R. Co. v. Savannah, 198 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. Rep. 690; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 A. & E. Ann. Cas. 561.

None of the special rules prescribed by the taxing statute concerning exemptions or concerning application or computation of the tax produces any lack of necessary uniformity.

Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Mercantile Nat. Bank v. New York, 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. Rep. 826; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Petersburg v. Petersburg Benev. Mechanics' Asso. 78 Va. 431; Mercantile Nat. Bank v. Hubbard, 98 Fed. 465; First Nat. Bank v. Chapman, 173 U. S. 205, 43 L. ed. 669, 19 Sup. Ct. Rep. 407; United States v. Singer, 15 Wall. 111, 21 L. ed. 49; Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904; Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907; District of Columbia v. Brooke, 214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. Rep. 560; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736; Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack) 100 U. S. 595, 25 L. ed. 647; New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705, 4 A. & E. Ann. Cas. 381.

The company required to pay the tax is not subject to any unreasonable search or seizure by any of the administrative provisions of the statute.

Re Chapman, 166 U. S. 661, 41 L. ed. 1154, 17 Sup. Ct. Rep. 677; Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372.

Mr. **William D. Guthrie** argued the cause, and, with Messrs. Victor Norawetz and Howard Van Sinderen, filed a brief for appellees in No. 410:

A tax upon income derived from the carrying on or doing business is an excise, and not a direct tax, within the meaning of the Constitution.

Pacific Ins. Co. v. Soule, 7 Wall. 433, 443, 19 L. ed. 95, 98; Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack) 100 U. S. 595, 598, 25 L. ed. 647, 648; Springer v. United States, 102 U. S. 586, 598, 26 L. ed. 253, 257; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 411, 48 L. ed. 496, 501, 24 Sup. Ct. Rep. 376; South Carolina v. United States, 199 U. S. 437, 454, 50 L. ed. 261, 266, 26 Sup. Ct. Rep. 110, 4 A. & E. Ann. Cas. 737.

The provision of the 5th Amendment, that no person shall be deprived of property without due process of law, is sufficient to prevent any such impairment or destruction of contract rights.

Sinking Fund Cases, 99 U. S. 700, 718, 25 L. ed. 496, 501; United States v. Union P. R. Co. 160 U. S. 1, 33, 40 L. ed. 319, 330, 16 Sup. Ct. Rep. 190.

The question now presented is whether or not income can nevertheless be indirectly taxed by means of a so-called special excise tax upon the carrying on or doing business by corporations; in other words, by merely changing the name of the tax.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 654, 39 L. ed. 759, 844, 15 Sup. Ct. Rep. 673.

Undoubtedly, public utilities, when owned by the state itself, and not conducted by it as a private business for profit, ought not to be taxable by Congress. But it is well established that such public utilities, when owned and operated by private corporations, or by individuals for purposes of profit, are proper subjects of taxation (Union P. R. Co. v. Peniston, 18 Wall. 5, 31, 21 L. ed. 787, 791), and that, if owned and operated by the state as a business for profit, they become subject to taxation by Congress within the principle of South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 A. & E. Ann. Cas. 737.

A special franchise from the state of New York is entirely distinct from the so-called franchise to be a corporation.

New York v. Bryan, 196 N. Y. 163, 89 N. E. 467; People v. O'Brien, 111 N. Y. 47, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692.

A Federal tax on the franchise to condemn property and to operate the railroad in the state of New York might come within the ruling of the court in the case of California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; but that ruling certainly would not apply to a tax upon the business of the railroad corporation. This case did not overrule or qualify Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787.

A tax upon the mere carrying on of business, levied impartially and uniformly upon all corporations, is essentially different from a tax on so-called special franchises, and from a tax on the franchise to be a corporation, or to carry on business in a corporate form.

There is a serious question as to whether Congress may select state corporations as a separate class, and impose upon them an excise tax "with respect to the carrying on or doing business by such corporation," while exempting or not similarly taxing individuals and copartnerships engaged in carrying on or doing identically the same business, under substantially like conditions.

Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 A. & E. Ann. Cas. 1247.

If a state, aside from its power to create, regulate, or exclude corporations, could not discriminate against corporations and in favor of individuals or partnerships without violating the 14th Amendment, then any attempt by Congress so to discriminate may likewise be unconstitutional under the 5th Amendment.

Carroll v. Greenwich Ins. Co. 199 U. S. 401, 410, 50 L. ed. 246, 250, 26 Sup. Ct. Rep. 66.

The classification of corporations as a separate class by the states has been sustained on grounds which are, at least partly, unavailable in support of an act of Congress.

Delaware Railroad Tax, 18 Wall. 206, 21 L. ed. 888; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; Home Ins. Co. v. New York, 134 U. S. 594, 606, 33 L. ed. 1025, 1031, 10 Sup. Ct. Rep. 593; New York v. Roberts, 171 U. S. 658, 665, 43 L. ed. 323, 326, 19 Sup. Ct. Rep. 58; Florida C. R. Co. v. Reynolds, 183 U. S. 471, 477, 46 L. ed. 283, 286, 22 Sup. Ct. Rep. 176; Berea College v. Kentucky, 211 U. S. 45, 54, 53 L. ed. 81, 85, 29 Sup. Ct. Rep. 33.

Congress cannot constitutionally impose an excise tax measured by nontaxable income.

Pollock v. Farmers' Loan & T. Co. 158 U. S. 635, 39 L. ed. 1125, 15 Sup. Ct. Rep. 912.

If the argument now advanced on behalf of the United States be sound, many of the decisions of the court sustaining excise taxes on corporations have proceeded on entirely erroneous reasoning.

Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 410, 417, 48 L. ed. 496, 500, 503, 24 Sup. Ct. Rep. 376; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Southern R. Co. v. Greene, 216 U. S. 400, 416, 54 L. ed. 536, 541, 30 Sup. Ct. Rep. 287, 17 A. & E. Ann. Cas. 1247; Home Sav. Bank v. Des Moines, 205 U. S. 503, 519, 51 L. ed. 901, 910, 27 Sup. Ct. Rep. 571; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 396, 398, 47 L. ed. 513, 518, 519, 23 Sup. Ct. Rep. 463; State Tonnage Tax Cases (Cox v. Lott) 12 Wall. 204, 217, 20 L. ed. 370, 374.

The underlying principle of these decisions is that a license or occupation tax cannot be imposed by a state upon foreign corporations, measured by the amount of nontaxable property or the amount of nontaxable interstate business of the corporations, and that any such attempt would establish an unconstitutional basis of classification for purposes of taxation; in other words, that a tax cannot be measured by nontaxable property or income. If we apply the same principle to the case at bar, it must follow that Congress cannot, directly or indirectly, measure an excise tax on corporations or individuals by property or income which is not taxable at all, or only taxable by a direct and apportioned tax.

The act of August 5, 1909, should be construed as imposing an excise tax only upon income derived from the carrying on or doing business.

United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 407, 53 L. ed. 836, 848, 29 Sup. Ct. Rep. 527; Kepner v. United States, 195 U. S. 100, 125, 49 L. ed. 114, 122, 24 Sup. Ct. Rep. 797, 1 A. & E. Ann. Cas. 655; United States v. Nix, 189 U. S. 199, 205, 47 L. ed. 775, 777, 23 Sup. Ct. Rep. 495; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 417, 48 L. ed. 496, 503, 24 Sup. Ct. Rep. 376.

Congress presumably deemed it unjust to compel a holding company to pay a tax

upon income derived from dividends of other companies which had already paid the tax, although if a corporation has been organized for the purpose of carrying on the business of holding securities, there is, perhaps, no reason why it cannot be subjected to taxation upon net income or profits derived from that occupation or business.

People ex rel. Vandervoort Realty Co. v. Glynn, 194 N. Y. 389, 87 N. E. 434.

The exception or exclusion of dividends from stocks of other corporations does not signify that the general clause "from all sources" must be given any broader interpretation than if no such exception had been made.

Baggaley v. Pittsburg & L. S. Iron Co. 33 C. C. A. 202, 62 U. S. App. 683, 90 Fed. 638; Mullins v. Surrey County, L. R. 5 Q. B. Div. 173; West Derby Union v. Metropolitan L. Assur. Soc. [1897] A. C. 652, 66 L. J. Ch. N. S. 726, 77 L. T. N. S. 284, 61 J. P. 820; Georgia R. & Bkg. Co. v Smith, 128 U. S. 174, 181, 32 L. ed. 377, 380, 9 Sup. Ct. Rep. 47; Interstate Commerce Commission v. Baird, 194 U. S. 25, 36, 37, 48 L. ed. 860, 865, 866, 24 Sup. Ct. Rep. 563; American Exp. Co. v. United States, 212 U. S. 522, 534, 53 L. ed. 635, 640, 29 Sup. Ct. Rep. 315.

Under state laws imposing taxes upon the capital of corporations employed in business, or receipts derived from business, it is quite often necessary to make similar inquiry into the character and use of their property and the conduct of their businesses.

People ex rel. Singer Mfg. Co. v. Wemple, 150 N. Y. 46, 44 N. E. 787; People ex rel. Chicago Junction R. & Union Stockyards Co. v. Roberts, 154 N. Y. 1, 47 N. E. 974; People ex rel. Niagara River Hydraulic Co. v. Roberts, 30 App. Div. 180, 51 N. Y. Supp. 771, affirmed in 157 N. Y. 676, 51 N. E. 1093; People ex rel. Ft. George Realty Co. v. Miller, 179 N. Y. 49, 71 N. E. 463; People ex rel. Interborough Rapid Transit Co. v. Williams, 200 N. Y. 103, 93 N. E. 505; Com. v. Standard Oil Co. 101 Pa. 119; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; Re Alabama & C. R. Co. 9 Blatchf. 390; Fed. Cas. No. 124; Gilchrist v. Helena, H. S. & S. R. Co. 47 Fed. 593; Oakland Sugar Mill Co. v. Fred W. Wolf Co. 55 C. C. A. 93, 118 Fed. 239; New York & S. Constr. Co. v. Winton, 208 Pa. 471, 57 Atl. 955; Colonial Trust Co. v. Montello Brick Works, 97 C. C. A. 144, 172 Fed. 311; General Conference v. Berkey, 156 Cal. 466, 105 Pac. 411; Missouri Coal & Min. Co. v. Ladd, 160 Mo. 435, 61 S. W. 191.

Messrs. William N. Dykman and Arthur E. Goddard filed a brief for appellees in No. 409:

The tax in question does not involve an unconstitutional interference with the sovereign powers and functions of the states.

South Carolina v. United States, 199 U. S. 437, 454, 459, 50 L. ed. 261, 266, 268, 26 Sup. Ct. Rep. 110, 4 A. & E. Ann. Cas. 737; License Tax Cases, 5 Wall. 462, 475, 18 L. ed. 497, 502; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 A. & E. Ann. Cas. 561; Plummer v. Coler, 178 U. S. 115, 137, 44 L. ed. 998, 1009, 20 Sup. Ct. Rep. 829; Scholey v. Rew, 23 Wall. 331, 23 L. ed. 99; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Snyder v. Bettman, 190 U. S. 249, 47 L. ed. 1035, 23 Sup. Ct. Rep. 803.

A distinction exists between the governmental and quasi private functions and instrumentalities of the state.

Re Rapid Transit Comrs. 197 N. Y. 81, — L.R.A.(N.S.) —, 90 N. E. 456, 18 A. & E. Ann. Cas. 366.

If, as is claimed, Congress cannot tax corporations chartered by the states, and if this is one of the subjects of taxation over which Congress has no power, such as exports, then it must follow (Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135) that the result cannot be accomplished in any manner, directly or indirectly, and whether or not individuals as well as corporations are included in the tax. That this is not the case is shown by the following, among other cases:

Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376; Thomas v. United States, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305; Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack) 100 U. S. 595, 25 L. ed. 647; Pacific Ins. Co. v. Soule, 7 Wall. 433, 19 L. ed. 95.

In every case in which it has been held, directly or indirectly, that a state may not tax a corporate franchise granted by Congress, it will be found that the real reason for this is not that the mere franchise, as such, is a part and parcel of the sovereign governmental instrumentalities of the Federal government, but that the functions, duties, and operations of such corporations fall within the protection of the powers delegated to Congress, and therefore are not subject to interference by the states.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; California v. Central P. R. Co. 127 U. S. 1,

32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Reagan v. Mercantile Trust Co. 154 U. S. 413, 38 L. ed. 1028, 4 Inters. Com. Rep. 575, 14 Sup. Ct. Rep. 1060.

A Federal tax upon the income of corporations is not a direct tax, because it is rather an excise upon the artificial rights of corporations who hold property and receive income therefrom, than a direct tax upon the property.

Knowlton v. Moore, 178 U. S. 41, 59, 44 L. ed. 969, 977, 20 Sup. Ct. Rep. 747; Plummer v. Coler, 178 U. S. 115, 137, 44 L. ed. 998, 1009, 20 Sup. Ct. Rep. 829; Nicol v. Ames, 173 U. S. 509, 521, 43 L. ed. 786, 793, 19 Sup. Ct. Rep. 522.

The tax is a tax upon the doing of business by corporations and joint stock companies. Their right of doing business, apart from their right to exist and hold property, considered above, is distinct from the natural right of individuals in general to engage in business, just as the right to buy and sell property at an exchange is distinct from the general natural right to buy and sell property anywhere. A tax on the former is an excise tax on a privilege, while a tax on the latter may be held to be a direct tax on property.

Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522.

The Federal government in the past has imposed taxes falling only upon corporations engaged in certain businesses, without the slightest suggestion or objection that the taxes were improper because not excise taxes on business.

Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482; Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack) 100 U. S. 595, 25 L. ed. 647; United States v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597.

Measuring excise or privilege taxes by gross receipts or net income from all sources, whether or not directly derived from the privilege in question, is an extremely common method, and has frequently been upheld by this court.

Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904; Pacific Ins. Co. v. Soule, 7 Wall. 433, 19 L. ed. 95; State R. Tax Cases, 92 U. S. 575, 23 L. ed. 663; Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; McHenry v. Alford, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242.

The tax imposed by the act is "uniform."

Head Money Cases (Edye v. Robertson) 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; McCray v. United States, 195 U. S. 27, 50, 49 L. ed. 78, 93, 24 Sup. Ct. Rep. 769, 1 A. & E. Ann. Cas. 561.

A tax upon the franchises or business of state railroads or public-service corporations is not an interference with governmental functions or instrumentalities of the state, and is valid.

South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 A. & E. Ann. Cas. 737; Re Rapid Transit Comrs. 197 N. Y. 81, — L.R.A. (N.S.) —, 90 N. E. 456, 18 A. & E. Ann. Cas. 366; Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack) 100 U. S. 595, 25 L. ed. 647.

Messrs. Charles A. Snow and Joseph H. Knight filed a brief for appellees in No 425:

The taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument.

Pacific Ins. Co. v. Soule, 7 Wall. 433, 446, 19 L. ed. 95, 99; McCray v. United States, 195 U. S. 27, 59, 49 L. ed. 78, 97, 24 Sup. Ct. Rep. 769, 1 A. & E. Ann. Cas. 561.

Under the rule of *stare decisis* the corporation tax must be held to be an "excise." Otherwise, numerous decisions holding identical or analogous taxes to be "excises" must be overruled.

Pacific Ins. Co. v. Soule, 7 Wall. 433, 19 L. ed. 95; Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack) 100 U. S. 595, 25 L. ed. 647; United States v. Erie R. Co. 106 U. S. 327, 27 L. ed. 151, 1 Sup. Ct. Rep. 223; Western Union R. Co. v. United States, 101 U. S. 543, 550, 25 L. ed. 1068, 1070; Bailey v. New York C. & H. R. R. Co. 106 U. S. 109, 115, 27 L. ed. 81, 83, 1 Sup. Ct. Rep. 62; Memphis & C. R. Co. v. United States, 108 U. S. 228, 234, 27 L. ed. 711, 713, 2 Sup. Ct. Rep. 482; Little Miami & C. & X. R. Co. v. United States, 108 U. S. 277, 279, 27 L. ed. 724, 725, 2 Sup. Ct. Rep. 627; Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482;

Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 638, 18 L. ed. 904, 906; Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897; Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907; Portland Bank v. Apthorp, 12 Mass. 256; Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 573, 18 L. ed. 229; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; State Tax on R. Gross Receipts, 15 Wall. 284, 293, 21 L. ed. 164, 167; Springer v. United States, 102 U. S. 586, 26 L. ed. 253; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 413, 48 L. ed. 496, 501, 24 Sup. Ct. Rep. 376; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Scholey v. Rew, 23 Wall. 331, 23 L. ed. 99; Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; Treat v. White, 181 U. S. 264, 45 L. ed. 853, 21 Sup. Ct. Rep. 611; Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; Thomas v. United States, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 A. & E. Ann. Cas. 561; New York v. Roberts, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58; Snyder v. Bettman, 190 U. S. 249, 253, 47 L. ed. 1035, 1037, 23 Sup. Ct. Rep. 803.

Being "excises," their validity is not questionable by reason of the fact that United States tax-exempt securities, or state or municipal bonds, or other instrumentalities of state governments, are included within the estate or capital thus subjected to an excise tax.

Scholey v. Rew, 23 Wall. 331, 23 L. ed. 99; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; Murdock v. Ward, 178 U. S. 139, 44 L. ed. 1009, 20 Sup. Ct. Rep. 775; Mager v. Grima, 8 How. 490, 12 L. ed. 1168; Snyder v. Bettman, 190 U. S. 249, 47 L. ed. 1035, 23 Sup. Ct. Rep. 803; United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; New York v. Roberts, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58; Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; Billings v. Illinois, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; Campbell v. California, 200 U. S. 87, 50 L. ed. 382, 26 Sup. Ct. Rep. 182; Cahen v. Brewster, 203 U. S. 543, 51 L. ed. 310, 27 Sup. Ct. Rep. 174, 8 A. & E. Ann. Cas. 215; Chanler v. Kelsey, 205 U. S. 466, 51 L. ed. 882, 27 Sup. Ct. Rep. 550; Buck v. Beach, 206 U. S. 392, 408, 51 L. ed. 1106, 1114, 27 Sup. Ct. Rep. 712, 11 A. & E. Ann. Cas. 732.

As an excise tax, the corporation tax is uniform and otherwise fully complies with all constitutional requirements.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Patton v. Brady, 184 U. S. 608, 622, 623, 46 L. ed. 713, 720, 721, 22 Sup. Ct. Rep. 493.

Corporate franchises are properly subject to Federal excise taxes, notwithstanding the fact that the corporation may not be engaged in interstate commerce, and so is not subject in any way to Federal regulation or control.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Snyder v. Bettman, 190 U. S. 249, 252, 47 L. ed. 1035, 1036, 23 Sup. Ct. Rep. 803; Scholey v. Rew, 23 Wall. 331, 23 L. ed. 99.

The classification of corporations and noncorporations presents such obvious distinctions that it is unnecessary to argue that there is a reasonable basis for such classification.

McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 A. & E. Ann. Cas. 561; Board of Education v. Illinois, 203 U. S. 553, 51 L. ed. 314, 27 Sup. Ct. Rep. 171, 8 A. & E. Ann. Cas. 157.

The decisions of this court give no countenance to the theory that the selection by Congress of one class as a proper subject for excise taxation, rather than another class, presents any reason for judicial interference, upon the ground that any provision of the Constitution has been contravened.

Spencer v. Merchant, 125 U. S. 345, 355, 31 L. ed. 763, 767, 8 Sup. Ct. Rep. 921; McCray v. United States, 195 U. S. 27, 61 49 L. ed. 78, 97, 24 Sup. Ct. Rep. 769, 1 A. & E. Ann. Cas. 561; Treat v. White, 181 U. S. 264, 269, 45 L. ed. 853, 855, 21 Sup. Ct. Rep. 611; Patton v. Brady, 184 U. S. 608, 623, 46 L. ed. 713, 720, 22 Sup. Ct. Rep. 493.

An excise tax cannot be attacked upon the ground that it directly taxes or interferes with the instrumentalities of the state or Federal governments, for it is not a tax on property, and the kind of property taxed indirectly is a matter of no consequence.

Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 573, 18 L. ed. 229; Snyder v. Bettman, 190 U. S. 249, 47 L. ed. 1035, 23 Sup. Ct. Rep. 803; Home Ins. Co. v.

New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 A. & E. Ann. Cas. 737; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

The Senate has the power to amend a revenue bill. This power to amend is not confined to the elimination of provisions contained in the original act, but embraces as well the addition of such provisions thereto as may render the original act satisfactory to the body which is called upon to support it. It has, in fact, been held that the substitution of an entirely new measure for the one originally proposed can be supported as a valid amendment.

Brake v. Collison, 122 Fed. 722.

Mr. James L. Quackenbush filed a statement for appellees in No. 442.

Solicitor General **Lehmann** (by special leave) argued the cause for the United States on reargument.

Mr. Justice **Day** delivered the opinion of the court:

These cases involve the constitutional validity of § 38 of the act of Congress approved August 5, 1909, known as "the corporation tax" law. 36 Stat. at L. 11, 112–117, chap. 6, U. S. Comp. Stat. Supp. 1909, pp. 659, 844–849.

It is contended in the first place that this section of the act is unconstitutional, because it is a revenue measure, and originated in the Senate in violation of § 7 of article 1 of the Constitution, providing that "all bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with the amendments, as on other bills." The 143]history of the act *is contained in the government's brief, and is accepted as correct, no objection being made to its accuracy.

This statement shows that the tariff bill of which the section under consideration is a part, originated in the House of Representatives, and was there a general bill for the collection of revenue. As originally introduced, it contained a plan of inheritance taxation. In the Senate the proposed tax was removed from the bill, and the corporation tax, in a measure, substituted therefor. The bill having properly originated in the House, we perceive no reason in the constitutional provision relied upon why it may not be amended in the Senate in the manner which it was in this case. The amendment was germane to the subject-matter of the bill, and not beyond the power of the Senate to propose.

In thus deciding we do not wish to be regarded as holding that the journals of the House and Senate may be examined to invalidate an act which has been passed and signed by the presiding officers of the House and Senate, and approved by the President, and duly deposited with the State Department. Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Harwood v. Wentworth, 162 U. S. 547, 40 L. ed. 1069, 16 Sup. Ct. Rep. 890; Twin City Bank v. Nebeker, 167 U. S. 196, 42 L. ed. 134, 17 Sup. Ct. Rep. 766.

In order to have in mind some of the more salient features of the statute, with a view to its interpretation, a part of the first paragraph is here set out, as follows:

"Sec. 38. That every corporation, joint stock company, or association organized for profit and having a capital stock represented by shares, and every insurance company now or hereafter organized under the laws of the United States or of any state or territory of the United States, or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country, and engaged in business in any state or territory of the United States or in Alaska or in the District of Columbia, shall be subject *to[144 pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company equivalent to one per centum upon the entire net income over and above five thousand dollars, received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies subject to the tax hereby imposed; or, if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its territories, Alaska and the District of Columbia, during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies subject to the tax hereby imposed."

A reading of this portion of the statute shows the purpose and design of Congress in its enactment and the subject-matter of its operation. It is at once apparent that its terms embrace corporations and joint stock companies or associations which are organized for profit, and have a capital

stock represented by shares. Such joint stock companies, while differing somewhat from corporations, have many of their attributes and enjoy many of their privileges. To these are added insurance companies, and they, as corporations, joint stock companies, or associations, must be such as are now or hereafter organized under the laws of the United States or of any state or territory of the United States, or under the acts of Congress applicable to Alaska and the District of Columbia. Each and all of these, the statute declares, shall be subject to pay annually a special excise tax with respect to the carrying on and doing business by such corporation, joint stock company or association, or insurance company. The tax is to be equivalent to 1 per [145] cent of the entire net *income over and above $5,000 received by such corporation or company *from all sources* during the year, excluding, however, amounts received by them as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed by the statute. Similar companies organized under the laws of any foreign country, and engaged in business in any state or territory of the United States, or in Alaska or the District of Columbia, are required to pay the tax upon the net income over and above $5,000 received by them from business transacted and capital invested within the United States, the territories, Alaska, and the District of Columbia, during each year, with the like exclusion as to amounts received by them as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed.

While the mere declaration contained in a statute that it shall be regarded as a tax of a particular character does not make it such if it is apparent that it cannot be so designated consistently with the meaning and effect of the act, nevertheless the declaration of the lawmaking power is entitled to much weight, and in this statute the intention is expressly declared to impose a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company. It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation, irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business, and with respect to the carrying on thereof, in a sum equivalent to 1 per centum upon the entire net income over and above $5,000 received from all sources during the year; that is, when imposed in this manner it is a tax upon the doing of business, with the advantages which inhere in the peculiarities *of corporate or joint[146] stock organization of the character described. As the latter organizations share many benefits of corporate organization, it may be described generally as a tax upon the doing of business in a corporate capacity. In the case of the insurance companies, the tax is imposed upon the transaction of such business by companies organized under the laws of the United States or any state or territory, as heretofore stated.

This tax, it is expressly stated, is to be equivalent to 1 per centum of the entire net income over and above $5,000 received from *all sources* during the year,—this is the measure of the tax explicitly adopted by the statute. The income is not limited to such as is received from property used in the business, strictly speaking, but is expressly declared to be upon the entire net income above $5,000 from all sources, excluding the amounts received as dividends on stock in other corporations, joint stock companies or associations, or insurance companies also subject to the tax. In other words, the tax is imposed upon the doing of business of the character described, and the measure of the tax is to be the income, with the deduction stated, received not only from property used in business, but from every source. This view of the measure of the tax is strengthened when we note that as to organizations under the laws of foreign countries, the amount of net income over and above $5,000 includes that received from business transacted and capital invested in the United States, the territories, Alaska, and the District of Columbia.

It is further strengthened when the subsequent sections are considered as to deductions in ascertaining net income and requiring returns from those subject to the act. Under the second paragraph the net income is to be ascertained by certain deductions from the gross amount of income received within the year "from all sources;" and the return to be made to the collector of internal revenue *under the third[147] section is required to show the gross amount of the income received during the year "from all sources." The evident purpose is to secure a return of the entire income, with certain allowances and deductions which do not suggest a restriction to income derived from property actively engaged in the business. This interpretation of the act, as resting upon the doing of business, is sustained by the reasoning in Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397,

48 L. ed. 496, 24 Sup. Ct. Rep. 376, in which a special tax measured by the gross receipts of the business of refining oil and sugar was sustained as an excise in respect to the carrying on or doing of such business.

Having thus interpreted the statute in conformity, as we believe, with the intention of Congress in passing it, we proceed to consider whether, as thus construed, the statute is constitutional.

It is contended that it is not; certainly so far as the tax is measured by the income of bonds nontaxable under Federal statutes, and of municipal and state bonds beyond the Federal power of taxation. And so of real and personal estates, because as to such estates the tax is direct, and required to be apportioned according to population among the states. It is insisted that such must be the holding unless this court is prepared to reverse the income tax cases decided under the act of 1894. [28 Stat. at L. 509, chap. 349.] Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, s. c. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912.

The applicable provisions of the Constitution of the United States in this connection are found in article 1, § 8, clause 1, and in article 1, § 2, clause 3, and article 1, § 9, clause 4. They are respectively:

"The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

148] *"Representatives and direct taxes shall be apportioned among the several states which may be included within the Union, according to their respective numbers."

"No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

It was under the latter requirement as to apportionment of direct taxes according to population that this court in the Pollock Case held the statute of 1894 to be unconstitutional. Upon the rehearing of the case Mr. Chief Justice Fuller, who spoke for the court, summarizing the effect of the decision, said:

"We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such." 158 U. S. 635.

And as to excise taxes, the chief justice said:

"We do not mean to say that an act laying by apportionment a direct tax on all real estate and personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments, and vocations." (P. 637.)

The Pollock Case was before this court in Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747. In that case this court sustained an excise tax upon the transmission of property by inheritance. It was contended there, as here, that the case was ruled by the Pollock case, and of that case this court, speaking by the present chief justice, said:

"The issue presented in the Pollock Case was whether an income tax was direct within the meaning of the Constitution. The contentions which the case involved were thus presented. On the one hand, it was argued that only *capitation taxes[149 and taxes on land as such were direct, within the meaning of the Constitution, considered as a matter of first impression, and that previous adjudications had construed the Constitution as having that import. On the other hand, it was asserted that, in principle, direct taxes, in the constitutional sense, embraced not only taxes on land and capitation taxes, but all burdens laid on real or personal property because of its ownership, which were equivalent to a direct tax on such property, and it was affirmed that the previous adjudications of this court had settled nothing to the contrary.

. . . . . .

"Undoubtedly, in the course of the opinion in the Pollock Case, it was said that if a tax was direct within the constitutional sense, the mere erroneous qualification of it as an excise or duty would not take it out of the constitutional requirement as to apportionment. But this language related to the subject-matter under consideration, and was but a statement that a tax which was in itself direct, *because imposed upon property solely by reason of its ownership*, could not be changed by affixing to it the qualification of excise or duty. Here we are asked to decide that a tax is a direct tax on property which has at all times been considered as the antithesis of such a tax; that is, that it has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy.

. . . . . .

"Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons *solely be-*

cause of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that 150]the *tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts, and excises, which are not the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall."

The same view was taken of the Pollock Case in the subsequent case of Spreckels Sugar Ref. Co. v. McClain, supra.

The act now under consideration does not impose direct taxation upon property solely because of its ownership, but the tax is within the class which Congress is authorized to lay and collect under article 1, § 8, clause 1 of the Constitution, and described generally as taxes, duties, imposts, and excises, upon which the limitation is that they shall be uniform throughout the United States.

Within the category of indirect taxation, as we shall have further occasion to show, is embraced a tax upon business done in a corporate capacity, which is the subject-matter of the tax imposed in the act under consideration. The Pollock Case construed the tax there levied as direct, because it was imposed upon property simply because of its ownership. In the present case the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed. The difference between the acts is not merely nominal, but rests upon substantial differences between the mere ownership of property and the actual doing of business in a certain way.

It is unnecessary to enter upon an extended consideration of the technical mean-151]ing of the term "excise." It has *been the subject-matter of considerable discussion,—the terms duties, imposts, and excises are generally treated as embracing the indirect forms of taxation contemplated by the Constitution. As Mr. Chief Justice Fuller said in the Pollock Case, supra:

"Although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts, and excises,' such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue." [157 U. S. 557.]

And in the same connection the chief justice, delivering the opinion of the court in Thomas v. United States, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305, in speaking of the words "duties," "imposts," and "excises," said:

"We think that they were used comprehensively, to cover customs and excise duties imposed on importation, consumption, manufacture, and sale of certain commodities, privileges, particular business transactions, vocations, occupations, and the like."

Duties and imposts are terms commonly applied to levies made by governments on the importation or exportation of commodities. Excises are "taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges." Cooley, Const. Lim. 7th ed. 680.

The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, *i. e.*, with the advantages which arise from corporate or quasi corporate organization; or, when applied to insurance companies, for doing the business of such companies. As was said in the Thomas Case, 192 U. S. supra, the requirement to pay such taxes 152]involves the exercise of *privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable.

If we are correct in holding that this is an excise tax, there is nothing in the Constitution requiring such taxes to be apportioned according to population. Pacific Ins. Co. v. Soule, 7 Wall. 433, 19 L. ed. 95; Springer v. United States, 102 U. S. 586, 26 L. ed. 253; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376.

It is next contended that the attempted taxation is void because it levies a tax upon the exclusive right of a state to grant corporate franchises, because it taxes franchises which are the creation of the state in its sovereign right and authority. This

proposition is rested upon the implied limitation upon the powers of national and state governments to take action which encroaches upon or cripples the exercise of the exclusive power of sovereignty in the other. It has been held in a number of cases that the state cannot tax franchises created by the United States or the agencies or corporations which are created for the purpose of carrying out governmental functions of the United States. M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787; California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150. 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073.

An examination of these cases will show that in each case where the tax was held invalid, the decision rested upon the proposition that the corporation was created to carry into effect powers conferred upon the Federal government in its sovereign capacity, and the attempted taxation was an interference with the effectual exercise of such powers.

In Osborn v. Bank of United States, supra, a leading case upon the subject, whilst it was held that the bank of the United States was not a private corporation, but a public one, created for national purposes, and 153]therefore beyond the *taxing power of the state, Chief Justice Marshall, in delivering the opinion of the court, conceded that if the corporation had been originated for the management of an individual concern, with private trade and profit for its great end and principal object, it might be taxed by the state. Said the chief justice:

"If these premises [that the corporation was one of private character] were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the state, as any individual would be; and the casual circumstance of its being employed by the government in the transaction of its fiscal affairs would no more exempt its private business from the operation of that power than it would exempt the private business of any individual employed in the same manner."

The inquiry in this connection is: How far do the implied limitations upon the taxing power of the United States over objects which would otherwise be legitimate subjects of Federal taxation, withdraw them from the reach of the Federal government in raising revenue, because they are pursued under franchises which are the creation of the states?

In approaching this subject we must remember that enactments levying taxes, as other laws of the federal government when acting within constitutional authority, are the supreme law of the land. The Constitution contains only two limitations on the right of Congress to levy excise taxes: they must be levied for the public welfare, and are required to be uniform throughout the United States. As Mr. Chief Justice Chase said, speaking for the court in License Tax Cases, 5 Wall. 462, 471, 18 L. ed. 497, 500: "Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every *subject and may be exercised[154 at discretion." The limitations to which the chief justice refers were the only ones imposed in the Constitution upon the taxing power.

In McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 A. & E. Ann. Cas. 561, this court sustained a Federal tax on oleomargarine, artificially colored, and held that while the 5th and 10th Amendments qualify, so far as applicable, all the provisions of the Constitution, nothing in those amendents operates to take away the power to tax conferred by the Constitution on the Congress. In that case it was contended that the subject taxed was within the exclusive domain of the states, and that the real purpose of Congress was not to raise revenue, but to tax out of existence a substance not harmful of itself and one which might be lawfully manufactured and sold; but the only constitutional limitation which this court conceded, in addition to the requirement of uniformity, and that for the sake of argument only so far as concerned the case then under consideration, was that Congress is restrained from arbitrary impositions or from exceeding its powers in seeking to effect unwarranted ends. The limitation of uniformity was deemed sufficient by those who framed and adopted the Constitution. The courts may not add others. Patton v. Brady, 184 U. S. 608, 622, 46 L. ed. 713, 720, 22 Sup. Ct. Rep. 493. And see United States v. Singer, 15 Wall. 111, 121, 21 L. ed. 49, 51; Nicol v. Ames, 173 U. S. 509, 515, 43 L. ed. 786, 791, 19 Sup. Ct. Rep. 522.

We must therefore enter upon the inquiry as to implied limitations upon the exercise of the Federal authority to tax because of the sovereignty of the states over matters within their exclusive jurisdiction, having in view the nature and extent of the power specifically conferred upon Congress by the Constitution of the United

States. We must remember, too, that the revenues of the United States must be obtained in the same territory, from the same people, and excise taxes must be collected from the same activities, as are also reached by the states in order to support their local government.

155] *While the tax in this case, as we have construed the statute, is imposed upon the exercise of the privilege of doing business in a corporate capacity, as such business is done under authority of state franchises, it becomes necessary to consider in this connection the right of the Federal government to tax the activities of private corporations which arise from the exercise of franchises granted by the state in creating and conferring powers upon such corporations. We think it is the result of the cases heretofore decided in this court, that such business activities, though exercised because of state- created franchises, are not beyond the taxing power of the United States. Taxes upon rights exercised under grants of state franchises were sustained by this court in Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack) 100 U. S. 595, 25 L. ed. 647; United States v. Erie R. Co. 106 U. S. 327, 27 L. ed. 151, 1 Sup. Ct. Rep. 223; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376.

It is true that in those cases the question does not seem to have been directly made, but, in sustaining such taxation, the right of the Federal government to reach such agencies was necessarily involved. The question was raised and decided in the case of Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482. In that well-known case a tax upon the notes of a state bank issued for circulation was sustained. Mr. Chief Justice Chase, in the course of the opinion, said:

"Is it, then, a tax on a franchise granted by a state, which Congress, upon any principle exempting the reserved powers of the states from impairment by taxation, must be held to have no authority to lay and collect?

"We do not say that there may not be such a tax. It may be admitted that the reserved rights of the states, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of state government, are not proper subjects of the taxing power of Congress. But 156]it cannot be admitted that *franchises granted by a state are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a state, seem to be as properly objects of taxation as any other property.

"But in the case before us the object of taxation is not the franchise of the bank, but property created, or contracts made and issued under the franchise, or power to issue bank bills. A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the state as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the state which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are means of profit to the corporations which issue them; and both, as we think, may properly be made contributory to the public revenue." (Pp. 547, 548.)

It is true that the decision in the Veazie Bank Case was also placed, in a measure, upon the authority of the United States to control the circulating medium of the country, but the force of the reasoning which we have quoted has not been denied or departed from.

In Thomas v. United States, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305, a Federal tax on the transfer of corporate shares in state corporations was upheld as a tax upon business transacted in the exercise of privileges afforded by the state laws in respect to corporations.

In Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522, a Federal tax was sustained upon the enjoyment of privileges afforded by a board of trade incorporated by the state of Illinois.

*When the Constitution was framed,[157 the right to lay excise taxes was broadly conferred upon the Congress. At that time very few corporations existed. If the mere fact of state incorporation, extending now to nearly all branches of trade and industry, could withdraw the legitimate objects of Federal taxation from the exercise of the power conferred, the result would be to exclude the national government from many objects upon which indirect taxes could be constitutionally imposed. Let it be supposed that a group of individuals, as partners, were carrying on a business upon which Congress concluded to lay an excise tax. If it be true that the forming of a state corporation would defeat this purpose, by taking the necessary steps required

by the state law to create a corporation and carrying on the business under rights granted by a state statute, the Federal tax would become invalid and that source of national revenue be destroyed, except as to the business in the hands of individuals or partnerships. It cannot be supposed that it was intended that it should be within the power of individuals acting under state authority to thus impair and limit the exertion of authority which may be essential to national existence.

In this connection South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 A. & E. Ann. Cas. 737, is important. In that case it was held that the agents of the state government, carrying on the business of selling liquor under state authority, were liable to pay the internal revenue tax imposed by the Federal government. In the opinion previous cases in this court were reviewed, and the rule to be deduced therefrom stated to be that the exemption of state agencies and instrumentalities from national taxation was limited to those of a strictly governmental character, and did not extend to those used by the state in carrying on business of a private character. 199 U. S. 461.

The cases unite in exempting from Federal taxation the means and instrumentalities 158]employed in carrying on the *governmental operations of the state. The exercise of such rights as the establishment of a judiciary, the employment of officers to administer and execute the laws, and similar governmental functions, cannot be taxed by the Federal government. The Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122; United States v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597; Ambrisini v. United States, 187 U. S. 1, 47 L. ed. 49, 23 Sup. Ct. Rep. 1, 12 Am. Crim. Rep. 699.

But this limitation has never been extended to the exclusion of the activities of a merely private business from the Federal taxing power, although the power to exercise them is derived from an act of incorporation by one of the states. We therefore reach the conclusion that the mere fact that the business taxed is done in pursuance of authority granted by a state in the creation of private corporations does not exempt it from the exercise of Federal authority to levy excise taxes upon such privileges.

But, it is insisted, this taxation is so unequal and arbitrary in the fact that it taxes a business when carried on by a corporation, and exempts a similar business when carried on by a partnership or private individual, as to place it beyond the authority conferred upon Congress. As we have seen, the only limitation upon the authority conferred is uniformity in laying the tax, and uniformity does not require the equal application of the tax to all persons or corporations who may come within its operation, but is limited to geographical uniformity throughout the United States. This subject was fully discussed and set at rest in Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, and we can add nothing to the discussion contained in that case.

In levying excise taxes the most ample authority has been recognized from the beginning to select some and omit other possible subjects of taxation, to select one calling and omit another, to tax one class of property and to forbear to tax another. For examples of such taxation see *cases[159 in the margin, decided in this court, upholding the power.†

Many instances might be given where this court has sustained the right of a state to select subjects of taxation, although as to them the 14th Amendment imposes a limitation upon state legislatures, requiring

†Hylton v. United States, 3 Dall. 171, 1 L. ed. 556 (a tax on carriages which the owner kept for private use); Nicol v. Ames, supra (a tax upon sales or exchanges of boards of trade); Knowlton v. Moore, supra (a tax on the transmission of property from the dead to the living); Treat v. White, 181 U. S. 264, 45 L. ed. 853, 21 Sup. Ct. Rep. 611 (a tax on agreements to sell shares of stock, denominated "calls" by stockbrokers); Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493 (a tax on tobacco manufactured for consumption, and imposed at a period intermediate the commencement of manufacture and the final consumption of the article); Cornell v. Coyne, 192 U. S. 418, 48 L. ed. 504, 24 Sup. Ct. Rep. 383 (a tax on "filled cheese" manufactured expressly for export); McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 A. & E. Ann. Cas. 561 (a tax on oleomargarine not artificially colored, a higher tax on oleomargarine artificially colored, and no tax on butter artificially colored); Thomas v. United States, supra (a tax on sales of shares of stock in corporations); Pacific Ins. Co. v. Soule, 7 Wall. 433, 19 L. ed. 95 (a tax upon the amounts insured, renewed, or continued by insurance companies, upon the gross amounts of premiums received and assessments made by them, and also upon dividends, undistributed sums, and incomes); Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482 (a tax of 10 per centum on the amount of the notes paid out of any state bank, or state banking association); Scholey v. Rew, 23 Wall. 331, 23 L. ed. 99 (a tax on devolutions of title to real estate); Spreckels v. Sugar Ref. Co. 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376

160]that no person *shall be denied the equal protection of the laws. See some of them noted in the margin.‡

In Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533, dealing with the 14th Amendment, which in this respect imposes limitations only on state authority, this court said:

"The provision in the 14th Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow de-161]ductions for indebtedness, or not *allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their Constitution."

It is insisted in some of the briefs assailing the validity of this tax that these cases have been modified by Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 A. & E. Ann. Cas. 1247. In that case a corporation organized in a state other than Alabama came into that state in compliance with its laws, paid the license tax and property tax imposed upon other corporations doing business in the state, and acquired, under direct sanction of the laws of the state, a large amount of property therein, and when it was attempted to subject it to a further tax, on the ground that it was for the privilege of doing business as a foreign corporation, when the same tax was not imposed upon state corporations doing precisely the same business, in the same way, it was held that the attempted taxation was merely arbitrary classification, and void under the 14th Amendment. In that case the foreign corporation was doing business under the sanction of the state laws no less than the local corporation; it had acquired its property under sanction of those laws; it had paid all direct and indirect taxes levied against it, and there was no practical distinction between it and a state corporation doing the same business in the same way.

In the case at bar we have already discussed the limitations which the Constitution imposes upon the right to levy excise taxes, and it could not be said, even if the principles of the 14th Amendment were applicable to the present case, that there is no substantial difference between the carrying on of business by the corporations taxed, and the same business when conducted by a private firm or individual. The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, *but the tax[162 is laid upon the privileges which exist in

(a tax on the gross receipts of corporations and companies, in excess of $250,000, engaged in refining sugar or oil); Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack) 100 U. S. 595, 25 L. ed. 647 (a tax laid in terms upon the amounts paid by certain public-service corporations as interest on their funded debt, or as dividends to their stockholders, and also on "all profits, incomes, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction." Held to be a tax upon the company's earnings, and therefore essentially an excise upon the business of the corporations); Springer v. United States, 102 U. S. 586, 26 L. ed. 253 (a duty provided by the internal revenue acts to be assessed, collected, and paid upon gains, profits, and incomes, held to be an excise or duty, and not a direct tax).

‡Beers v. Glynn, 211 U. S. 477, 53 L. ed. 290, 29 Sup. Ct. Rep. 186 (a state tax on personalty of nonresident decedents who owned realty in the state); New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736 (a state tax on the transfers of stock made within the state); Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232 (a state license tax on meat-packing houses. A foreign corporation selling its products in the state, but whose packing establishments are not situated in the state, is not exempt from such license tax); Savannah, T. & I. of H. R. Co. v. Savannah, 198 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. Rep. 690 (a classification which distinguishes between an ordinary street railway and a steam railroad, making an extra charge for local deliveries of freight brought over its road from outside the city, held not to be such a classification as to make the tax void under the 14th Amendment); Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233 (a state tax on cigarette dealers); Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594 (upholding the graded inheritance tax law of Illinois); Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533 (state tax upon the nominal face value of bonds, instead of their actual value, held a valid part of the state system of taxation).

conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods, which may be the same, whether done by corporations or individuals.

It is further contended that some of the corporations, notably insurance companies, have large investments in municipal bonds and other nontaxable securities, and in real estate and personal property not used in the business; that therefore the selection of the measure of the income from all sources is void, because it reaches property which is not the subject of taxation,—upon the authority of the Pollock Case, supra, But this argument confuses the measure of the tax upon the privilege with direct taxation of the state or thing taxed. In the Pollock Case, as we have seen, the tax was held unconstitutional because it was in effect a direct tax on the property solely because of its ownership.

Nor does the adoption of this measure of the amount of the tax do violence to the rule laid down in Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638, nor the Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190. In the Galveston Case it was held that a tax imposed by the state of Texas, equal to 1 per cent upon 163]the gross *receipts "from every source whatever" of lines of railroad lying wholly within the state, was invalid as an attempt to tax gross receipts derived from the carriage of passengers and freight in interstate commerce, which in some instances was much the larger part of the gross receipts taxed. This court held that this act was an attempt to burden commerce among the states, and the fact that it was declared to be "equal to" 1 per cent made no difference, as it was merely an effort to reach gross receipts by a tax not even disguised as an occupation tax, and in nowise helped by the words "equal to." In other words, the tax was held void, as its substance and manifest intent was to tax interstate commerce as such.

In the Western Union Telegraph Cases the state undertook to levy a graded charter fee upon the entire capital stock of one hundred millions of dollars of the Western Union Telegraph Company, a foreign corporation, and engaged in commerce among the states, as a condition of doing local business within the state of Kansas. This court held, looking through forms and reaching the substance of the thing, that the tax thus imposed was in reality a tax upon the right to do interstate commerce within the state, and an undertaking to tax property beyond the limits of the state; that whatever the declared purpose, when reasonably interpreted, the necessary operaction and effect of the act in question was to burden interstate commerce and to tax property beyond the jurisdiction of the state, and it was therefore invalid.

There is nothing in these cases contrary, as we shall have occasion to see, to the former rulings of this court which hold that where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the state or nation, the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself nontaxable. The distinction lies between the attempt to tax the property *as such and to measure a legiti-[164 mate tax upon the privileges involved in the use of such property.

In Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593, a tax was sustained upon the right or privilege of the Home Insurance Company to be a corporation, and to do business within the state in a corporate capacity, the tax being measured by the extent of the dividends of the corporation in the current year upon the capital stock. Although a very large amount, nearly two of three millions of capital stock, was invested in bonds of the United States, expressly exempted from taxation by a statute of the United States, the tax was sustained as a mode of measurement of a privilege tax which it was within the lawful authority of the state to impose. Mr. Justice Field, who delivered the opinion of the court, reviewed the previous cases in this court, holding that the state could not tax or burden the operation of the Constitution and of laws enacted by the Congress to carry into execution the powers vested in the general government. Yielding full assent to those cases, Mr. Justice Field said of the tax then under consideration: "It is not a tax in terms upon the capital stock of the company, nor upon any bonds

of the United States composing a part of that stock. The statute designates it a tax upon the 'corporate franchise or business' of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year." In that case, in the course of the opinion, previous cases of this court were cited, with approval. Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897; Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907.

In the Coite Case a privilege tax upon the total amount of deposits in a savings bank was sustained, although $500,000 of the deposits had been invested in securities of the United States, and declared by act of Congress to be exempt from taxation by state authority. In that case the court said: "Nothing can be more certain in 165]legal *decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a state for the support of the state government. Authority to that effect resides in the state independent of the Federal government, and is wholly unaffected by the fact that the corporation or individual has or has not made investment in Federal securities." In Provident Inst. v. Massachusetts, supra, a like tax was sustained.

It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is nontaxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part, at least, property which, as such, could not be directly taxed. See, in this connection, Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163, as interpreted in Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 226, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638.

It is contended that measurement of the tax by the net income of the corporation or company received by it from all sources is not only unequal, but so arbitrary and baseless as to fall outside of the authority of the taxing power. But is this so? Conceding the power of Congress to tax the business activities of private corporations, including, as in this case, the privilege of carrying on business in a corporate capacity, the tax must be measured by some standard, and none can be chosen which will operate with absolute justice and equality upon all corporations. Some corporations do a large business upon a small amount of capital; others with a small business may have a large *capital. A tax upon the[166 amount of business done might operate as unequally as a measure of excise as it is alleged the measure of income from all sources does. Nor can it be justly said that investments have no real relation to the business transacted by a corporation. The possession of large assets is a business advantage of great value; it may give credit which will result in more economical business methods; it may give a standing which shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige.

It is true that in the Spreckels Case, 192 U. S. supra, the excise tax, for the privilege of doing business, was based upon the business assets in use by the company, but this was because of the express terms of the statute which thus limited the measure of the excise. The statute now under consideration bears internal evidence that its draftsman had in mind language used in the opinion in the Spreckels Case, and the measure of taxation, the income from all sources, was doubtless inserted to prevent the limitation of the measurement of the tax to the income from business assets alone. There is no rule which permits a court to say that the measure of a tax for the privilege of doing business, where income from property is the basis, must be limited to that derived from property which may be strictly said to be actively used in the business. Departures from that rule, sustained in this court, are not wanting. In United States v. Singer, 15 Wall. 111, 21 L. ed. 49, an excise tax was sustained upon the liquor business, which was fixed by the payment of an amount not less than 80 per cent of the total capacity of the distillery. Whether such capacity was used in the business was a matter of indifference, and this court said of such a measure:

"Everyone is advised in advance of the amount he will be required to pay if he enters into the business of distilling spirits, and every distiller must know the producing *capacity of his distillery. If he[167 fail under these circumstances to produce the amount for which, by the law, he will in any event be taxed if he undertakes to

distill at all, he is not entitled to much consideration."

In Society for Savings v. Coite, 6 Wall. supra, and Provident Inst. v. Massachusetts, 6 Wall. supra, as we have seen, the amount of excise was measured by the amount of bank deposits. It made no difference that the deposits were not used actively in the business.

In Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904, the tax was measured by the excess of the market value of the corporation's capital stock above the value of its real estate and machinery, and in this connection see Home Ins. Co. v. New York, 134 U. S. supra, where the excise was computed upon the entire capital stock, measured by the extent of the dividends thereon.

We must not forget that the right to select the measure and objects of taxation devolves upon the Congress, and not upon the courts, and such selections are valid unless constitutional limitations are overstepped. "It is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount or the property upon which it is imposed." Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; McCray v. United States, 195 U. S. 27, 58, 49 L. ed. 78, 96, 24 Sup. Ct. Rep. 769, 1 A. & E. Ann. Cas. 561, and previous cases in this court there cited.

Nor is that line of cases applicable, such as Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678, holding that a tax on the sales of an importer is a tax on the import, and Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015, holding a tax on auctioneers' sales of goods in original packages a tax on imports. In these cases the tax was held invalid, as the state thereby taxed subjects of taxation within the exclusive power of Congress.

What we have said as to the power of Congress to lay this excise tax disposes of the contention that the act is void, as lacking in due process of law.

168] *It is urged that this power can be so exercised by Congress as to practically destroy the right of the states to create corporations, and for that reason it ought not to be sustained, and reference is made to the declaration of Chief Justice Marshall in M'Culloch v. Maryland, that the power to tax involves the power to destroy. This argument has not been infrequently addressed to this court with respect to the exercise of the powers of Congress. Of such contention this court said in Knowlton v. Moore, 178 U. S. 60, 44 L. ed. 977, 20 Sup. Ct. Rep. 755:

"This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists. In other words, the power to destroy, which may be the consequence of taxation, is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But this reasoning has no application to a lawful tax, for if it had, there would be an end of all taxation; that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may, when further exercised, be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied."

In Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482, supra, speaking for the court, the chief justice said:

"It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is therefore beyond the constitutional power of Congress.

"The first answer to this is that the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, *but the re-[169 sponsibility of the legislature is not to the courts, but to the people by whom its members are elected. So, if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."

So the same effect; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 A. & E. Ann. Cas. 561. In the latter case it was said:

"No instance is afforded from the foundation of the government where an act which was within a power conferred was declared to be repugnant to the Constitution because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust."

And in the same case this court said, after reviewing the previous cases in this court:

"Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise."

The argument, at last, comes to this: That because of possible results, a power lawfully exercised may work disastrously, therefore the courts must interfere to prevent its exercise, because of the consequences feared. No such authority has ever been invested in any court. The remedy for such wrongs, if such in fact exist, is in the ability of the people to choose their own representatives, and not in the exertion of unwarranted powers by courts of justice.

It is especially objected that certain of the corporations whose stockholders challenge the validity of the tax are so-called real estate companies, whose business is principally the holding and management of real estate. These cases are No. 415, Cedar Street Company v. Park Realty Company; No. 431, Percy H. Brundage v. Broadway 170]Realty *Company; No. 443, Phillips v. Fifty Associates et al.; No. 446, Mitchell v. Clark Iron Company; No. 412, William H. Miner v. Corn Exchange Bank et al.; and No. 457, Cook et al. v. Boston Wharf Company.

In No. 412, Miner v. Corn Exchange Bank et al., the bank occupies a building in part and rents a large part to tenants.

Of the realty companies, the Park Realty Company was organized to "work, develop, sell, convey, mortgage, or otherwise dispose of real estate; to lease, exchange, hire, or otherwise acquire property; to erect, alter, or improve buildings; to conduct, operate, manage, or lease hotels, apartment houses, etc.; to make and carry out contracts in the manner specified concerning buildings . . . and generally to deal in, sell, lease, exchange, or otherwise deal with lands, buildings, and other property, real or personal," etc.

At the time the bill was filed the business of the company related to the Hotel Leonori, and the bill averred that it was engaged in no other business except the management and leasing of that hotel.

The Broadway Realty Company was formed for the purpose of owning, holding, and managing real estate. It owns an office building and certain securities. The office building is let to tenants, to whom light and heat are furnished, and for whom janitor and similar service are performed.

The Fifty Associates are operating under a charter to own real estate, with power to build, improve, alter, pull down, and rebuild, and to manage, exchange and dispose of the same.

The Clark Iron Company was organized under the laws of Minnesota, owns and leases ore lands for the purpose of carrying on mining operations, and receives a royalty depending upon the quantity of ore mined.

The Boston Wharf Company is operating under a *charter authorizing it to ac-[171 quire lands and flats, with their privileges and appurtenances, and to lease, manage, and improve its property in whatever manner shall be deemed expedient by it, and to receive dockage and wharfage for vessels laid at its wharfs.

What we have said as to the character of the corporation tax as an excise disposes of the contention that it is direct, and therefore requiring apportionment by the Constitution. It remains to consider whether these corporations are engaged in business. "Business" is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict. 158, citing People ex rel. Hoyt v. Tax Comrs. 23 N. Y. 242, 244. "That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit." 1 Bouvier's Law Dict. p. 273.

We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of this statute, and in the capacity necessary to make such organizations subject to the law.

Of the Motor Taximeter Cab Company Case, No. 432, the company owns and leases taxicabs, and collects rents therefrom. We think it is also doing business within the meaning of the statute.

What we have already said disposes of the objections made in certain cases of life insurance and trust companies, and banks, as to income derived from United States, state, municipal, or other nontaxable bonds.

We come to the question, Is a so-called public-service corporation, such as the Coney Island and Brooklyn Railroad Company, in case No. 409, and the Interborough *Rapid Transit Company. No. 442,[172 exempted from the operation of this statute? In the case of South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 A. & E. Ann. Cas. 737, this court held that when a state, acting within its lawful authority, undertook to carry on the liquor business, it did not withdraw the agencies of the state, carrying on the traffic, from the operation of the internal revenue laws of the United States. If a state may not thus withdraw from the operation of a Federal taxing law a subject-matter of such taxation, it is difficult to see how the incorporation of companies

whose service, though of a public nature, is, nevertheless, with a view to private profit, can have the effect of denying the Federal right to reach such properties and activities for the purposes of revenue.

It is no part of the essential governmental functions of a state to provide means of transportation, supply artificial light, water, and the like. These objects are often accomplished through the medium of private corporations, and though the public may derive a benefit from such operations, the companies carrying on such enterprises are nevertheless private companies, whose business is prosecuted for private emolument and advantage. For the purpose of taxation they stand upon the same footing as other private corporations upon which special franchises have been conferred.

The true distinction is between the attempted taxation of those operations of the states essential to the execution of its governmental functions, and which the state can only do itself, and those activities which are of a private character. The former, the United States may not interfere with by taxing the agencies of the state in carrying out its purposes; the latter, although regulated by the state, and exercising delegated authority, such as the right of eminent domain, are not removed from the field of legitimate Federal taxation.

Applying this principle, we are of opin-
173]ion that the so-called *public-service corporations represented in the cases at bar are not exempt from the tax in question. Union P. R. Co. v. Peniston, 18 Wall. 5, 33, 21 L. ed. 787, 792.

It is again objected that incomes under $5,000 are exempted from the tax. It is only necessary, in this connection, to refer to Knowlton v. Moore, 178 U. S. supra, in which a tax upon inheritances in excess of $10,000 was sustained. In Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594, a graded inheritance tax was sustained.

As to the objections that certain organizations,—labor, agricultural, and horticultural,—fraternal and benevolent societies, loan and building associations, and those for religious, charitable, or educational purposes, are excepted from the operation of the law, we find nothing in them to invalidate the tax. As we have had frequent occasion to say, the decisions of this court from an early date to the present time have emphasized the right of Congress to select the objects of excise taxation, and within this power to tax some and leave others untaxed must be included the right to make exemptions such as are found in this act.

Again, it is urged that Congress exceeded its power in permitting a deduction to be made of interest payments only in case of interest paid by banks and trust companies on deposits, and interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of the corporation or company. This provision may have been inserted with a view to prevent corporations from issuing a large amount of bonds in excess of the paid-up capital stock, and thereby distributing profits so as to avoid the tax. In any event, we see no reason why this method of ascertaining the deductions allowed should invalidate the act. Such details are not wholly arbitrary, and were deemed essential to practical operation. Courts cannot substitute their judgment *for[174 that of the legislature. In such matters a wide range of discretion is allowed.

The argument that different corporations are so differently circumstanced in different states, and the operation of the law so unequal as to destroy it, is so fully met in the opinion in Knowlton v. Moore, 178 U. S. supra, that it is only necessary to make reference thereto. For this purpose the law operates uniformly, geographically considered, throughout the United States, and in the same way wherever the subject-matter is found. A liquor tax is not rendered unlawful as a revenue measure because it may yield nothing in those states which have prohibited the liquor traffic. No more is the present law unconstitutional because of inequality of operation owing to different local conditions.

Nor is the special objection tenable, made in some of the cases, that the corporations act as trustees, guardians, etc., under the authority of the laws or courts of the state. Such trustees are not the agents of the state government in a sense which exempts them from taxation because executing the necessary governmental powers of the state. The trustees receive their compensation from the interests served, and not from the public revenues of the state.

It is urged in a number of the cases that in a certain feature of the statute there is a violation of the 4th Amendment of the Constitution, protecting against unreasonable searches and seizures. This amendment was adopted to protect against abuses in judicial procedure under the guise of law, which invade the privacy of persons in their homes, papers, and effects, and applies to criminal prosecutions and suits for penalties and forfeitures under the revenue laws. Boyd v. United States, 116 U. S.

632, 29 L. ed. 751, 6 Sup. Ct. Rep. 524. It does not prevent the issue of search warrants for the seizure of gambling paraphernalia and other illegal matter. Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372. It does not prevent the issuing of process to require attend-175]ance *and testimony of witnesses, the production of books and papers, etc. Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563. Certainly the amendment was not intended to prevent the ordinary procedure in use in many, perhaps most, of the states, of requiring tax returns to be made, often under oath. The objection in this connection applies, when the substance of the argument is reached, to the 6th subsection of § 38 of the act, which provides:

"Sixth. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue, and shall constitute public records, and be open to inspection as such." [36 Stat. at L. 116, chap. 6, U. S. Comp. Stat. Supp. 1909, p. 849.]

An amendment was made June 17, 1910, which reads as follows:

"For classifying, indexing, exhibiting, and properly caring for the returns of all corporations, required by section thirty-eight of an act entitled, 'An Act to Provide Revenue, Equalize Duties, Encourage the Industries of the United States, and for Other Purposes,' approved August fifth, nineteen hundred and nine, including the employment in the District of Columbia of such clerical and other personal services and for rent of such quarters as may be necessary, twenty-five thousand dollars: Provided, That any and all such returns shall be open to inspection only upon the order of the President, under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President." [36 Stat. at L. 494, chap. 297.]

The contention is that the above section as originally framed and as now amended could have no legitimate connection with the collection of the tax, and in substance amounts to no more than an unlawful attempt to exhibit the private affairs of corporations to public or private inspection, without any substantial connection with or 176]*legitimate purpose to be subserved in the collection of the tax under the act now under consideration. But we cannot agree to this contention. The taxation being, as we have held, within the legitimate powers of Congress, it is for that body to determine what means are appropriate and adapted to the purposes of making the law effectual. In this connection the often-quoted declaration of Chief Justice Marshall in M'Culloch v. Maryland, 4 Wheat. 316, 421, 4 L. ed. 579, 605, is appropriate: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Congress may have deemed the public inspection of such returns a means of more properly securing the fullness and accuracy thereof. In many of the states laws are to be found making tax returns public documents, and open to inspection.†

*We cannot say that this feature of[177 the law does violence to the constitutional protection of the 4th Amendment, and, this is equally true of the 5th Amendment, protecting persons against compulsory self-incriminating testimony. No question under the latter Amendment properly arises in these cases, and when circumstances are presented which invoke the protection of that Amendment, and raise questions involving rights thereby secured, it will be time enough to decide them. And so of the argument that the penalties for the

†In Connecticut, the requirement is that the tax lists of the assessors shall be abstracted and lodged in the town clerk's office "for public inspection." Rev. Stat. (Conn.) § 2310. In New York, notices of the completion of the assessment rolls must be conspicuously posted in three or more public places, and a copy left in a specified place, "where it may be seen and examined by any person until the third Tuesday of August next following." Consol. Laws of N. Y. vol. 5, p. 5859; N. Y. Laws 1909, chap. 62, § 36. In Maryland, a record of property assessed is required to be kept, and the valuation thereof, with alphabetical list of owners, recorded in a book, "which any person may inspect without fee or reward." Pub. Laws (Md.) vol. 2, p. 1804, § 23. In Pennsylvania, it is provided that from the time of publishing the assessor's returns until the day appointed for finally determining whether the assessor's valuations are too low, "any taxable inhabitant of the county shall have the right to examine the said return in the commissioner's office." Pepper & L. Dig. Laws (Pa.) vol. 2, p. 4591, § 357. In New Hampshire, the list of taxes assessed are required to be kept in a book, and also left with the town clerk, and such records "shall be open to the inspection of all persons." Pub. Stat. (N. H.) 1901, p. 214, § 5.

nonpayment of the taxes are so high as to violate the Constitution. No case is presented involving that question, and, moreover, the penalties are clearly a separate part of the act, and whether collectible or not may be determined in a case involving an attempt to enforce them. Willcox v. Consolidated Gas Co. 212 U. S. 19, 53, 53 L. ed. 382, 400, 29 Sup. Ct. Rep. 192, 15 A. & E. Ann. Cas. 1034.

It has been suggested that there is a lack of power to tax foreign corporations, doing local business in a state, in the manner proposed in this act, and that the tax upon such corporations, being unconstitutional, works such inequality against domestic corporations as to invalidate the law. It is sufficient to say of this that no such case is presented in the record. Southern R. Co. v. King, 217 U. S. 525, 54 L. ed. 868, 30 Sup. Ct. Rep. 594. This is equally true as to the alleged invalidity of the act as a tax on exports, which is beyond the power of Congress. No such case is presented in those now before the court.

We have noticed such objections as are made to the constitutionality of this law as it is deemed necessary to consider. Finding the statute to be within the constitutional power of the Congress, it follows that the judgments in the several cases must be affirmed.

Affirmed.

AMORY ELIOT, Appt.,
v.
178] *JAMES G. FREEMAN, Robert A. Boit, Nathanael Thayer, and Robert H. Gardner. (No. 448.)

MAINE BAPTIST MISSIONARY CONVENTION, Appt.,
v.
CHARLES E. COTTING and Charles F. Adams, 2d, Trustees, etc. (No. 496.)

(See S. C. Reporter's ed. 178–187.)

Internal revenue — Federal corporation tax — applicability to real estate trusts.

Real estate trusts created by deed for the purchasing, improving, holding, or selling lands and buildings for the benefit of the shareholders, which do not derive any benefit from, and are not organized under, any statute of the state, and which, by their terms, end with lives in being and twenty years thereafter, are not subject to the excise imposed by the act of August 5, 1909 (36 Stat. at L. 11, 112–117, chap. 6, U. S. Comp. Stat. Supp. 1909, pp. 659, 844–849), § 38, upon the doing of business by corporations, joint stock companies, or associations "now or hereafter organized under the laws of the United States or of any state or territory."

[For other cases, see Internal Revenue, III., in Digest Sup. Ct. 1908.]

[Nos. 448 and 496.]

Argued January 19, 1911. Decided March 13, 1911.

TWO APPEALS from the Circuit Court of the United States for the District of Massachusetts to review decrees sustaining demurrers to and dismissing bills filed by *cestuis que trust* to enjoin the trustees from compliance with the Federal corporation tax. Reversed.

The facts are stated in the opinion.

Mr. **Moorfield Storey** argued the cause, and, with Messrs. Richard W. Hale and Frank W. Grinnell, filed a brief for appellant in No. 448:

The respondents are not carrying on or doing business.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; Smith v. Anderson, L. R. 15 Ch. Div. 276, 50 L. J. Ch. N. S. 39, 43 L. T. N. S. 329, 29 Week. Rep. 21.

There is no joint stock company or association.

Smith v. Anderson, supra.

The trust was not organized for profit. Reg. v. Whitmarsh, 15 Q. B. 618; Bear v. Bromley, 18 Q. B. 276, 21 L. J. Q. B. N. S. 354, 16 Jur. 450, 7 Eng. R. & C. Cas. 507; Moore v. Rawlins, 6 C. B. N. S. 315, 28 L. J. C. P. N. S. 247, 5 Jur. N. S. 941; Smith v. Anderson, L. R. 15 Ch. Div. 273, 50 L. J. Ch. N. S. 39, 43 L. T. N. S. 329, 29 Week. Rep. 21.

The defendants have not a capital stock represented by shares within the meaning of the act.

28 Ops. Atty. Gen. p. 194, Feb. 14th 1910; Mayo v. Moritz, 151 Mass. 481, 24 N. E. 1083; Howe v. Morse, 174 Mass. 502, 55 N. E. 213; Phillips v. Blatchford, 137 Mass. 510; Gleason v. McKay, 134 Mass. 419; Opinion of Justices, 196 Mass. 603, 85 N. E. 545.

The defendants are not organized under the laws of Massachusetts. The unwritten law is never correctly spoken of in the plural.

Swift v. Tyson, 16 Pet. 1, 18, 10 L. ed. 865, 871; Baltimore & O. R. Co. v. Baugh, 149 U. S. 369, 371, 37 L. ed. 772, 774, 13 Sup. Ct. Rep. 914.

The expression, "organized under the laws of," plainly refers to an organization under some statute law authorizing such

organization. There have been such statutes in New York and other places, as appears in Taft v. Ward, 106 Mass. 522, and the act undoubtedly refers to companies organized under laws of that kind.

Edwards v. Warren Linoline & Gasoline Works, 168 Mass. 564, 38 L.R.A. 791, 47 N. E. 502; Oliver v. Liverpool & L. Life & F. Ins. Co. 100 Mass. 531, 10 Wall. 566, 19 L. ed. 1029; People ex rel. Platt v. Wemple, 117 N. Y. 136, 6 L.R.A. 303, 2 Inters. Com. Rep. 735, 22 N. E. 1046; Gregg v. Sanford, 12 C. C. A. 525, 28 U. S. App. 313, 65 Fed. 151.

Where the construction of a tax is doubtful, the doubt is to be resolved in favor of those upon whom the tax is sought to be laid.

Spreckels Sugar Ref. Co. v. McClain, 51 C. C. A. 201, 113 Fed. 247, 192 U. S. 397, 416, 48 L. ed. 496, 503, 24 Sup. Ct. Rep. 376.

A statute will not be construed so as to violate the Constitution, unless its language imperatively demands it.

Knights Templars' & M. Life Indemnity Co. v. Jarman, 187 U. S. 197, 205, 47 L. ed. 139, 145, 23 Sup. Ct. Rep. 108; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 407, 53 L. ed. 836, 848, 29 Sup. Ct. Rep. 527.

This court has decided that a tax on the income is a tax on the land, and therefore a direct tax, which must be levied according to the rule of apportionment.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; Knowlton v. Moore, 178 U. S. 82, 44 L. ed. 986, 20 Sup. Ct. Rep. 747.

But even if the tax is treated as an excise tax, it cannot be sustained.

United States v. Singer, 15 Wall. 111, 121, 21 L. ed. 49, 51; Roup's Case, 81 *Pa. 211; Cooley, Const. Lim. pp. 695, 697; People ex rel. Detroit & H. R. Co. v. Salem, 20 Mich. 473, 4 Am. Rep. 400; Portland Bank v. Apthorp, 12 Mass. 258; Southern R. Co. v. Greene, 216 U. S. 400, 417, 54 L. ed. 536, 541, 30 Sup. Ct. Rep. 287, 17 A. & E. Ann. Cas. 1247; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 165, 41 L. ed. 666, 668, 671, 17 Sup. Ct. Rep. 255; Chicago, M. & St. P. R. Co. v. Westby, — L.R.A.(N.S.) —, 102 C. C. A. 65, 178 Fed. 624.

Mr. **Burton E. Eames** argued the cause, and, with Messrs. Charles H. Tyler, Owen D. Young, and Clement F. Robinson, filed a brief for appellant in No. 496:

All tax laws should be construed strictly.

Sutherland Stat. Const. 2d ed. §§ 536, 537; Cooley, Taxn. pp. 453 et seq.; United States v. Wigglesworth, 2 Story, 369, Fed. Cas. No. 16,690; Benziger v. United States, 192 U. S. 38, 48 L. ed. 331, 24 Sup. Ct. Rep. 189; Sewall v. Jones, 9 Pick. 412; Spreckles Sugar Ref. Co. v. McClain, 192 U. S. 397, 416, 48 L. ed. 496, 503, 24 Sup. Ct. Rep. 376.

The department store trust is not "organized under the laws." The word "laws" should be held to include only statute laws, and not the general body of the common law.

Brinckerhoff v. Bostwick, 99 N. Y. 185, 1 N. E. 663; State ex rel. Clapp v. Sioux City & N. R. Co. 43 Minn. 17, 44 N. W. 1032.

The natural meaning of the word "organized" connotes an idea of creating an entity, if it does not connote actual incorporation.

Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103.

It seems to be an unusual use of a term, to call the department store trust "organized." A corporation is "organized." A trust is "made," "declared," "created," or "entered into," but hardly "organized."

Hinds v. Marmolejo, 60 Cal. 231; Daggs v. Phœnix Nat. Bank, 5 Ariz. 409, 53 Pac. 201; Lindsay & P. Co. v. Mullen, 176 U. S. 126, 44 L. ed. 400, 20 Sup. Ct. Rep. 325.

If we take the expression "joint stock company or association organized under the laws" to mean a joint stock company or association organized under and by virtue of certain statutes and deriving certain special privileges therefrom, we describe a form of organization which has a real existence in this country, and is radically different from the department store trust.

Lyon v. Denison, 80 Mich. 371, 8 L.R.A. 358, 45 N. W. 358; Hussey v. Arnold, 185 Mass. 202, 70 N. E. 87; Atty. Gen. v. Mercantile M. Ins. Co. 121 Mass. 524; Cook, Corp. § 505; Andrews Bros. Co. v. Youngstown Coke Co. 30 C. C. A. 293, 58 U. S. App. 444, 86 Fed. 585.

There is no intermediate form in Massachusetts between a corporation and a partnership, although a joint stock company may exist under the common law of that state solely as a partnership.

Phillips v. Blatchford, 137 Mass. 510; Ricker v. American Loan & T. Co. 140 Mass. 346, 5 N. E. 284.

In court proceedings these organizations are generally treated as corporations in so far that, by virtue of the statutes, actions may be brought by or against them in their association names.

Oak Ridge Coal Co. v. Rogers, 108 Pa. 147; Westcott v. Fargo, 61 N. Y. 542, 19

Am. Rep. 300; Saltsman v. Shults, 14 Hun, 256; Van Aernam v. Bleistein, 102 N. Y. 355, 7 N. E. 537; Hibbs v. Brown, 112 App. Div. 214, 98 N. Y. Supp. 353, 190 N. Y. 167, 82 N. E. 1108; Platt v. Colvin, 50 Ohio St. 703, 36 N. E. 735; Adams Exp. Co. v. State, 55 Ohio St. 69, 44 N. E. 506; Edgeworth v. Wood, 58 N. J. L. 463, 33 Atl. 940; Boatner v. American Exp. Co. 122 Fed. 714; Adams Exp. Co. v. Schofield, 111 Ky. 832, 64 S. W. 903.

In the Federal courts formerly these organizations were treated jurisdictionally as corporations (Andrews Bros. Co. v. Youngstown Coke Co. 30 C. C. A. 293, 58 U. S. App. 444, 86 Fed. 585); but since the case of Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690, the contrary has been held.

See also Saunders v. Adams Exp. Co. 136 Fed. 494; Fred Macey Co. v. Macey, 68 C. C. A. 363, 135 Fed. 725; Taylor v. Weir, 96 C. C. A. 438, 171 Fed. 636; Chapman v. Barney, 129 U. S. 677, 32 L. ed. 800, 9 Sup. Ct. Rep. 426.

In Massachusetts the courts have never allowed the joint stock companies of other states to be treated as entities in court proceedings.

Taft v. Ward, 106 Mass. 518; Bodwell v. Eastman, 106 Mass. 525; Gott v. Dinsmore, 111 Mass. 45; Boston & A. R. Co. v. Pearson, 128 Mass. 445; Edwards v. Warren Linoline & Gasoline Works, 168 Mass. 564, 38 L.R.A. 791, 47 N. E. 502.

In the case of statutory joint stock companies, the law sometimes permits title to be taken in the name of the association, which may even have a seal for use on deeds of the property.

Eliot v. Himrod, 108 Pa. 569; Briar Hill Coal & I. Co. v. Atlas Works, 146 Pa. 290, 23 Atl. 326; Kountz's Appeal, 204 Pa. 432, 54 Atl. 316.

A member of a Pennsylvania joint stock company (like the stockholder of a corporation) would not be liable individually for the torts of the managers of the association, unless he should personally participate.

Whitney v. Backus, 149 Pa. 29, 24 Atl. 51; Hill v. Stetler, 127 Pa. 162, 13 Atl. 306, 17 Atl. 887.

An express company organized under the laws of New York as a joint stock company is sufficiently a corporation to sustain an indictment for the embezzlement of its funds as of the funds of a "corporation."

Kossakowski v. People, 177 Ill. 563, 53 N. E. 115.

Under the decisions of New York and Pennsylvania, in order to include these statutory joint stock companies and associations with corporations in a tax act, they must be mentioned in terms.

Hoey v. Coleman, 46 Fed. 221; People ex rel. Winchester v. Coleman, 133 N. Y. 279, 16 L.R.A. 183, 31 N. E. 96; People ex rel. Platt v. Wemple, 117 N. Y. 136, 6 L.R.A. 303, 2 Interns. Com. Rep. 735, 22 N. E. 1046; Sanford v. Gregg, 58 Fed. 620, 12 C. C. A. 525, 28 U. S. App. 313, 65 Fed. 151.

No tax is laid upon these trusts in Massachusetts, except the ordinary tax upon the property. This property is taxed to the trustees, like the property of any other trust. The beneficiaries have a purely equitable interest in the property, and no tax is laid upon their interest.

Hussey v. Arnold, 185 Mass. 202, 70 N. E. 87; Kinney v. Treasurer & Receiver General, 207 Mass. 368, — L.R.A.(N.S.) —, 93 N. E. 586.

It is to be noted, however, that, in one case originating in Massachusetts, statutory joint stock companies were treated as corporations for the purpose of taxation.

Oliver v. Liverpool & L. Life & F. Ins. Co. 100 Mass. 531, 10 Wall. 566, 19 L. ed. 1029.

Perhaps the most important statutory privilege given in certain states to the statutory joint stock company is the privilege of limited liability.

Oak Ridge Coal Co. v. Rogers, 108 Pa. 147; Stevens v. Philadelphia Ball Club, 142 Pa. 52, 11 L.R.A. 860, 21 Atl. 797; Staver & A. Mfg. Co. v. Blake, 111 Mich. 282, 38 L.R.A. 798, 69 N. W. 508.

Statutory joint stock companies possess other privileges which are unlike anything of which the department store trust can avail itself.

Citizens' Sav. Bank v. Vaughan, 115 Mich. 156, 73 N. W. 143; Rhoades v. Malta Vita Pure Food Co. 149 Mich. 236, 112 N. W. 940; Pittsburg Melting Co. v. Reese, 118 Pa. 355, 12 Atl. 362; Walker v. Keystone Brewing Co. 131 Pa. 546, 20 Atl. 309; Mercantile Nat. Bank v. Lauth, 143 Pa. 53, 21 Atl. 1017; Andrews Bros. Co. v. Youngstown Coke Co. 39 Fed. 353; Dickinson v. Matheson Motor Car Co. 161 Fed. 874; Park Bro. & Co. v. Harwi, 2 Kan. App. 629, 42 Pac. 939.

This trust has no capital stock represented by shares.

Hussey v. Arnold, 185 Mass. 202, 70 N. E. 87; Linnell v. Leon, 206 Mass. 71, 91 N. E. 895; Kinney v. Treasurer & Receiver General, 207 Mass. 368, — L.R.A.(N.S.) —, 93 N. E. 586.

This trust is not carrying on or doing business.

People ex rel. Parker Mills v. Tax Comrs.

23 N. Y. 242; Re Alabama & C. R. Co. 9 Blatchf. 390, Fed. Cas. No. 124.

Solicitor General **Lehman** argued the cause, and, with Mr. Henry E. Colton, filed a brief for the United States:

The common law is, just as much as the statutes, a part of the laws of a state; and the statutes are often nothing more than declarations of the common law.

Van Ness v. Hyatt, 13 Pet. 294, 298, 10 L. ed. 168, 170; Morsell v. First Nat. Bank, 91 U. S. 357, 359, 23 L. ed. 436, 437; Bucher v. Cheshire R. Co. 125 U. S. 555, 583, 584, 31 L. ed. 795, 798, 799, 8 Sup. Ct. Rep. 974; Phelps v. The City of Panama, 1 Wash. Terr. 523; Lycoming F. Ins. Co. v. Wright, 60 Vt. 517, 12 Atl. 103.

The Cushing Real Estate Trust and the department store trust are common-law joint stock companies.

Kossakowski v. People, 177 Ill. 568, 53 N. E. 115; 1 Bates, Partn. § 72, pp. 88, 89; Taber v. Breck, 192 Mass. 361, 78 N. E. 472; Howe v. Morse, 174 Mass. 499, 55 N. E. 213; 2 Cook, Corp. 6th ed. § 504, p. 1357.

Joint stock companies are frequently, if not usually, formed under deeds of settlement and declarations of trust.

Liverpool & L. Life & F. Ins. Co. v. Massachusetts (Liverpool & L. Life & F. Ins. Co. v. Oliver) 10 Wall. 566, 568, 19 L. ed. 1029, 1030; Taber v. Breck, 192 Mass. 361, 78 N. E. 472.

The claim that these companies have no capital stock is absolutely without merit.

Howe v. Morris, 174 Mass. 496, 55 N. E. 213.

The property of a company organized for the purpose of pursuing many activities may not improperly be said to be devoted to those activities, though from time to time some of those activities are not pursued.

People ex rel. Wall & H. Street Realty Co. v. Miller, 181 N. Y. 334, 73 N. E. 1102.

The maintenance and operation of an office building is the carrying on of a business.

People ex rel. Wall & H. Street Realty Co. v. Miller, 181 N. Y. 336, 73 N. E. 1102.

Mr. Justice **Day** delivered the opinion of the court:

These cases present facts differing from 184]those involved *in the consideration of the corporation tax cases, just decided. Flint v. Stone Tracy Co. [220 U. S. 107, ante, 389, 31 Sup. Ct. Rep. 342.]

In No. 448, the question is raised as to the right to lay a tax under this statute upon a certain trust formed for the purpose of purchasing, improving, holding, and selling lands and buildings in Boston, known as the Cushing Real Estate Trust. By the terms of the trust, the property was conveyed to certain trustees, who executed a trust agreement whereby the management of the property was vested in the trustees, who had absolute control and authority over the same, with right to sell for cash or credit, at public or private sale, and with full power to manage the property as they deemed best for the interest of the shareholders. The shareholders are to be paid dividends from time to time from the net income or net proceeds of the property, and twenty years after the termination of lives in being, the property to be sold, and the proceeds of the sale to be divided among the parties interested. The trustees were to issue 4,800 shares to the owners of the property, at $100 each, the owners to receive a number of shares equal to the value of the interest conveyed to the trustees. The shares were transferable on the books of the trustees, and on surrender of the certificate, and the transfer thereof in writing, a new certificate is to issue to the transferee. No shareholder had any legal title or interest in the property, and no right to call for the partition thereof during the continuance of the trust. The legal representatives of a shareholder are to succeed to the interest of a shareholder, the interest passing by operation of law. Provision is made for the termination of the trust by an instrument or instruments in writing, signed by not less than three fourths of the value of stock held by shareholders. Meetings of the shareholders are held at their discretion, or whenever requested in writing by five shareholders, or by shareholders owning not less than one tenth of the shares in value.

*The trust has a building, leasing it[185 to a single tenant. It also maintains and operates an office building with elevator service, janitor service, etc.

Case No. 496 involves what is known as a department store trust. It was created by deed, and formed for the purpose of purchasing and holding certain parcels of land in the city of Boston, and erecting a building thereon suitable for a department store. The land and buildings are leased to one tenant for a period of thirty years. The trust had transferable certificates issued to shareholders at the par value of $100 each. The trustees conduct the affairs of the trust, manage the property, and pay dividends when declared. The shareholders meet annually, and a majority of them have the power to elect and depose trustees, and to alter and amend the terms of the trust agreement. This trust also continues for certain lives in being and for

twenty years thereafter. Each of the trusts involved in these cases is in receipt of a net income exceeding $5,000.

Under the terms of the corporation tax act, corporations and joint stock associations must be such as are "now or hereafter organized under the laws of the United States, or of any state or territory of the United States, or under the acts of Congress applicable to Alaska or the District of Columbia."

The pertinent question in this connection is: Are these trusts organized under the laws of the state? As we have construed the corporation tax act in the previous cases (Flint v. Stone Tracy Co. ante, 389), the tax is imposed upon doing business in a corporate or quasi corporate capacity; that is, with the facility or advantage of corporate organization.

It was the purpose of the act to treat corporations and joint stock companies, similarly organized, in the same way, and assess them upon the facility in doing business which is substantially the same in 186]both forms of organization. *Joint stock organizations are not infrequently organized under the statute laws of a state, deriving therefrom, in a large measure, the characteristics of a corporation.

The language of the act ". . . now or hereafter organized under the laws of the United States," etc., imports an organization deriving power from statutory enactment. The statute does not say under the law of the United States, or a state, or lawful in the United States or in any state, but is made applicable to such as are organized under the laws of the United States, etc. The description of the corporation or joint stock association as one organized under the laws of a state at once suggests that they are such as are the creation of statutory law, from which they derive their powers and are qualified to carry on their operations.

A trust of the character of those here involved can hardly be said to be organized, within the ordinary meaning of that term; it certainly is not organized under statutory laws as corporations are. The difference between joint stock associations at common law and those organized under statutes is well recognized (2 Cook, Corp. § 505):

"There is an essential difference between a joint stock company as it exists at common law and a joint stock company having extensive statutory powers conferred upon it by the state within which it is organized. The latter kind of joint stock companies is found in England and in the state of New York. To such an extent have these statutory powers been conferred on joint stock companies that the only substantial difference between them and corporations is that the members are not exempt from liability as partners for the debts of the company."

The two cases now under consideration embrace trusts which do not derive any benefit from and are not organized *under[187 the statutory laws of Massachusetts. Joint Stock companies of the statutory character are not known to the laws of that commonwealth. Ricker v. American Loan & T. Co. 140 Mass. 346, 5 N. E. 284. These trusts do not have perpetual succession, but end with lives in being and twenty years thereafter.

Entertaining the view that it was the intention of Congress to embrace within the corporation tax statute only such corporations and joint stock associations as are organized under some statute, or derive from that source some quality, or benefit not existing at the common law, we are of opinion that the real estate trusts involved in these two cases are not within the terms of the act. In that view the decrees in both cases will be reversed and the same remanded to the Circuit Court of the United States for the District of Massachusetts, with directions to overrule the demurrers, and for further proceedings consistent with this opinion.

Reversed.

ARY E. ZONNE, Appt.,
v.
MINNEAPOLIS SYNDICATE, John De Laittre, Treasurer, and J. Frank Conklin, Assistant Treasurer.

(See S. C. Reporter's ed. 187–191.)

Internal revenue — excise on corporations — doing business.

A corporation organized for the purpose of owning and renting an office building, but which has wholly parted with the control and management of the property, and by the terms of a reorganization has disqualified itself from any activity in respect to it, its sole authority being to hold the title subject to a lease for 130 years, and to receive and distribute the rentals which may accrue under the terms of the lease, or the proceeds of any sale of the land, if it shall be sold, is not doing business within the meaning of the act of August 5, 1909 (36 Stat. at L. 11, 112–117, chap. 6, U. S. Comp. Stat. Supp. 1909, pp. 659, 844–849), § 38, imposing an excise upon the doing or the carrying on of business in a corporate or quasi corporate capacity.

[For other cases, see Internal Revenue, III., in Digest Sup. Ct. 1908.]

[No. 627.]

Submitted January 19, 1911. Decided March 13, 1911.

APPEAL from the Circuit Court of the United States for the District of Minnesota to review a decree sustaining a demurrer to and dismissing a bill filed by a stockholder to restrain the corporation and its officers from complying with the Federal corporation tax. Reversed.

The facts are stated in the opinion.

Mr. John R. Van Derlip submitted the cause for appellant. Mr. Burt F. Lum was on the brief:

The grant to the incorporators of being and acting as a corporation differs from the privilege or franchise vested in the corporation, in that the power to do business as a corporation is the right and privilege—or franchise—of the incorporators.

Memphis & L. R. R. Co. v. Railroad Comrs. (Memphis & L. R. R. Co. v. Berry) 112 U. S. 609, 619, 28 L. ed. 837, 841, 5 Sup. Ct. Rep. 299; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Ashley v. Ryan, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; Paul v. Virginia, 8 Wall. 181, 19 L. ed. 360; Horn Silver Min. Co. v. New York, 143 U. S. 305 312, 36 L. ed. 164, 167, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co. 86 Tex. 143, 22 L.R.A. 802, 24 S. W. 16.

Since franchises are property, and taxable as such (Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482; Central P. R. Co. v. California, 162 U. S. 91, 126, 40 L. ed. 903, 915, 16 Sup. Ct. Rep. 766; Horn Silver Min. Co. v. New York, 143 U. S. 305, 313, 36 L. ed. 164, 167, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403); since it must be admitted that a franchise has no value save that which arises from the use and enjoyment of it; and since it is impossible to force a distinction between that which gives value to the property and the property itself (Pollock v. Farmers' Loan & T. Co. 158 U. S. 625, 626, 628, 39 L. ed. 1121, 1122, 15 Sup. Ct. Rep. 912),—the conclusion is inevitable that a tax upon the use of a franchise is a tax upon the franchise itself, and, unapportioned, is invalid.

See also Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522.

When the liability of a corporation to pay a tax is made wholly dependent upon its earning a net income, and when the amount of the tax to be paid is wholly dependent upon the amount of such net income, it is impossible to escape the conclusion that, whatever it may be called, or under whatever law it may be imposed, the tax is an income tax, pure and simple.

Nicol v. Ames, 173 U. S. 515, 43 L. ed. 791, 19 Sup. Ct. Rep. 522.

The practical nature of the tax itself, its natural and reasonable effect, the criterion adopted to determine what corporations fall within the law, the measure of the burden in each case, all demonstrate to a certainty that the tax is in its character, and in the purpose of its authors an income tax, regardless of the language in which the statute is framed.

Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; State Freight Tax Case, 15 Wall. 232, 272, 21 L. ed. 146, 160; Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015.

While an excise law must operate with uniformity throughout the United States, such uniformity demands not alone that it shall apply to the specified subjects of taxation wherever found, but equally that it shall lay its burden with just and uniform proportion upon each subject within its embrace.

Head Money Cases (Edye v. Robertson) 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; United States v. Singer, 15 Wall. 111, 21 L. ed. 49; Home Ins. Co. v. New York, 134 U. S. 594, 607, 33 L. ed. 1025, 1032, 10 Sup. Ct. Rep. 593.

The Minneapolis Syndicate is not, and since January 1, 1907, has not been, a corporaton organized for profit.

Mundy v. Van Hoose, 104 Ga. 292, 30 S. E. 783; Gray v. Darlington, 15 Wall. 63, 21 L. ed. 45; Bennett v. Austin, 81 N. Y. 319; People ex rel. McMaster v. Niagara County, 4 Hill, 20.

It is not, and since January 1, 1907, it has not been, carrying on or doing business of any kind.

Roberts v. State, 26 Fla. 362, 7 So. 861; State v. Boston Club, 45 La. Ann. 585, 20 L.R.A. 185, 12 So. 895; Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co. 86 Tex. 153, 22 L.R.A. 802, 24 S. W. 16; Graham v. Hendricks, 22 La. Ann. 524; Harris v. State, 50 Ala. 127; Re Alabama & C. R. Co. 9 Blatchf. 390, Fed. Cas. No. 124; Holmes v. Holmes, 40 Conn. 117; 21 Am. & Eng. Enc. Law, 2d ed. p. 811, notes 6, 8; People v. Horn Silver Min. Co. 105 N. Y. 83, 11 N. E. 155; State v. Barnes, 126 N. C. 1063, 35 S. E. 605; State v. Anniston Rolling Mills, 125 Ala. 121, 27 So. 921; Goddard v. Chaffee, 2 Allen, 395, 79 Am. Dec. 796; Hickey v. Thompson, 52 Ark. 237, 12 S. W. 475; Shryock v. Latimer, 57 Tex. 677; Braeutigam v. Edwards, 38 N. J. Eq. 545.

Mr. John R. Van Derlip also filed a separate brief for appellant:

The carrying on or doing of business connotes something more than a single iso-

lated act; it implies continuity of activity along some given line.

Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; General Conference v. Berkey, 156 Cal. 466, 105 Pac. 411; Atlantic Postal Teleg.-Cable Co. v. Savannah, 133 Ga. 66, 65 S. E. 184; Smith v. Anderson, L. R. 15 Ch. Div. 247, 50 L. J. Ch. N. S. 39, 43 L. T. N. S. 329, 29 Week. Rep. 21.

The corporation must be organized for profit.

Smith v. Anderson, L. R. 15 Ch. Div. 247, 50 L. J. Ch. N. S. 39, 43 L. T. N. S. 329, 29 Week. Rep. 21.

Solicitor General **Lehman** submitted the cause for the United States:

The tax is an excise to which a corporation is subjected with respect to the business done by it, measured by its income from all sources, as it was in Pacific Ins. Co. v. Soule, 7 Wall. 433, 19 L. ed. 95, and Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack) 100 U. S. 595, 25 L. ed. 647, and this, in no event nor to any extent, makes the tax one upon property, for a corporation is organized to do something, and not simply to exist, and it holds its property not in mortmain, but as a means of, or an aid to, the accomplishment of that which it was organized to do. The activity of the company is not made the measure of the tax, except as that may manifest itself in the income; and, on the other hand, that sloth is not made a reason for deduction from the measure cannot be a valid objection to the propriety of that measure.

Mr. Justice **Day** delivered the opinion of the court:

This case involves the validity of the corporation tax act just passed upon in No. 407, Flint v. Stone Tracy Co. [220 U. S. 107, ante, 389, 31 Sup. Ct. Rep. 342.]

The case presents a peculiarity of corporate organization and purpose not involved in the cases just decided. The Minneapolis Syndicate, as the allegations of the bill, 190]*admitted by the demurrer, show, was originally organized for and engaged in the business of letting stores and offices in a building owned by it, and collecting and receiving rents therefor. On the 27th of December, 1906, the corporation demised and let all of the tracts, lots, and parcels of land belonging to it, being the westerly half of block 87 in the city of Minneapolis, to Richard M. Bradley, Arthur Lyman, and Russell Tyson, as tustees, for the term of 130 years from January 1, 1907, at an annual rental of $61,000, to be paid by said lessees to said corporation. At that time the corporation caused its articles of incorporation, which had theretofore been those of a corporation organized for profit, to be so amended as to read:

"The sole purpose of the corporation shall be to hold the title to the westerly one half of block 87 of the town of Minneapolis, now vested in the corporation, subject to a lease thereof for a term of 130 years from January 1, 1907, and, for the convenience of its stockholders, to receive, and to distribute among them, from time to time, the rentals that accrue under said lease, and the proceeds of any disposition of said land."

As we have construed the corporation tax law (Flint v. Stone Tracy Co. supra), it provides for an excise upon the carrying on or doing of business in a corporate capacity. We have held in the preceding cases that corporations organized for profit under the laws of the state, authorized to manage and rent real estate, and being so engaged, are doing business within the meaning of the law, and are therefore liable to the tax imposed.

The corporation involved in the present case, as originally organized and owning and renting an office building, was doing business with the meaning of the statute as we have construed it. Upon the record now presented we are of opinion that the Minneapolis Syndicate, after the demise of the property and reorganization of the corporation, *was not engaged in doing busi-[191 ness within the meaning of the act. It had wholly parted with control and management of the property; its sole authority was to hold the title subject to the lease for 130 years, to receive and distribute the rentals which might accrue under the terms of the lease, or the proceeds of any sale of the land, if it should be sold. The corporation had practically gone out of business in connection with the property, and had disqualified itself by the terms of reorganization from any activity in respect to it. We are of opinion that the corporation was not doing business in such wise as to make it subject to the tax imposed by the act of 1909 [36 Stat. at L. 112, chap. 6, § 38, U. S. Comp. Stat. Supp. 1909, p. 844]. Holding this view, we think the court below erred in sustaining the demurrer to the bill. The decree of the court below is therefore reversed and the cause remanded to the Circuit Court of the United States for the District of Minnesota, with directions to overrule the demurrer, and for further proceedings consistent with this opinion.

Reversed.

EX PARTE: IN THE MATTER OF THE STATE OF OKLAHOMA, by Charles N. Haskell, Governor, etc., Petitioner.

(See S. C. Reporter's ed 191–210.)

Prohibition — adequacy of other remedies.

Prohibition against proceedings in the Federal circuit court to enjoin the prosecution of search-and-seizure proceedings instituted in the state courts, under Okla. Sess. Laws 1907–08, chap. 69, against intoxicating liquors shipped into the state, will not be granted by the Federal Supreme Court, since adequate relief is afforded by the full right of review in the latter court and in the proper circuit court of appeals by appeal or certiorari.

[For other cases see Prohibition, II., in Digest Sup. Ct. 1908.]

[No. 9, Original.]

Argued April 4 and 5, 1910. Ordered for argument before a full bench May 31, 1910. Reargued February 23, 1911. Decided April 3, 1911.

PETITION for Prohibition against proceedings in the Circuit Court of the United States for the Eastern District of Oklahoma to enjoin the prosecution of search-and-seizure proceedings instituted in the state courts against intoxicating liquors shipped into the state. Rule discharged and prohibition denied.

The facts are stated in the opinion.

Messrs. **Fred S. Caldwell** and **Joseph W. Bailey** argued the cause and filed a brief for petitioner:

The cases at bar are proper ones for the issuance of writs of prohibition.

Mayo v. James, 12 Gratt. 23; People ex rel. Hudson v. Superior Ct. Judge, — Mich. —, 2 N. W. 919; State ex rel. Townsend v. Ward, 70 Minn. 58, 72 N. W. 825; Planters' Ins. Co. v. Cramer, 47 Miss. 202; Johnston v. Hunter, 50 W. Va. 53, 40 S. E. 448; State v. Road Comrs. 1 Mill, Const. 57, 12 Am. Dec. 596; Washburn v. Phillips, 2 Met. 298; Maurer v. Mitchell, 53 Cal. 291; People ex rel. Taylor v. Election Comrs. 54 Cal. 404, 406; Camron v. Kenfield, 57 Cal. 553; State ex rel. Hahn v. Young, 29 Minn. 523, 9 N. W. 738; People ex rel. Patrick v. Fitzgerald, 73 App. Div. 339, 76 N. Y. Supp. 868; State ex rel. De Puy v. Evans, 88 Wis. 255, 60 N. W. 435.

Mr. **Joseph S. Graydon** argued the cause, and, with Messrs. Lawrence Maxwell and E. G. McAdams, filed a brief as *amici curiæ*:

The writ will not issue unless it clearly appears that the inferior court is about to exceed its jurisdiction.

Re Fassett, 142 U. S. 479, 486, 35 L. ed. 1087, 1089, 12 Sup. Ct. Rep. 295; Re Engles, 146 U. S. 357, 36 L. ed. 1004, 13 Sup. Ct. Rep. 281; Re Morrison, 147 U. S. 14, 37 L. ed. 60, 13 Sup. Ct. Rep. 246; Re Rice, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149; Re New York & P. R. S. S. Co. 155 U. S. 523, 39 L. ed. 246, 15 Sup. Ct. Rep. 183; Smith v. Whitney, 116 U. S. 167, 176, 29 L. ed. 601, 603, 6 Sup. Ct. Rep. 570.

Want of jurisdiction must not appear from facts *dehors* the record.

Ex parte Easton, 95 U. S. 68, 77, 24 L. ed. 373, 376; Re Cooper, 143 U. S. 472, 36 L. ed. 232, 12 Sup. Ct. Rep. 453; Re Fassett, 142 U. S. 479, 484, 35 L. ed. 1087, 1088, 12 Sup. Ct. Rep. 295; Re Huguley Mfg. Co. 184 U. S. 297, 46 L. ed. 549, 22 Sup. Ct. Rep. 455; Taylor, Jurisdiction, §§ 334, 335.

Mr. **S. T. Bledsoe** argued the cause for respondent. Messrs. Joseph M. Bryson, Clifford L. Jackson, William R. Allen, A. B. Browne, and James Hagerman filed a brief for respondent.

Mr. Chief Justice **White** delivered the opinion of the court:

On March 24, 1908, the legislature of Oklahoma enacted a statute, known as the Billups bill, providing for a state agency for the dispensing of liquors under certain circumstances, but not for use as a beverage, and prohibiting generally the manufacture, sale, bartering, giving away, or otherwise furnishing liquor within the state. Session Laws Oklahoma, 1907–1908, chap. 69, p. 605; Comp. Laws of 1909, §§ 4180 et seq. Sections 5 and 6 of article 3 of the statute, §§ 4184 and 4185, Comp. Laws of 1909, provide in substance that any judge of a district or county court or justice of the peace, upon a showing of probable cause, may issue search-and-seizure warrants directed to any officer of the county, to seize liquors under the circumstances therein mentioned, and provide for a hearing as to whether such liquors are being unlawfully held, etc. The statute also makes provision for the forfeiture of liquors and other personal property employed in unlawfully trafficking in liquors.

*The state of Oklahoma, through [199 its governor, is here complaining that "the circuit court of the United States for the eastern district of Oklahoma and Ralph E. Campbell, the district judge of said district, sitting as judge of said circuit court, have, in direct violation of the 11th Amendment to the Constitution of the United States, and contrary to and in direct violation of § 720 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 581), assumed jurisdiction" in nine suits in equi-

ty, brought in said court, and the number of each case and the parties thereto are stated. The particular proceedings had in each case are not set out, but it is, in substance, alleged that in each the relief sought was the enjoining of the prosecution of search-and-seizure proceedings instituted under the statute above referred to in the courts of Oklahoma, and the enjoining of the state "from prosecuting any action in its said courts, under and pursuant to said §§ 4184 and 4185, supra, of petitioner's said laws, against any intoxicating liquors, in all cases where it may become necessary to try and determine any one or more" of the issues set out in the margin.†

200] *It is averred that the relief sought in the said equity suits has been granted, and the state and its officials are wrongfully prevented from enforcing the statute, "and that the state of Oklahoma has suffered and is suffering great and irreparable injury, from which said petitioner has no adequate remedy at law," and "that said acts of said respondents constitute and are an unlawful and unwarranted interference with petitioner, the state of Oklahoma, in the exercise of its governmental functions and sovereign powers in connection with the enforcement of petitioner's said prohibition laws.

In substance, it was prayed in the petition that the further prosecution of the suits and the enforcement of the various restraining orders and temporary injunctions entered therein should be prohibited, as well as any further interference with the prosecution in the state courts of search-and-seizure process under the law in question.

As a return to a rule to show cause, respondent judge has filed an answer, containing copies of the file papers in the equity suits referred to in the petition. The following facts are taken from the showing thus made:

Prior to the fall of 1908, under the assumed authority of search warrants issued for alleged violations of the foregoing statute, numerous consignments from other states than Oklahoma to residents of Oklahoma of liquor had been taken from the cars or depots at stations within the state of Oklahoma of the Missouri, Kansas, & Texas Railway Company, while such property was in the custody of the company, before the completion of the interstate transportation by delivery to the consignees. Alleging diversity of citizenship, and a continuous violation of *rights protect-[201 ed by the Constitution of the United States, the unlawfulness of these seizures and the irreparable character of the injury done and likely to be occasioned by further threatened seizures, the railway company commenced, on September 9, 1908, the first of the equity suits referred to in the petition. Twelve persons were made defendants, as having been concerned either in the obtaining of the various search warrants and their service, or because in possession of property seized, or on account of advising and encouraging the commission of the alleged trespasses. A decree for the restoration of eighteen specified consignments, alleged to have been unlawfully seized, was prayed, as also an injunction against future seizures. A temporary restraining order was granted; and, ultimately, a stipulation was entered into for the return of the property seized, and for its redelivery to the defendants, or the payment to them of its value in the event the litigation should terminate adversely to the railway company. On September 16, 1908, the temporary restraining order was, by agreement of the parties, continued in force until a time to be fixed by consent for the hearing of an application for a temporary injunction. No further proceedings were had in the case.

Four of the equity suits referred to in the petition—three filed December 17, 1909,

†(a) The issue as to whether or not the particular intoxicating liquor in question was, at the time of its seizure, a bona fide shipment made to a person within petitioner's borders from a place outside of petitioner's borders, which said shipment had not been delivered by the interstate carrier under the contract of interstate shipment to the consignee at the place of destination.

(b) The issue as to whether or not the particular intoxicating liquor in question had been shipped from a point outside of petitioner's borders to a place within petitioner's borders, in violation of § 3449 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 2277).

(c) The issue as to whether or not the particular intoxicating liquor in question had been shipped from a place outside of petitioner's borders to a place within petitioner's borders, in violation of any one or more of §§ 238, 239, and 240 of the act of Congress of March 4, 1909 (35 Stat. at L. 1136, 1137, chap. 321, U. S. Comp. Stat. Supp. 1909, p. 1464).

(d) The issue as to whether or not the particular intoxicating liquor in question, although shipped from a place outside of petitioner's borders to a place within petitioner's borders, and in the possession of the interstate carrier, undelivered under the contract of interstate shipment at the time the seizure was made, is "adulterated" or "misbranded" within the meaning of the act of congress of June 30, 1906, chapter 3915, 34 Stat. at L. 768, U. S. Comp. Stat. Supp. 1909, p. 1187, commonly known as the pure food and drug act.

and one on January 18, 1910—were afterwards commenced in the same court by the railway company. The defendants were several individuals alleged to have actively participated in the seizure at various stations on the line of the company's road, like in character to the seizure complained of in the prior suit. Such seizures were averred to have been made under the assumed authority of the prohibition statute heretofore referred to. In one of the suits so commenced on December 17, 1909, a stipulation was filed to the effect that the seizures complained of had been made by the defendants acting as constables and un-[202 der the authority of a *search warrant, a copy of which was attached. In each of the four cases, after hearing counsel for the respective parties, a temporary restraining order was granted, prohibiting future interference with interstate shipments before delivery to consignees, and ordering the restoration of the property alleged to have been seized, except that in one case, a portion of the seized property was ordered to be safely and securely kept by the defendants until the further order of the court. In each of the cases, following the allowance of a temporary injunction, a demurrer to the bill was filed, alleging in substance that the court was without jurisdiction to hear and determine the controversy, "and that the relief prayed for is sought in direct violation of the 7th and 11th Amendments of the Constitution of the United States, and in direct violation of § 720 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 581);" and that the bill of complaint "is wholly without equity." These demurrers have not been passed upon.

In the interval between the commencement of the first and the last of the suits just referred to, four dealers in liquors and consignors of shipments which had been taken from the custody of the railway company while in course of interstate transportation to consignees in Oklahoma, under the assumed authority of the statute in question, also commenced the other suits in equity referred to in the petition. The defendants in these suits, designated by their official titles, were the state dispensary agent and the sheriff, constables, or other officials who had participated in the seizures complained of in the various bills of complaint, as also the person who held possession of the property. The prayer of each bill was for the allowance of temporary and perpetual injunctions restraining future seizures of liquors shipped by the complainant and consigned to bona fide consignees in Oklahoma by railroad until the interstate transportation had terminated by delivery of the property to the consignees. A temporary *restraining order was issued in[203 each case. Thereafter, in all of these cases, a demurrer was filed to each bill upon the grounds which were made the basis of the demurrers filed in the cases commenced by the railway company, and upon the following additional ground: "That it appears from said complainants' bill of complaint that their business operations, which they seek to have protected by decree of this honorable court, are carried on and conducted in direct violation of the penal laws of the United States of America; to wit, in violation of §§ 238, 239, and 240 of an act of Congress of March 4, 1909. 35 Stat. at L. 1136, 1137, chap. 321, U. S. Comp. Stat. Supp. 1909, p. 1464."

The temporary injunctions issued in the suits brought by the railway company were substantially alike, and restrained the defendants and each of them, their agents and employees, "from entering the cars, depots, or other premises of the complainant, Missouri, Kansas, & Texas Railway Company, and from taking therefrom intoxicating liquors shipped from points outside of the state of Oklahoma to points and consigned to persons within the eastern district of the state of Oklahoma, and that said defendants, and each of them, their agents and employees, be restrained from in anywise interfering with complainant in its handling and delivery of such interstate shipments of intoxicating liquors, and from inciting, aiding, abetting, or advising other persons so to do." The defendants were also enjoined from taking any steps looking to the forfeiture of the seized property.

The temporary injunctions issued in the suits brought by the foreign liquor houses were also substantially alike, and in each the defendants, their agents, etc., were "enjoined and restrained until further order of this court, from seizing or causing to be seized, either directly or indirectly, or ordering or directing any person to seize, any intoxicating liquors shipped by the complainant Thixton from the state of Kentucky to actual bona fide consignees within *the eastern district of the state of Ok-[204 lahoma, while the same is in the possession of the common carrier, and before the same have been delivered, either actually or constructively, to such consignees." In two of the cases commenced by shippers, however, the following proviso was inserted in the injunction order:

"Provided, however, that this order shall not apply to any liquors shipped in violation of § 3449 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 2277), or to liquors shipped in violation of §§ 238, 239, and 240, of the act of Con-

gress of March 4, 1909 (35 Stat. at L. 1136, 1137, chap. 321, U. S. Comp. Stat. Supp. 1909, p. 1464), or to any such liquors which are adulterated or misbranded within the meaning of the act of Congress of June 30, 1906 (chap. 3915, 34 Stat. at L. 768, U. S. Comp. Stat. Supp. 1909, p. 1187), commonly known as the pure food and drug act, or to any such liquors shipped in violation of any other act of Congress."

In one of the shippers' cases the injunction order also contained a provision prohibiting action by the defendants looking to the forfeiture of any of the liquors referred to in the complaint as having been seized by such defendants.

This application for a writ of prohibition was made practically cotemporaneous with the filing of the various demurrers above referred to. In substance, the reasons which caused the respondent judge to assume jurisdiction over the causes and to award the relief against the defendants therein, of which the state now complains, are not only stated in the return, but are expounded in an opinion delivered in one of the cases which is made a part of the return. These reasons are, in substance, made manifest by two excerpts,—one from the opinion referred to, and the other from the return itself, as follows:

"Under the facts as stipulated in this case, the shipments seized were still in the hands of the carrier, were interstate commerce, and had not become subject to the laws of the state. If it be contended that, 205]in enacting the *search-and-seizure laws referred to, the legislature intended that they should apply to such interstate commerce, then the answer is that, to that extent, the law is invalid, because it is made to apply to a subject within the exclusive jurisdiction of Congress. If, on the other hand, it is contended that such was not the intention of the legislature, then the state courts are exceeding the law in issuing such search-and-seizure warrants. They are, in my judgment, no protection to the officer who seeks by them to justify his acts thereunder, and to enjoin him from executing them is not a violation of § 720 of the Revised Statutes. The authority of the state does not attach to shipments of the character involved in this case until the delivery to the consignee.

. . . . . .

"If these seizures are permitted, complainants will either have to abandon their property so seized, or defend a multiplicity of suits, the number of which will be determined only by the zeal of the enforcement officers in their interference with interstate commerce. As the record now stands, the complainants, of course, must eventually win in such suits, for upon a showing to the state court that the property seized was still interstate commerce, undelivered to the consignee, it would have to be ordered returned to the complainants. It is not conceived, however, that such a course presents that adequate legal remedy which precludes the action of a court of equity. Nor is it conceived that in granting the temporary injunctions complained of, respondent is violating the 11th amendment to the Constitution, or § 720 of the Revised Statutes of the United States, because the injunction may prevent one or more of the defendants from thereafter causing such warrants of search and seizure to issue, or from executing such warrants after issuance."

It is elaborately argued by counsel for the state, first, *that the in-[206 junction suits complained of were, in effect, directed against the state, and therefore were barred by the 11th Amendment; second, that the proceedings prosecuted under §§ 4184 and 4185 of the 1909 Compiled Laws of Oklahoma are actions *in rem*, brought under a valid state law, in courts of competent jurisdiction, and therefore the injunctions restraining the enforcement of the search warrants were, in substance and effect, injunctions staying proceedings in the courts of the state, in violation of § 720 of the Revised Statutes. And, as supporting this last contention, it is argued, "the effect of the injunctions here complained of is to prevent and prohibit the 'judicial power' of the state of Oklahoma being invoked, even by the state itself, for the purpose of judicially determining the status of any particular quantity of intoxicating liquor found within its borders, in so far as questions touching its status as interstate commerce are concerned."

Counsel who oppose the allowance of the writ urge numerous reasons why the application should be denied, in part as follows: Relief, it is claimed, should be refused because it is sought to review in one action the proceedings in different causes involving different parties and issues. Attention is called to the fact that, in the first of the suits commenced by the railway company, no jurisdictional objection was raised. It is argued that the bills of complaint filed in the various suits commenced by the railway company do not show on their face that the suits were against state officers, or that injunctions were sought to stay proceedings in the state courts; and that, in any event, the primary purpose of the bills was to restrain future seizures of interstate shipments before delivery to the consignees. As

to the suits brought by the four liquor houses, it is urged that § 720 of the Revised Statutes was not violated, as the relief granted was only against future seizures, and the suits were against state officials to 207]prevent *them from enforcing against the plaintiffs a state statute which, whether valid or not on its face, was invalid as to plaintiffs under the state of facts set forth in the bills on which the circuit court acted. It is additionally urged that the granting of the writ would enable local officers to interfere with the operation of the revenue laws and other laws of the United States, as the state of Oklahoma claims the right, upon any hearing which may be had in respect to the validity of seizures of the character of those under consideration, to determine whether the particular shipments were made in violation of any statute of the United States; and although for such violations the property would be subject to be forfeited to the United States, yet if it is found by the state court that the property had been shipped in violation of a law of the United States, the goods would be adjudged not to have been legitimate subjects of interstate commerce, and would be forfeited to the state. Further, it is urged that continuous seizures of liquors in transit by state authorities for the purpose of ascertaining whether they are or may be obnoxious to the police laws of the state is in itself an unconstitutional burden placed upon interstate commerce, and decisions of this court are cited as supporting the proposition. In addition, it is insisted that the law in question has been construed by the supreme court of Oklahoma not to be applicable to interstate shipments of intoxicating liquors until their arrival at destination and delivery to the consignees; and because of such construction, it is urged, it clearly results that "any officer or person seeking to seize or cause to be seized intoxicating liquors under the provisions of said act, before their arrival at destination and delivery to consignee, acts entirely outside of and beyond the scope of said law, and is a naked trespasser, and may be enjoined."

But we do not think we are called upon to test the accuracy of these as well as oth-208]er, conflicting contentions, *because we are of the opinion that, consistently with the orderly course of judicial proceeding, we may not pass upon them, since we cannot do so without disregarding the plain statutory provisions providing means for reviewing the action of the court which is complained of, and which, if availed of, would afford complete and adequate remedy.

The principle under which the power to issue the extraordinary writ of prohibition may be exerted was thus stated in Re Huguley Mfg. Co. 184 U. S. 301, 46 L. ed. 551, 22 Sup. Ct. Rep. 455:

"It is firmly established that where it appears that a court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, a party who has objected to the jurisdiction at the outset, and has no other remedy, is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, the granting or refusal of the writ is discretionary. Re Rice, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149. And that the writ of mandamus cannot be used to perform the office of an appeal or writ of error, and is only granted as a general rule where there is no other adequate remedy. Re Atlantic City R. Co. 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208."

It will become apparent from even a merely superficial analysis that, consistently with the doctrine just referred to, the facts which we have stated afford no basis for the allowance of the writ of prohibition as prayed. This is obvious because, first, an adequate remedy was provided by law in each case, even before final judgment, for reviewing and correcting in the circuit court of appeals any error committed by the court below in awarding interloeutory relief by injunction; second, because after final decree, if the cases so ultimated, adequate remedy existed at the election of the defendants to come directly to this court upon the question alone of the jurisdiction of the *court below as Federal court over the[209 respective causes; third, because even if these remedies were not resorted to, and the cases had gone to final decrees against the defendants, and they had chosen to appeal the whole case to the circuit court of appeals, and that court had decided against them, there would be either a right in this court to review by appeal, or discretionary power, if it was deemed that the questions involved warranted such action, to bring the whole case up for review by the writ of certiorari. Bearing these considerations in mind, it results that relief by the extraordinary remedy of prohibition, if here granted, could not possibly rest upon the ground that there was otherwise no adequate means of relief, but would have to be placed upon the assumption that there was a right to the writ, even although the party invoking it had declined to avail himself of the otherwise complete and adequate measures of relief which would have been afforded by following the orderly and regular course of judicial proceeding.

In view of the identity of the principles which govern the right to invoke the extraordinary remedy of mandamus to correct an unlawful assumption of jurisdiction, and those which control the power to issue the writ of prohibition for the same purpose, it was perhaps unnecessary to consider the subject from an original point of view, since the matter is settled by authority. Quite recently in Re Harding, 219 U. S. 363, ante, 252, 31 Sup. Ct. Rep. 324, the whole subject was reviewed, and it was held that discretion to issue the writ of mandamus would not be exerted to review a question of jurisdiction where there was otherwise adequate remedy provided by statute for the review of errors in that respect, asserted to have been committed by a trial court. Besides, a previous decision which was reviewed and reaffirmed in the Harding Case so completely controls the issue here presented as to leave no room for contention on the subject. The case is Ex parte Nebraska, 210]209 *U. S. 436, 52 L. ed. 876, 28 Sup. Ct. Rep. 581. That case was this: The state of Nebraska was one of the plaintiffs in a cause removed from a state court into a circuit court of the United States on the ground that there was a separable controversy between the other plaintiffs in the cause and the defendant. The circuit court having denied a motion to remand, the state of Nebraska applied to this court for a writ of mandamus to compel the remanding of the cause, averring that it was plain from the record that it was the real, and, in substance, the only, party plaintiff in the removed cause. The application for the writ, however, was denied upon the ground that the order overruling the motion to remand was subject after final judgment to be reviewed by appeal, and therefore was not properly reviewable by the writ of mandamus.

Rule discharged and prohibition denied.

EX PARTE: IN THE MATTER OF THE STATE OF OKLAHOMA, by Charles N. Haskell, Governor, etc., Petitioner.

(See S. C. Reporter's ed. 210-214.)

This case is governed by the decision in Ex parte Oklahoma, ante, 431.

[No. 10, Original.]

Argued April 4 and 5, 1910. Ordered for argument before a full bench, May 31, 1910. Reargued February 23, 1911. Decided April 3, 1911.

PETITION for Prohibition against proceedings in the Circuit Court of the United States for the Western District of Oklahoma to enjoin the prosecution of search-and-seizure proceedings instituted in the state courts against intoxicating liquors shipped into the state. Rule discharged and prohibition denied.

The facts are stated in the opinion.

Messrs. **Fred S. Caldwell** and **Joseph W. Bailey** argued the cause and filed a brief for petitioner. For their contentions, see their brief as reported in Ex parte homa, ante, 431.

Mr. **Joseph S. Graydon** argued the cause, and, with Messrs. Lawrence Maxwell and E. G. McAdams, filed a brief as *amici curiæ*. For their contentions, see their brief as reported in Ex parte Oklahoma, ante, 431.

Mr. **S. T. Bledsoe** argued the cause, and, with Messrs. J. R. Cottingham, Aldis B. Browne, Alexander Britton, and Evans Browne, filed a brief for respondent:

An adequate remedy exists by appeal, and the extraordinary relief sought by prohibition should, for that reason, be denied.

Re Rice, 155 U. S. 402, 39 L. ed. 200, 15 Sup. Ct. Rep. 149; Re New York & P. R. S. S. Co. 155 U. S. 531, 39 L. ed. 249, 15 Sup. Ct. Rep. 183; Re Huguley Mfg. Co. 184 U. S. 297, 46 L. ed. 549, 22 Sup. Ct. Rep. 455.

Messrs. Joseph M. Bryson, Clifford L. Jackson, William R. Allen, A. B. Browne, and James Hagerman also filed a brief for respondent.

Mr. Chief Justice **White** delivered the opinion of the court:

In this case it is asked that a writ of prohibition be issued, restraining District Judge Cotteral, sitting as judge of the circuit court for the western district of Oklahoma, from further proceeding in seven separate actions commenced in said court,—two brought by railroad companies and five by shippers,—like in character to the cases which formed the basis of the application made in No. 9, Original. The grounds upon which the right to the writ in this case is based are also substantially the same as in the other.

Of the seven suits referred to, the first was commenced by the Atchison, Topeka, & Santa Fe Railway Company in August 1908; the second by the Missouri, Kansas, & Texas Railway Company in October, 1908; and the remaining cases were commenced in October and November, 1909.

The bill of the Atchison road, among other things, alleged the taking posses-

sion by the defendants of more than forty-three separate interstate shipments of intoxicating liquors while in the custody of the railway company, and before delivery to the consignee, and the threatened confiscation of the property. In both of the suits commenced by the railway companies no jurisdictional objection was raised at any time in the circuit court. Not only was this so, but in a cross complaint incorporated with answers filed in each case, one of the defendants, counsel to the governor of Oklahoma, prayed relief against the railway companies, upon the theory that, by the delivery of interstate shipments to persons who intended to use the [212]*same in violation of the state prohibition law, the "complainant thereby creates a public nuisance in said state." In the five suits commenced by foreign liquor dealers, however, demurrers "for lack of jurisdiction and equity" were filed, and in all but one lengthy answers were filed. In two of the cases numerous affidavits were filed and temporary orders were refused, whereupon temporary bills were filed and temporary injunctions were granted. Proceedings in contempt were also instituted in several of the cases for alleged violations of the injunctions. Moreover, in several of the cases the demurrers were heard and overruled, while in the others no action was taken subsequent to the filing of the answers or demurrers. In certain of the cases, also, affidavits were filed to the effect that goods which had been ordered returned by a justice of the peace upon the ground that they were exempt from seizure because the interstate transportation had not ended were again seized upon search warrants issued by another justice.

In his return to the rule to show cause, the district judge, among other things, said:

"The jurisdiction of the circuit court in these cases is supported in general by the averments in the pleadings of the complainants that the opposing parties are citizens of different states, and that the respective amounts in dispute exceed $2,000; and furthermore, that the cases arise under the Constitution of the United States by involving acts of alleged interference with transactions in interstate commerce and the question of the right to protection of the same. The equity jurisdiction of the court is invoked by the complainants on the ground of the necessity of relief to prevent irreparable injury and avoid a multiplicity of suits.

"The pleadings disclose that the complainants allege transactions by way of shipment of intoxicating liquors from other states to points in Oklahoma, and assert the *right to the transportation and deliv-[213 ery of the same to consignees in the state, as commodities of interstate commerce, and charge actual and threatened seizures thereof by the defendants before delivery within the state, not remediable at law. Wherefore, the amount in dispute being found sufficient, the jurisdiction of the court was held to arise for the purpose of hearing and investigating the grievances complained of and any defense which might be interposed, and to grant or deny relief as the facts and the law might warrant. Although the defendants sought to justify their conduct upon the ground that they were state officers, and represented the state in discharging their duties, the court was of the opinion that jurisdiction existed to proceed, consistently with the 11th Amendment to the Federal Constitution.

. . . . . .

"The question made upon the jurisdiction of the court was regarded as one pertaining to the merits rather than to original jurisdiction, and as instituting the inquiry whether, in the exercise of jurisdiction the defendants might be relieved of the suits on the ground that they represented the state. But it was believed that before the defendants could succeed with that defense, it was encumbent on them to justify their conduct under a valid law of the state, and that this they could not do, if the liquors they were seeking to seize and confiscate were undelivered commodities of interstate commerce.

. . . . . .

"With respect to the objection founded on § 720 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 581), it appears that the orders by their terms do not stay proceedings or direct the restoration of property, but restrain seizures. It was the opinion of the circuit court that the statute does not limit the Federal judicial power so as to forbid injunctions against future proceedings. But aside from this, if the orders were not erroneous, they do not affect *the seizure[214 of property subject to the police power of the state.

It is manifest that the reasons which led to the refusal to issue the writ in No. 9, Original, just decided [220 U. S. 191, ante, 431, 31 Sup. Ct. Rep. 426] are applicable to and control this case, and the order therefore will be—rule discharged and prohibition denied.

MARIANO MARTINEZ, Administrator of Francisco Martinez, Deceased, Appt.,
v.
INTERNATIONAL BANKING CORPORATION. (No. 79.)

MARIANO MARTINEZ, Administrator of Francisco Martinez, Deceased, Appt.,
v.
INTERNATIONAL BANKING CORPORATION. (No. 80.)

(See S. C. Reporter's ed. 214-224.)

Appeal — amount in dispute — counterclaim.

1. The value of a mortgaged vessel and the profits from its use, demanded in a dismissed counterclaim in a suit to foreclose the mortgage, cannot be added to the amount of the mortgage debt in determining the value of the matter in controversy, for the purpose of an appeal to the Federal Supreme Court from the supreme court of the Philippine Islands.

[For other cases, see Appeal and Error, 402-412, in Digest Sup. Ct. 1908.]

Appeal — amount in dispute — consolidated suits.

2. Two suits separately commenced, but tried together for convenience, will not be treated as consolidated, for the purpose of increasing the amount in dispute so as to sustain an appeal to the Federal Supreme Court from the supreme court of the Philippine Islands, where the understanding of court and counsel below was that there was in fact no consolidation.

[For other cases, see Appeal and Error, I. f, in Digest Sup. Ct. 1908.]

Note.—On the jurisdiction of Federal courts as affected by the amount in dispute —see notes to Rich v. Gray, 2 L.R.A. 225; Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459; and O. J. Lewis Mercantile Co. v. Klepner, 100 C. C. A. 288.

As to what judgments or decrees are final for purposes of review—see notes to Brush Electric Co. v. Electric Improv. Co. 2 C. C. A. 379; Central Trust Co. v. Madden, 17 C. C. A. 238; Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co. 28 C. C. A. 482; Gibbons v. Ogden, 5 L. ed. U. S. 302; and Schlosser v. Hemphill, 49 L. ed. U. S. 1001.

Appellate jurisdiction of Federal Supreme Court over supreme court of Philippine Islands.

This jurisdiction, under the act of July 1, 1902, § 10, extends to a revision, by appeal or writ of error, in cases in which the Constitution or any statute, treaty, right, or privilege of the United States is involved, or in which the value in controversy exceeds $25,000, or in which the title or possession of real estate exceeding in value that amount, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; the procedure to be the same as that governing the review of judgments or decrees of the circuit courts. This provision is carried forward in the New Judicial Code as § 248, in which the only changes are the substitution, in the conformity clause, of "district courts," instead of "circuit courts," which are abolished by that Code, and by inserting in the same clause the words "within the same time."

Mode of review.

Appeal, and not writ of error, is the proper method of obtaining a review in the Supreme Court of the United States of a final order of the supreme court of the Philippine Islands in a habeas corpus case, under the act of July 1, 1902, § 10, providing that judgments and decrees of the latter court can only be reviewed "in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the circuit courts." Fisher v. Baker, 203 U. S. 174, 51 L. ed. 142, 27 Sup. Ct. Rep. 135, 7 A. & E. Ann. Cas. 1018.

Writ of error is the proper mode of bringing up to the Federal Supreme Court for review a judgment of the supreme court of the Philippine Islands in proceedings for the registration of land. Cariño v. Philippine Islands, 212 U. S. 449, 53 L. ed. 594, 29 Sup. Ct. Rep. 334; Tiglao v. Philippine Islands, 215 U. S. 410, 54 L. ed. 257, 30 Sup. Ct. Rep. 129; Jover y Costas v. Philippine Islands, 221 U. S. 623, post, 884, 31 Sup. Ct. Rep. 664.

The court said in Cariño v. Philippine Islands supra: "The proceeding for registration is likened to bills in equity to quiet title, but it is different in principle. It is a proceeding *in rem* under a statute of the type of the Torrens act, such as was discussed in Tyler v. Registration Ct. Judges, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812. It is nearer to law than to equity, and is an assertion of legal title; but we think it unnecessary to put it into either pigeonhole. A writ of error is the general method of bringing cases to this court, an appeal the exception; confined to equity in the main. There is no reason for not applying the general rule to this case."

Jurisdictional amount.

The general rule that the Federal courts have no jurisdiction of the subjects of divorce or alimony does not preclude an appeal to the Supreme Court of the United States from the supreme court of the Philippine Islands to review a decree of that court reversing a degree of the court of first instance granting a divorce to the wife, and awarding her a sum in excess of $25,000 as alimony *pendente lite* and as her share of the conjugal property. De la Rama v. De la Rama, 201 U. S. 303, 50 L. ed. 765, 26 Sup. Ct. Rep. 485.

The judgment in an action to recover real property, in which plaintiff, although claim-

Appeal—final judgment.

3. A judgment of the supreme court of the Philippine Islands which directs the entry of judgment for the plaintiff below, in accordance with its decision, but leaves to the lower court the judicial determination of the exact amount for which the judgment shall be entered, is not final for the purpose of an appeal to the Federal Supreme Court.

[For other cases, see Appeal and Error, I. d, 5, in Digest Sup. Ct. 1908.]

[Nos. 79 and 80.]

Argued March 3 and 6, 1911. Decided April 3, 1911.

APPEAL from the Supreme Court of the Philippine Islands to review a decree which, reversing a decree of the Court of First Instance of the City of Manila, directed the entry of a decree in favor of plaintiff in a suit to foreclose a mortgage. Dismissed for lack of the jurisdictional amount.

Also an

APPEAL from the Supreme Court of the Philippine Islands to review a decree which, reversing a decree of the Court of First Instance of the City of Manila in a suit for the foreclosure of an alleged mortgage, directed the entry of a decree in favor of the plaintiff, leaving to the court below a judicial determination of the exact amount for which judgment should be entering under a single title all the land occupied separately by the various defendants, does not allege joint ownership or joint possession or joint action of any kind, the controversy with each defendant relating to a separate and distinct parcel,—does not show an amount in dispute sufficient to sustain a writ of error from the Federal Supreme Court, where such judgment, while apparently rendered jointly, so far as the damages are concerned, against all the defendants, runs separately against each defendant for recovery of possession of that part of the land of which he was alleged and found to be in possession, and the whole amount of the damages, added to the value of the land in controversy with any of the defendants, does not equal the jurisdictional amount. Tupiño v. La Compañia General De Tabacos, 214 U. S. 268, 53 L. ed. 992, 29 Sup. Ct. Rep. 610.

Federal question.

Judgments of the supreme court of the Philippine Islands denying any liability of the present city of Manila upon municipal obligations incurred prior to the cession of the Philippine Islands to the United States by the treaty of December 10, 1898, are rendered in cases in which a treaty of the United States is involved, within the meaning of the act of July 1, 1902, § 10, governing the appellate jurisdiction of the Federal Supreme Court, although no distinct claim under that treaty was made in the pleadings. Vilas v. Manila, 220 U. S. 345, post, 491, 31 Sup. Ct. Rep. 416.

A suit to restrain the defendant from setting up title to certain gold mines in the Philippine Islands, or interfering with the same, and to obtain an accounting, in which the meaning and effect of the provisions of the act of July 1, 1902, § 45, concerning mining titles, are in question, is one in which a statute of the United States is "involved," so as to support an appeal to the Supreme Court of the United States from a decree of the supreme court of the Philippine Islands in such suit. Reavis v. Fianza, 215 U. S. 16, 54 L. ed. 72, 30 Sup. Ct. Rep. 1.

A conviction of falsification of documents under P. I. Penal Code, art. 300, clauses 4, 7, is not reviewable in the Federal Supreme Court as involving the denial of the protection afforded by the Philippine Bill of Rights, where the most that can be gathered from the record is that the accused contended that the complaint was bad by the rules of criminal pleading. Paraiso v. United States, 207 U. S. 368, 52 L. ed. 249, 28 Sup. Ct. Rep. 127.

The denial of a motion for rehearing by the supreme court of the Philipine Islands cannot serve to bring Federal questions into the record, so as to sustain a writ of error from the Supreme Court of the United States. Ibid.

Scope of review.

The distinction between an appeal and a writ of error with reference to the scope of review obtains here conformably to the usual practice in the Federal courts.

Hence, only questions of law are brought up for review by a writ of error from the Federal Supreme Court to the supreme court of the Philippine Islands. Santos v. Holy Roman Catholic & Apostolic Church, 212 U. S. 463, 53 L. ed. 599, 29 Sup. Ct. Rep. 338.

And for this reason, assignments of error which challenge the sufficiency of the evidence to warrant a conviction cannot be considered by the Federal Supreme Court on a writ of error to the supreme court of the Philippine Islands to review a judgment affirming such conviction, where it is not contended that there was no evidence of guilt. Ling Su Fan v. United States, 218 U. S. 302, 54 L. ed. 1049, 30 L.R.A.(N.S.) 1176, 31 Sup. Ct. Rep. 21.

And, whether the supreme court of the Philippine Islands, acting under the authority of P. I. Code of Procedure, § 497, subd. 3, erred in setting aside the conclusion of the court of first instance as being plainly and manifestly against the weight of evidence, is a question which is not open on a writ of error from the Federal Supreme Court. Behn v. Campbell, 205 U. S. 403, 51 L. ed. 857, 27 Sup. Ct. Rep. 502.

tered. Dismissed for want of final judgment.

See same case below, No. 79, 10 Philippine, 242; No. 80, 10 Philippine, 252.

The facts are stated in the opinion.

Messrs. **Frederic R. Coudert** and **Howard Thayer Kingsbury** argued the cause and with Mr. Paul Fuller filed a brief for appellant.

Mr. **Henry E. Davis** argued the cause and filed a brief for appellee.

Mr. Chief. Justice **White** delivered the opinion of the court:

These are two suits commenced in the court of first instance of the city of Manila on the same day, February 25, 1905, and numbered in that court as cases Nos. 3363 and 3365, respectively. In each suit the International Banking Company was plaintiff and Francisco Martinez and another person as the guardian of Martinez were defendants. After the present appeals were taken Martinez died and his administrator has been substituted in his stead.

We shall separately summarize the proceedings below in the two cases to the extent it is necessary to do so to understand the proper disposition to be made of the appeals.

Case No. 79 was a suit of an equitable nature brought by the bank against Martinez to foreclose a mortgage upon the steamer Germana, sell the steamer, and collect an alleged debt of 30,000 pesos, claimed to

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No intention to change this rule can fairly be inferred from the statement by Mr. Justice Peckham in Strong v. Repide, 213 U. S. 419, 53 L. ed. 853, 29 Sup. Ct. Rep. 521, that the facts, when the courts below differ, will be reviewed by the Federal Supreme Court, on appeal from or writ of error to the judgments of the supreme court of the Philippine Islands, since in this case the parties, besides suing out the writ of error, had also taken an apeal, and the solitary case cited in support of the proposition is De la Rama v. De la Rama, infra, where the case went up on appeal, and a different rule therefore obtains.

The sufficiency of the evidence on which a divorce to the wife was refused is open for review in the Supreme Court of the United States on an appeal from the supreme court of the Philippine Islands, where the correctness of the denial of alimony *pendente lite* and of a separation of the conjugal property cannot be determined without passing upon the weight of such evidence, and the appeal was taken from the whole decree. De la Rama v. De la Rama, 201 U. S. 303, 50 L. ed. 765, 26 Sup. Ct. Rep. 485.

But concurrent findings of fact by the two lower courts in support of a claim of certain natives of the Philippine Islands to have held possession of certain mines and to have worked them to the exclusion of all others down to the bringing of suit will not be disturbed by the Supreme Court of the United States on appeal from the supreme court of the Philippine Islands, if there is some evidence of the facts found. Reavis v. Fianza, 215 U. S. 16, 54 L. ed. 72, 30 Sup. Ct. Rep. 1.

Errors not assigned will not ordinarily be considered by the Federal Supreme Court on writ of error to the supreme court of the Philippine Islands. Paraiso v. United States, 207 U. S. 368, 52 L. ed. 249, 28 Sup. Ct. Rep. 127.

But questions not raised below, respecting the denial of rights which find expression and sanction in the Federal Constitution and the Philippine Bill of Rights, may be considered by the Federal Supreme Court on error to the supreme court of the Philippine Islands, in the exercise of its discretion, under Supreme Court rule 35, to notice a plain error not assigned. Weems v. United States, 217 U. S. 349, 54 L. ed. 793, 30 Sup. Ct. Rep. 544, 19 A. & E. Ann. Cas. 705.

The error, if any, committed by the court of first instance, when determining the guilt or innocence of accused, in considering the latter's failure to testify in his own behalf, is not available on a writ of error from the Federal Supreme Court to the supreme court of the Philippine Islands, where the latter court, in denying a motion for new trial after its decision reducing the sentence on the accused's appeal, stated that it did not, as the trial court did, take the accused's failure to testify into consideration. Pendleton v. United States, 216 U. S. 305, 54 L. ed. 491, 30 Sup. Ct. Rep. 315.

The right to registration of a land title in the Philippine Islands on the ground of established possession when a composition deed from the Spanish authorities was issued will not be considered by the Federal Supreme Court, when reviewing a judgment of the supreme court of the Philippine Islands which affirmed a judgment of the trial court refusing registration on the opposition of the insular government, where the case, as made by the pleadings, is rested solely upon the right to register resulting from the composition deed, without the slightest averment of possession prior to the time such deed was issued, except as it may be considered that such possession was alleged as a necessary result of the averments as to the deed, and no evidence whatever was offered concerning the possession prior to, or at the time of, the composition deed, irrespective of the administration proceedings leading up to the issue of such deed and following upon its annulment, the validity of the deed, as depending upon the competency of the administrative officers to avoid it and to annul the composition proceedings, being the one issue which, as understood by the court below and by the parties, arose upon the opposition of the government. Roura v. Philippine Islands, 218 U. S. 386, 54 L. ed. 1080, 31 Sup. Ct. Rep. 75.

be secured thereby. By the answer and cross bill it was asserted that, at the time of executing the mortgage, Martinez was mentally incapacitated, and hence legally incompetent; that the whole transaction was void for fraud, duress, and conspiracy; that the alleged indebtedness was a part of the subject-matter of the instrument sued on in the other case, the effect of which instrument was to supersede the mortgage sued on in this, and that plaintiff had wrongfully taken and held possession of the steamer and refused to account for its profits. As affirmative relief the setting aside of the whole transaction was demanded, as also the return of the steamer and an accounting of its profits.

The court of first instance in substance sustained these defenses, dismissed the plaintiff's suit, and directed a return of the steamer.

217]*It was decided in the judgment: "This case was tried together with case No. 3365, it being agreed that the evidence taken on the trial pertinent to either or both cases should be considered by the court in the respective cases." On appeal, the supreme court of the Philippine Islands reversed this judgment, held that the transaction was valid, and entered the following judgment:

"It is ordered that the judgment appealed from the court of first instance of the city of Manila, dated March 29, 1906, be, and the same is hereby, reversed, and the record remanded to the court from which it came, with directions to that court to enter judgment in favor of the plaintiff, and against the defendants, Francisco Martinez and his guardian, Vicente Ilustre, for the sum of P. 28,599.13, and interest at the rate of 8 per cent per annum from the 1st day of January, 1904, with costs, and that the steamship Germana, if said judgment is not paid, be sold in accordance with law to pay and satisfy the amount of said judgment. No costs will be allowed to either party in this court."

Case No. 80.—This case was brought to recover a judgment for 159,607.81 pesos, with interest, and, in default of payment, for the foreclosure of an instrument alleged to be a mortgage, the sale of certain real estate described in the mortgage, execution in the event of a deficiency, and for general relief. By answer and cross bill the same general defenses were set up as in the other suit. It was further averred that the alleged consideration for the instrument sued on was "padded and fictitious," contained duplications of the same item, and included the item of 30,000 pesos which was the subject of the other case; also that the instrument sued on was not in law a mortgage, but was an agreement for the transfer of property with right of repurchase (*pacto de retro*), and that the defendant had never refused to perform such contract, but that the plaintiff had failed to perform its own obligations thereunder; *also that the plaintiff had wrong-[218 fully taken possession of the property in question and received its rents and profits. The defendant demanded that the entire transaction be set aside, that plaintiff's suit be dismissed, and that plaintiff account for the rents and profits it had received.

The court of first instance found against the plaintiff, and rendered judgment in favor of the defendant guardian for the gross amount of the rents adjudged to have been unlawfully collected by the plaintiff. The case was appealed to the supreme court of the Philippine Islands, and was there docketed as case No. 3,472. The appellate court held "that the evidence is not sufficient to establish any of the defenses or counterclaims," and "that the defendant Martinez, at the time the action was commenced, was indebted to the plaintiff in at least the sum of P. 159,807.81, was fully established by the evidence." The court, however, decided that the instrument claimed to be a mortgage was not such, but was "a promise to sell real estate upon certain terms, and contemplates a subsequent contract of sale which should contain the terms stated in this document," and that sufficient facts were stated in the complaint "to constitute a good cause of action for the specific performance of the contract." After referring to the fact that plaintiff had been in possession of certain of the real property described in the complaint, and collected rentals therefrom, the court concluded its opinion as follows:

"The net amount collected should be applied in reduction of the sum of 159,607.81 pesos, which, according to the evidence, the defendants owe to the plaintiff. When the case is remanded, the defendant should have an opportunity to question the expenses claimed to have been met by the plaintiff in connection with its possession of these buildings, which it has deducted from the gross amount received.

*"After a consideration of the whole[219 case, we hold that the plaintiff is entitled to a judgment in the court below, with costs, declaring that Francisco Martinez is justly indebted to it in the sum of 159,607.81 pesos, less such sum as that court may decide should be credited to Martinez for the net receipts from the real estate in question in this case, with interest on the balance from February 25th, 1905, at 8 per cent per annum; and ordering that Francisco Martinez and Vicente Ilustre, as guardian of

Francisco Martinez, execute and deliver to the plaintiff, within a time to be fixed by the court, such a contract as is contemplated by the contract of June 15th, 1903, which should be substantially in the form of the instrument above referred to of date February 12th, 1904, omitting therefrom, however, the steamer Germana. The judgment should contain a provision that whatever may be realized from the sale of the Germana under the judgment in case No. 3471 shall be considered as a partial payment when realized upon the amount found due in this action.

"The judgment of the court below is reversed, and the case is remanded with instructions to that court to enter judgment for the plaintiff in acordance with the views hereinbefore expressed. No costs will be allowed to either party in this court." [10 Philippine, 257.]

The following judgment was subsequently entered:

"It is hereby ordered that the judgment of the court of first instance of the city of Manila, appealed from and dated March 29, 1906, be reversed and the case remanded to the court from which it came, with directions to the judge to enter judgment in favor of the plaintiff in accordance with the decision of this court, without special provision as to the costs of this appeal."

The present separate appeals from the aforementioned judgments of the supreme court of the Philippine Islands were then taken. The petition for the allowance of the appeal in the first case (No. 79 here; 220] No. 3471 in the supreme *court of the Philippine Islands) expressly recited that the amount in controversy therein "is 30,000 pesos, equivalent to $15,000 U. S. currency." It was, however, asserted that the cause was "an incident and part of the same transaction and controversy involved in cause No. 3472," and that the two cases "were . . . consolidated and tried together in the court of first instance." The appeal was allowed by one of the associate justices of the supreme court of the Philippine Islands. In doing so he declared "that . . . there was not a strict consolidation of the two cases . . . between the same parties by virtue of an express order of the court, and in accordance with the procedural law, and . . . the amount in litigation in the first of the said cases does not exceed $15,000 United States currency." However, substantially upon the ground of the "connection and intimate relation" between the cases, "the doubt produced by reasons advanced as to whether or not the appeal interposed in case No. 3471 is admissible, notwithstanding the fact that the amount involved does not reach the sum of $25,000 United States currency," was left to be determined by this court. The appeal in the second case was allowed by the same justice, it being recited that it appeared "that the amount involved exceeds $25,000 United States currency."

In the argument at bar, counsel for appellee moved that the two appeals be dismissed for want of jurisdiction in this court. We, therefore, first proceed to consider this question.

The claim of want of jurisdiction in No. 79 is based upon the contention that the questions presented in the case could only be reviewed provided the value of the matter in controversy exceeds $25.000 (§ 10, act July 1, 1902, 32 Stat. at L. 691, 695, chap. 1369, U. S. Comp. Stat. Supp. 1909, p. 226), and that the value is less than that sum. We are of opinion that the objection is well taken. True, it is contended for the the appellant that the *amount award-[221 ed to the plaintiff by the supreme court of the Philippine Islands was 28,599.13 pesos and interest, and that the defendant's counterclaim for the vessel and the receipts from the use of the same amounted to 38,000.00 pesos, and that the two amounts should be aggregated in determining the value of the matter in controversy. The case of Harten v. Löffler, 212 U. S. 397, 53 L. ed. 568, 29 Sup. Ct. Rep. 351, is cited as authority. But conceding that cases may arise where the amount of a judgment in favor of a plaintiff may be combined with the sum demanded in a dismissed counterclaim of a defendant, to determine whether the jurisdictional value exists, manifestly this is not a case for the application of the doctrine. The value of the matter in dispute in this court is the test of our jurisdiction. Hilton v. Dickinson, 108 U. S. 165, 27 L. ed. 688, 2 Sup. Ct. Rep. 424. What, therefore, is that matter, is the question to be considered. Plainly, it is whether Martinez was indebted to the bank, as adjudged below; since, if the indebtedness existed, the amount thereof is the extent of the loss which the estate of Martinez can sustain; because, irrespective of what might be the proceeds of sale of the vessel or of other property of the estate of Martinez, if realized upon, no more of such proceeds could be taken than would be sufficient to satisfy the judgment. The jurisdictional value, however, plainly would not exist even if the vessel and its profits were treated as the matter in dispute, since, as we have seen, the appellant only asserts that the value of the vessel and the profits aggregated 38.000 pesos, less than $25.000. See, in this connection, the case of Peyton v. Robertson, 9 Wheat. 527, 6 L. ed. 151, approvingly cited in the Hilton Case, supra.

We are unable to assent to the view that the case should be treated as having been consolidated with No. 80; in other words, that the two cases are in realty but one. The suits were separately commenced, and although tried together, this was done for convenience, and the cases were tried not upon the theory that they were consolidat-
222]ed, but *as being separate and distinct suits. Thus, it is recited in the record that, at the commencement of the trial, on February 28, 1906, it was stipulated "that these two cases, Nos. 3363 and 3365, may be tried together, and that the defendants may amend their answer in 3365 as soon as they have opportunity, as of this date." Again, in the course of the examination of one Taylor, a witness for the plaintiff, counsel for the defendant objected to a question, whereupon the following colloquy ensued:

"Mr. Odlin: We are trying both cases together, but I can take him off the stand and put him back.

"Mr. Gibbs: If this question is asked with reference to 3365, I desire to make the further objection to the introduction of the evidence, for the reason that the complaint in that case does not state a cause of action."

The understanding of the trial judge that there was in fact no consolidation of the two cases is evidenced by the judgment which was entered by him, and that the supreme court of the Philippine Islands entertained the same view is shown by the judgment which it entered.

As to No. 80.—The objection is that the judgment of the supreme court of the Philippine Islands is not a final one. This objection must prevail for the reason that, although involving a decision upon the merits of the case, the judgment of the supreme court contemplates and requires further proceedings in the lower court, not inconsistent with its opinion. Clark v. Roller, 199 U. S. 541, 50 L. ed. 300, 26 Sup. Ct. Rep. 141. The supreme court of the Philippine Islands did not, in its judgment, as was done in the judgment entered in case No. 79, fix and determine the precise amount for which the trial court should enter judgment. On the contrary, its direction was that judgment be entered "in favor of the plaintiff, in accordance with the decision of this court." On referring to the opinion, it is seen that the supreme court deemed that the plaintiff was entitled to a judicial determination of the amount of
223]the indebtedness of Martinez *to it. It is patent that the court found that the exact amount could not be determined without further proceedings, since it in effect left the case open in the trial court for a hearing upon the question of the amount of expenses incurred by the bank in and about the real property of Martinez of which it had taken possession. Thus, in the opinion of the appellate court, it was said:

"The net amount collected should be applied in reduction of the sum of 159,607.81 pesos, which, according to the evidence, the defendants owe to the plaintiff. When the case is remanded, the defendant should have an opportunity to question the expenses claimed to have been met by the plaintiff in connection with its possession of these buildings, which it has deducted from the gross amount received."

It follows that although the appellate court fixed the rights and liabilities of the parties, it in effect referred a question in the case to the subordinate court for further judicial action; hence its judgment was not final for the purpose of an appeal or writ of error. Drake v. Kochersperger, 170 U. S. 303, 42 L. ed. 1046, 18 Sup. Ct. Rep. 942; Clark v. Kansas City, 172 U. S. 334, 43 L. ed. 467, 19 Sup. Ct. Rep. 207. Until, therefore, the trial court by its judgment ascertains and fixes the actual indebtedness of the plaintiff, and complies with the other directions contained in the mandate, it cannot be said that a final decree has been entered in the cause. Indeed, on the very face of the decree of the supreme court of the Philippine Islands, it is manifest that this court, if it took jurisdiction, could not finally dispose of the case in the event it affirmed the judgment below, since all it could do would be to consider the matters determined by the supreme court, and do as that court did, remand the cause for further proceedings in order that the rights of the parties might be thereafter finally passed upon. But the foundation upon which rests the doctrine which, as a general rule, limits the appellate jurisdiction of this court to final judgments, is that *cases should not be[224
brought here by piecemeal through the medium of successive appeals.

The motion to dismiss the appeal in each of the cases must be granted.

Dismissed for want of jurisdiction.

JOSE PEREZ Y FERNANDEZ and Victor Ochoa, Appts.,
v.
JOSE ANTONIO FERNANDEZ Y PEREZ.

(See S. C. Reporter's ed. 224–232.)

Judgment — opening — letting in absent defendants.

1. An absolute right to appear in and defend within a year after final judgment

a suit to enforce a lien or to remove a cloud on title to property within the district was given to absent defendants whenever the jurisdiction of the Federal circuit court over them rested upon publication, even though they may in fact have had knowledge of the suit, by the act of March 3, 1875 (18 Stat. at L. 472, chap. 137, U. S. Comp. Stat. 1901, p. 513), § 8, conferring such right upon all such defendants who have not been "actually personally notified as above provided," the previous provisions of the section calling for service on the party outside of the district of an order of the court directed to him, and requiring him to appear and defend within a time stated, or, if not practicable, for notice by publication.

[For other cases, see Judgment, XII. f, in Digest Sup. Ct. 1908.]

Judgment — opening to let in absent defendants — terms.

2. No other terms than the payment of costs can be imposed by the court in opening a decree to permit absent defendants served only by publication to appear in and defend a suit to enforce a lien or remove a cloud on the title to property within the district, pursuant to the act of March 3, 1875, § 8, providing that in such cases the court shall make an order setting aside the judgment, and permitting such defendants to plead therein on payment of such costs as the court deems just.

[For other cases, see Judgment, XII. f, in Digest Sup. Ct. 1908.]

[No. 110.]

Argued and submitted March 17, 1911. Decided April 3, 1911.

APPEAL from the District Court of the United States for Porto Rico to review a decree refusing to open a decree to permit certain absent defendants served by publication to appear in and defend the suit. Reversed and remanded for further proceedings.

See same case below, 4 Porto Rico Fed. Rep. 201.

The facts are stated in the opinion.

Mr. **Frederic D. McKenney** argued the cause, and, with Messrs. John Spalding Flannery, William Hitz, and T. D. Mott, Jr., filed a brief for appellants.

Messrs. **N. B. K. Pettingill** and **F. L. Cornwell** submitted the cause for appellee.

Note.—On lack of actual notice in case of constructive service as ground for relief under a statute permitting opening of judgment for mistake, inadvertence, surprise, or excusable neglect—see note to Kingsley v. Steiger, 31 L.R.A.(N.S.) 1068.

On relief from judgment rendered on publication of procees—see note to Dunlap v. Steere, 16 L.R.A. 361.

Mr. Chief Justice **White** delivered the opinion of the court:

José Antonio Fernandez, a judgment creditor of José Perez, in October, 1906, commenced in the court below this suit to unmask alleged fraudulent and simulated mortgages and sales of certain described real property of Perez, the judgment debtor, to the end that such property might be made available to pay the unsatisfied judgment debt. The defendants were José Perez, Victor Ochoa, and his wife, all three alleged to be citizens and residents of Spain, and ten persons alleged to be citizens and residents of Porto Rico, who were averred to be and were sued as the heirs at law of one Maristany. It was alleged that in the years 1899, 1900, and 1902 Perez, who was the registered owner of certain enumerated real estate, had executed and recorded deeds purporting to mortgage the same in favor of Ochoa and Maristany. These deeds, it was alleged, were simulations executed by Perez with the sole purpose of defrauding his creditors and preventing them from collecting their debts. It was additionally charged that to carry out the wrongful purpose which had caused the acts of mortgage to be drawn and recorded, and in consequence of a conspiracy between Perez and Ochoa, the latter had in May, 1906, sued in the court below to foreclose the apparent mortgages, and had procured an order of sale and a sale thereunder to be made by the marshal of the court, and at such sale had seemingly bought in the property and received a deed therefor. Ochoa, the alleged plaintiff, was charged to have been but *an interposed person, acting, not for[226 himself, but for Perez, the ostensible defendant. Finally, it was charged that the property standing in the name of Ochoa, the alleged purchaser, had, despite the sale, continuously remained under the dominion and beneficial control of Perez. The prayer of the bill was for a decree recognizing the fraudulent and simulated character of the alleged mortgages and sale, that they be declared to be mere shadows cast upon the title of Perez, and that the decree further direct that the property belonging to Perez be ordered to be sold to pay the judgment debt.

The ten persons who were made defendants as heirs or representatives of Maristany having been personally summoned and having failed to appear, the bill was, in December, 1906, taken for confessed against them. On the 3d day of June, 1907, the counsel for the complainant moved for an order to summons by publication José Perez, Victor Ochoa, and his wife. The motion for this order was supported by a return of the marshal showing that the sub-

pœnas issued to the parties named had not been served, because the marshal, after diligent inquiry, had been unable to find them in the district, and by an affidavit of counsel declaring that affiant "is unable to learn of the present whereabouts of said defendants, José Percz y Fernandez, Victor Ochoa y Perez, and his wife, Dolores Olavarricia, after duly inquiring, and that, therefore, personal service upon them is not practicable." The order was granted, directing that the defendants named be summoned by publication to appear on or before the 3d day of August, 1907, the publication to be made "in a newspaper of general circulation in Porto Rico, to wit, 'La Bandera Americana,' once a week for six consecutive weeks." On September 13 following, the defendants named not having appeared, and proof of publication having been made, the bill was taken for confessed against them. On February 1, 1908, a formal decree was 227]entered *against all the defendants, holding the mortgages and sale to be void as mere simulations, and directing their erasure from the records. The decree recognized the right of complainant to collect his unsatisfied judgment by a sale of the property, and in fact directed the marshal to proceed under an execution which was in his hands to levy upon and sell the property.

Within two months after the entry of this decree, and before the marshal had executed it by sale of the property, appearance was entered for José Perez, one of the defendants, and shortly after for Ochoa, and application was made in the name of both to vacate the decree and allow them to defend the suit, on the ground that they were entitled to do so because they had not been personally notified. At the same time, in the same court, a Mrs. Perfecta Blanco, alleging herself to be a resident of Spain, filed her bill against the marshal as well as against José Ferandez and his attorneys of record, alleging that the complainant had in July, 1906, bought from Ochoa the real estate described in the Fernandez suit, and that she was entitled to hold the property free from liability under the execution in the Fernandez Case. The prayer was for an injunction pending the suit, restraining the marshal from selling the property to pay the Ferandez judgment, and for a final decree perpetuating the injunction. The application made by Perez and Ochoa to set aside the decree and allow them to appear and defend, and that of Mrs. Blanco for a preliminary injunction, were considered by the court at one and the same time. The court stayed, for a brief period, the sale of the property under the execution issued in the case of Fernandez v. Perez, and the enforcement of the decree in the equity cause. In a memorandum opinion the court declared that this had been done for the following reasons:

First, to enable Perez and Ochoa "to make a first-class showing establishing that neither of them had, before the *decree[228 in the equity cause, any actual personal notice or knowledge of its pendency," and that they or either of them never received any notice or knowledge of the pendency of the same through any of the other respondents in the same mentioned, or through any of their apoderados, agents, tenants, or others, either in Porto Rico or in Spain, before said time, and that they, or either of them, did not personally receive a copy of or hear of or know of the publication of the notice of the pendency of said suit (the equity cause) in La Bandera Americana . . . and that they or either of them never in fact, previous to the entry of the decree, received any copy of said newspaper containing such notice through the mails from José Antonio Fernandez, or any other person, or see or hear of such copy being received by any other person in their vicinity in Spain." Second. In order to enable Perez and Ochoa to make "a first-class showing under oath that they in truth and in fact have a meritorious defense to the bill," and to give both Perez and Ochoa an opportunity to swear that the "mortgage to Ochoa in 1899 was in good faith and for a valuable consideration, and that the foreclosure of the same was not collusive," and that Ochoa must also state that his alleged sale to Mrs. Blanco of the property was made in good faith and for valuable consideration, as in the deed stated, and if not for that amount, then for how much; and that the said deed was made by said Ochoa without the knowledge of the decree in said equity cause, and "if possible he must furnish the affidavit of Mrs. Blanco," stating that her purchase was an honest one and how much he paid for the property.

The stay granted by the court was extended from time to time. There were hearings, and, it may be, some evidence tending to show the existence of the facts referred to by the court in the conditions upon which it granted the stay, and there was evidence to the contrary. Finally the court disposed of the matter by refusing to set aside the *decree in the equity cause, and hence,[229 declining to allow Perez and Ochoa to defend, and refusing to grant the application for a preliminary injunction on the bill of Mrs. Blanco.

From a final decree rejecting their application to set aside the equity decree and allow them to defend, Perez and Ochoa appeal.

The defendants Perez and Ochoa being

citizens of Spain, the court had general jurisdiction. Act March 2, 1901, chap. 812, § 3, 31 Stat. at L. 953. Power to award relief because of the situation of the property within the court's jurisdiction and the character of the rights asserted in and to the property even although Perez and Ochoa were nonresidents of the district and could not be found therein depended, as recognized by the court below and by the parties, upon the act of March 3, 1875, chap. 137, § 8, 18 Stat. at L. 472, U. S. Comp. Stat. 1901, p. 513. The right of the absent parties defendant to have the suit reopened and the duty of the court to permit them to make defense depended upon the proviso to the section in question. That proviso reads as follows:

"Provided, however, that any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."

As the appearance of Perez and Ochoa was within the year, their right to have the decree set aside depended upon whether they had been "actually personally notified" (in the case wherein the judgment was rendered), "as above provided." Treating the words "actually personally notified" as signifying information conveyed to them in 230]any *form of the existence of the suit, and concluding from the facts before it that it was established that both Perez and Ochoa had been notified, either by information conveyed to them by persons in Porto Rico, or by the receipt of a copy of the newspaper containing the publication of notice which the court had directed to be made, the right to appear and defend was denied. But we think the construction of the statute which the court must necessarily have adopted in order to enable it to reach such conclusion was a mistaken one. The right to appear and defend within the year is given by the proviso to all defendants who have not been "actually personally notified as above provided." To determine, therefore, whether a defendant who appears and asks to be allowed to defend has been actually personally notified in such a manner as to exclude him from the enjoyment of the right involves ascertaining not whether he had been notified in any possible manner, but whether he had been "actually personally notified as above provided;" that is, as required by the previous provisions of the section. Now, the previous provisions are these:

"That when in any suit commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any encumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be."

After thus giving authority to the court to authorize the *actual personal serv-[231 ice of a notice outside of the district, the statute then, in case where such personal notice is impossible, provides for publication as follows: "Or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks." Plainly, therefore, the previous provision to which the proviso applies exacts an actual personal notice resulting from the service on the party outside of the district of an order of the court directed to him, and requiring him to appear and defend within a time stated, the whole conformably to the express terms of the statute. In other words, where the property is situated in the district where the suit is brought, as provided in the statute, the right of the court to exert its authority is made to depend upon two forms of notice, which are distinct one from the other. First, an actual notice calling upon the person to appear, and which, in virtue of an express authority of the court, may be served upon the party outside of the district where the suit is pending. Second, a notice by publication, calling upon the party to appear and defend within the statutory time; this latter notice, however, being only necessary where the former method cannot be employed. Considering the two distinct subjects, the proviso of the statute ordains that where the actual personal notice has not been made as provided, and publication has therefore been resorted to, that within a year the party has a right to appear and the case must be reopened to permit him to make his defense. That is to say, the statute, without ambiguity, confers the right

to have the case reopened whereever the jurisdiction of the court has rested upon publication, and denies such right where the requirements of the statute as to actual personal notice have been complied with. It follows that in a case where the method for giving the actual notice pointed out by the statute has not been resorted to, and, 232]*on the contrary, publication of notice was the basis of the jurisdiction of the court, an inquiry as to information conveyed by letter or by other means of knowledge of the pendency of the suit to a defendant, for the purpose of determining whether such defendant has a right to appear within the year and have the case opened to enable him to defend, is wholly immaterial. We say this because, from the text of the statute as above elucidated, it clearly results that the right which it confers to have a case reopened is rested upon the criterion afforded by the record upon which the judgment was obtained, and is not caused to depend upon the uncertainty which might result from a resort to matters extraneous to the record. As the misconstruction by the court of the statute in respect just stated requires a reversal, it is not essential that we should go further. In order, however, that misconception may be avoided, we think it well to observe that in the cases to which the statute applies the right to appear and have a cause reopened is not dependent upon terms to be fixed by the court, except to the extent that the statute provides for terms as to costs. This, we think, is clear, since, after providing for the entry in the circuit court of his appearance by a defendant embraced within the statute, it is said: "And thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just."

Reversed and remanded with directions for further proceedings in conformity with this opinion.

233]*PERFECTO BLANCO Y BLANCO, Appt.,

v.

HARRY S. HUBBARD, U. S. Marshal for Porto Rico, José A. Fernandez y Perez, Frederick Cornwell, and Benjamin Horton.

(See S. C. Reporter's ed. 233, 234.)

This case is governed by the decision in Perez y Fernandez v. Fernandez y Perez, ante, 443.

[No. 111.]

Argued and submitted March 17, 1911. Decided April 3, 1911.

APPEAL from the District Court of the United States for Porto Rico to review a decree refusing to stay by injunction the execution of a decree in a suit to set aside conveyances as in fraud of creditors, which latter decree it had refused to open to permit absent defendants served by publication to appear in and defend the suit. Reversed and remanded for further proceedings.

See same case below, 4 Porto Rico Fed. Rep. 201.

Mr. **Frederic D. McKenney** argued the cause, and with Messrs. John Spalding Flannery, William Hitz, and D. T. Mott, Jr., filed a brief for appellants.

Messrs. **N. B. K. Pettingill** and **F. L. Cornwell** submitted the cause for appellee.

Mr. Chief Justice **White** delivered the opinion of the court:

This record involves the bill filed by Perfecto Blanco in the lower court to enjoin the sale of the property under execution in the case of Fernandez and Perez. It concerns, therefore, the proceedings in the equity cause and the right to reopen the decree entered in the same, which we have just disposed of. As stated in that case, the application for injunction *pendente lite* in this case was considered by the court along with the request to be allowed *to[234 appear and defend in the equity cause, made by Perez and Ochoa. When the court temporarily stayed the execution of the judgment, a suggestion was made to counsel by the court that in this case a demurrer be filed to the bill pending the delay which must transpire in considering the subject of the right to enjoin along with, or in connection with, the right of Perez and Ochoa to appear and defend. When it was concluded that the two latter persons had no such right, and the right to an injunction *pendente lite* in this case was refused, the reason which controlled the court in refusing to reopen and allow a defense in the equity cause were filed as its reasons for sustaining the demurrer and finally dismissing the bill in this case. As those reasons, however, did not at all concern themselves with the grounds of demurrer separately stated, but solely related to the right to stay, by the process of injunction, the execution of the unsatisfied judgment and the enforcement of the equity decree, we think it plainly results that the decree rendered in this case must be reversed, because the two cases in the mind of the court were so inseparably united that the error which led the court below to refuse

in the other case the right to reopen the cause controlled its action in this.

The decree is therefore reversed and the cause remanded for furthur proceedings not inconsistent with this opinion.

235]*INTERSTATE COMMERCE COMMISSION, the American Forwarding Company, et al., Appts.,
v.
DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY et al.

(See S. C. Reporter's ed. 235–256.)

Interstate Commerce Commission — judicial review — facts.

1. Findings of fact made by the Interstate Commerce Commission in a proceeding for redress for unlawful discrimination in railway rates are not open to review in the courts.

[For other cases, see Interstate Commerce Commission, 8–14, in Digest Sup. Ct. 1908.]

Carriers — discrimination in rates — ownership of shipment.

2. A carrier may not, under the interstate commerce act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), make the ownership of goods tendered to it for carriage the criterion by which its charge for such carriage is to be measured.

[For other cases, see Carriers, III. e, in Digest Sup. Ct. 1908.[

Carriers — rates — dissimilar conditions — ownership of shipment.

3. The ownership or nonownership by the shipper of the goods tendered for carriage is not a dissimilar circumstance and condition, within the meaning of the act of February 4, 1887, § 2, prohibiting inequality and discrimination in rates.

[For other cases, see Carriers, 275–283, in Digest Sup. Ct. 1908.]

Statutes — construction — adopted statute.

4. The settled construction of the equality clause of the English railway elauses consolidation act of 1845, as forbidding the charging of a higher rate for the carriage of goods for an intercepting or forwarding agent than for others, applies in construing the provisions of the act of February 4, 1887, § 2, which were substantially taken from the English statute.

[For other cases, see Statutes, 492–512, in Digest Sup. Ct. 1908.]

Carriers — discrimination in rates — forwarding agents.

5. A forwarding agent is a person within the meaning of the interstate commerce act of February 4, 1887, § 2, forbidding preferences and discrimination in rates.

[For other cases, see Carriers, III. e, in Digest Sup. Ct. 1908.[

Carriers — carload rates — discrimination.

6. A carrier may not forbid the aggregation of the shipments of various owners for the purpose of carload rating in Official Classification territory, or the combination of such shipments by forwarding agents for that purpose, where preferences and discriminations forbidden by the act of February 4, 1887, § 2, will result from the carrier's action.

[For other cases, see Carriers, III. e, in Digest Sup. Ct. 1908.[

[No. 325.]

Argued February 25 and 28, 1911. Decided April 3, 1911.

APPEAL from the Circuit Court of the United States for the Southern District of New York to review a decree enjoining the enforcement of an order of the Interstate Commerce Commission, forbidding a carrier from enforcing a rule which prohibits the aggregation of shipments of various owners for the purpose of carload rating in Official Classification territory, and the combination of such shipments by forwarding agents for that purpose. Reversed and remanded with directions to dismiss the bill.

See same case below, 166 Fed. 499.

The facts are stated in the opinion.

Mr. **Mazzini Slusser** argued the cause and filed a brief for appellants:

A forwarding agent which for a consideration receives goods into its possession, with directions from the owner thereof to ship the same, is a bailee for hire, and has a special property in the goods, investing it with the same authority and right of shipment as possessed by such owner.

Great Western R. Co. v. McComas, 33 Ill. 186; Edgerton v. Chicago, R. I. & P. R. Co. 40 Ill. 311, 88 N. E. 808; Story, Bailm. 9th ed. ¶ 444; Bush v. Miller, 13 Barb. 481; Freeman v. Birch, 1 Nev. & M. 420, 3 Q. B. 483.

Any such forwarding agent having the right to ship goods, and tendering the same for shipment to a common carrier, is a "shipper" in contemplation of law, whom the carrier is bound to serve, and a "person" within the meaning of § 2 of the act to regulate commerce.

Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 683, 28 L. ed. 291, 297, 4 Sup. Ct. Rep. 185; Shelbyville R. Co. v. Louisville, C. & L. R. Co. 82 Ky. 545; Hedding v. Gallagher, 72 N. H. 382, 64 L.R.A. 811, 57 Atl. 225; Parker v. Great

NOTE.—As to what constitutes an unlawful preference or discrimination by a carrier under interstate commerce regulations —see note to Gamble-Robinson Commission Co. v. Chicago & N. W. R. Co. 94 C. C. A. 230.

Western R. Co. 7 Mann. & G. 291, 7 Scott, N. R. 835, 3 Eng. Ry. & C. Cas. 563, 13 L. J. C. P. N. S. 105; Great Western R. Co. v. Sutton, L. R. 4 H. L. 226, 38 L. J. Exch. N. S. 177, 22 L. T. N. S. 43, 18 Week. Rep. 92.

Section 2 of the act to regulate commerce is modeled on § 90 of the English consolidated railways clauses act.

Interstate Commerce Commission v. Baltimore & O. R. Co. 3 Inters. Com. Rep. 192, 43 Fed. 53, affirmed in 145 U. S. 263, 284, 36 L. ed. 699, 706, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 222, 40 L. ed. 940, 948, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Re Party Rate Tickets, 12 Inters. Com. Rep. 96; Buckeye Buggy Co. v. Cleveland, C. C. & St. L. R. Co. 9 Inters. Com. Rep. 625.

It is a settled rule of construction that when a statute of one state is adopted by another state, and such statute has been construed by the courts of such former state, the construction so put upon such statute is considered by the courts of the adopting state as enacted with it, and is received with all the weight of authority.

McDonald v. Hovey, 110 U. S. 619, 628, 28 L. ed. 269, 271, 4 Sup. Ct. Rep. 142; Henrietta Min. & Mill. Co. v. Gardner, 173 U. S. 123, 130, 43 L. ed. 637, 640, 19 Sup. Ct. Rep. 327.

The question whether goods are offered for shipment under substantially similar circumstances and conditions, within the meaning of § 2 of the act to regulate commerce, is one of fact.

Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 170, 42 L. ed. 414, 424, 18 Sup. Ct. Rep. 45; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 194, 40 L. ed. 935, 938, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Piddington v. Southeastern R. Co. 5 C. B. N. S. 111, 27 L. J. C. P. N. S. 295, 4 Jur. N. S. 953; Crouch v. Great Northern R. Co. 11 Exch. 750, 25 L. J. Exch. N. S. 137; Baxendale v. Great Western R. Co. 16 C. B. N. S. 137, 33 L. J. C. P. N. S. 197, 10 Jur. N. S. 496, 9 L. T. N. S. 814, 12 Week. Rep. 602; Great Western R. Co. v. Sutton, L. R. 4 H. L. 226, 38 L. J. Exch. N. S. 177, 22 L. T. N. S. 43, 18 Week. Rep. 92.

The phrase, "under substantially similar circumstances and conditions," as found in § 2 of the act to regulate commerce, has reference solely to the matter of the physical carriage of the goods.

Parker v. Great Western R. Co. 7 Mann. & G. 291, 7 Scott, N. R. 835, 3 Eng. Ry. & C. Cas. 563, 13 L. J. C. P. N. S. 105; Couch v. Great Northern R. Co. 11 Exch. 751, 25 L. J. Exch. N. S. 137; Piddington v. Southeastern R. Co. 5 C. B. N. S. 111, 27 L. J. C. P. N. S. 295, 4 Jur. N. S. 953; Edwards v. Great Western R. Co. 11 C. B. 588, 21 L. J. C. P. N. S. 72; London & N. W. R. Co. v. Evershed, L. R. 3 App. Cas. 1029, 48 L. J. Q. B. N. S. 22, 39 L. T. N. S. 306, 26 Week. Rep. 863, 5 Eng. Rul. Cas. 351; Great Western R. Co. v. Sutton, L. R. 4 H. L. 226, 38 L. J. Exch. N. S. 177, 22 L. T. N. S. 43, 18 Week. Rep. 92; Denaby Main Colliery Co. v. Manchester, S. & L. R. Co. L. R. 11 App. Cas. 120, 6 Eng. Ry. & C. Traffic Cas. 133, 55 L. J. Q. B. N. S. 181, 54 L. T. N. S. 1, 50 J. P. 340; Bigbee & W. River Packet Co. v. Mobile & O. R. Co. 4 Inters. Com. Rep. 829, 60 Fed. 545; Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822; United States v. Wells-Fargo Exp. Co. 161 Fed. 606; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 166, 42 L. ed. 414, 423, 18 Sup. Ct. Rep. 45; Buckeye Buggy Co. v. Cleveland, C. C. & St. L. R. Co. 9 Inters. Com. Rep. 620; Re Party Rate Tickets, 12 Inters. Com. Rep. 96.

Section 2 of the act to regulate commerce prescribes a rigid rule of action. If the circumstances and conditions attending the carriage of goods are substantially similar, the charge must be the same.

London & N. W. R. Co. v. Evershed, L. R. 3 App. Cas. 1029, 48 L. J. Q. B. N. S. 22, 39 L. T. N. S. 306, 26 Week. Rep. 863, 5 Eng. Rul. Cas. 351; Denaby Main Colliery Co. v. Manchester, S. & L. R. Co. L. R. 11 App. Cas. 97, 6 Eng. Ry. & C. Traffic Cas. 133, 55 L. J. Q. B. N. S. 181, 54 L. T. N. S. 1, 50 J. P. 340; United States ex rel. Morris v. Delaware, L. & W. R. Co. 2 Inters. Com. Rep. 617, 40 Fed. 103; Re Party Rate Tickets, 12 Inters. Com. Rep. 96.

The forwarding agent, as bailee of the goods, having a special property therein, may itself bring an action in tort for loss or damage.

Great Western R. Co. v. McComas, 33 Ill. 186; Edgerton v. Chicago, R. I. & P. R. Co. 240 Ill. 311, 88 N. E. 808; Spence v. Norfolk & W. R. Co. 92 Va. 102, 29 L.R.A. 578, 22 S. E. 815; Hooper v. Chicago & N. W. R. Co. 27 Wis. 81, 9 Am. Rep. 439; Finn v. Western R. Co. 112 Mass. 524, 17 Am. Rep. 128; National Surety Co. v. United States, 63 C. C. A. 512, 129 Fed. 70; The Beaconsfield, 158 U. S. 303, 39 L. ed. 993, 15 Sup. Ct. Rep. 860.

The forwarding agent, as consignor and maker of the contract of carriage, may maintain an action in contract.

Ohio & M. R. Co. v. Emrich, 24 Ill. App. 245; Northern Line Packet Co. v. Shearer, 61 Ill. 263; Illinois C. R. Co. v. Schwartz,

11 Ill. App. 482; Buckeye Buggy Co. v. Cleveland, C. C. & St. L. R. Co. 9 Inters. Com. Rep. 620.

Assistant to the Attorney General **Ellis** also argued the cause, and, with Messrs. P. J. Farrell and Edwin P. Grosvenor, Special Assistants to the Attorney General, filed a brief for appellants:

The order of the Commission is within the scope of the delegated authority under which it purports to have been made.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155. See also Honolulu Rapid Transit & Land Co. v. Hawaii, 211 U. S. 282, 53 L. ed. 186, 29 Sup. Ct. Rep. 55; Knoxville v. Knoxville Water Co. 212 U. S. 1, 8, 18, 53 L. ed. 371, 378, 382, 29 Sup. Ct. Rep. 148; Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; Willcox v. Consolidated Gas Co. 212 U. S. 19, 41, 53 L. ed. 382, 395, 29 Sup. Ct. Rep. 192, 15 A. & E. Ann. Cas. 1034; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 397, 38 L. ed. 1014, 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

The ownership of property tendered for shipment cannot be made a test as to the applicability of a carrier's rates.

California Commercial Asso. v. Wells, F. & Co. 14 Inters. Com. Rep. 422.

The Commission committed no error in holding that the words, "similar circumstances and conditions," refer to matters of carriage, and that "person," used in the same section, has reference to the shipper, and not to the owner of the property.

Wight v. United States, 167 U. S. 512, 518, 42 L. ed. 258, 259, 17 Sup. Ct. Rep. 822; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 166, 42 L. ed. 414, 423, 18 Sup. Ct. Rep. 45.

This court will presume that the Congress, in adopting the language of the English act, had in mind the construction given to that language by the English courts, and intended to incorporate it into the American act.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; McDonald v. Hovey, 110 U. S. 619, 28 L. ed. 269, 4 Sup. Ct. Rep. 142.

As used in the English acts, the words "same description" and "like description" exhaust themselves upon the traffic, and the words "like circumstances" exhaust themselves upon the route, expense, and risk of carriage; and none of those phrases can be extended to the personal qualities of the party who makes the shipment.

Great Western R. Co. v. Sutton, L. R. 4 H. L. 226, 38 L. J. Exch. N. S. 177, 22 L. T. N. S. 43, 18 Week. Rep. 92; London & N. W. R. Co. v. Evershed, L. R. 3 App. Cas. 1029, 48 L. J. Q. B. N. S. 22, 39 L. T. N. S. 306, 26 Week. Rep. 863, 5 Eng. Rul. Cas. 351; Denaby Main Colliery Co. v. Manchester, S. & L. R. Co. L. R. 11 App. Cas. 97, 6 Eng. Ry. & C. Traffic Cas. 133, 55 L. J. Q. B. N. S. 181, 54 L. T. N. S. 1, 50 J. P. 340.

In construing § 2 of the American act, this court has made a similar ruling.

Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45.

A party who is rightfully in possession of personal property, and clothed by the beneficial owners thereof with authority to ship it in his own name, is a person within the meaning of § 2 of the act to regulate commerce.

United States v. Milwaukee Refrigerator Transit Co. 145 Fed. 1007.

Whether treated as a matter of law or fact, the transportation services are alike and contemporaneous, and performed by the carrier under substantially similar circumstances and conditions.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 238, 40 L. ed. 940, 954, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Great Western R. Co. v. Sutton, L. R. 4 H. L. 242, 38 L. J. Exch. N. S. 177, 22 L. T. N. S. 43, 18 Week. Rep. 92.

Messrs. **William S. Jenney** and **Walker D. Hines** argued the cause and filed a brief for appellees:

The attitude of a railroad company toward a forwarding agent is strictly analogous to the attitude of the railroad company toward numerous agencies which the railroad company may, or may not, permit to perform some function of the transportation service which the railroad company itself has a right to perform or control.

(a) A railroad company, in the performance of its obligation to carry passengers, may make an exclusive contract with a company to supply and operate special cars, such as sleeping cars.

Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co. 139 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. Rep. 490.

(b) A railroad company, in the performance of its obligation to load, unload, and care for live stock, may make an exclusive contract with a stock-yard company.

Central Stock Yards Co. v. Louisville & N. R. Co. 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113.

The right to make such exclusive contracts implies, or rather grows out of, the fundamental right of the railroad company to perform such phases of the transportation service itself, to the exclusion of all persons seeking to intervene for that purpose. The same principle justifies the railroad companies in excluding forwarding agents who seek to intervene in phases of the railroad business.

Cases similar in spirit to the cases just cited are the following:

(a) A railroad company cannot be compelled to make with connecting railroads the same terms as to through rates, through cars, etc.

Oregon Short Line & U. N. R. Co. v. Northern P. R. Co. 4 Inters. Com. Rep. 718, 9 C. C. A. 409, 15 U. S. App. 479, 61 Fed. 158; Little Rock & M. R. Co. v. St. Louis Southwestern R. Co. 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775; St. Louis Drayage Co. v. Louisville & N. R. Co. 5 Inters. Com. Rep. 137, 65 Fed. 39; Gulf, C. & S. F. R. Co. v. Miami S. S. Co. 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407.

(b) A railroad company owning a wharf may make an exclusive contract with a connection, whether railroad or steamship company, as to the use of the wharf, even though thereby all its traffic is diverted to one connecting transportation company.

Louisville & N. R. Co. v. West Coast Naval Stores Co. 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. Rep. 745.

(c) A railroad company may give to a baggage and transfer company the exclusive right to solicit business on its cars and premises.

Donovan v. Pennsylvania Co. 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91.

In this country, railroad companies are not common carriers of other common carriers, and, *a fortiori*, are not common carriers of forwarding agents.

Express Cases, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628.

The English doctrine that railroad companies must carry forwarding agents has no bearing, because in conflict with the common-law doctrine in this country.

Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission, 21 C. C. A. 103, 43 U. S. App. 308, 74 Fed. 803; Hutchinson, Carr. 3d ed. §§ 514–517.

The act to regulate commerce has not changed the common-law doctrine in this respect.

Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 509, 44 L. ed. 560, 566, 20 Sup. Ct. Rep. 385.

The specific judicial declarations, both in this country and Canada, support the view that railroad companies are not bound to apply their rates so as to enable forwarding agents to do business.

Lundquist v. Grand Trunk Western R. Co. 121 Fed. 915; Johnson v. Dominion Exp. Co. 28 Ont. Rep. 203.

Section 2 seeks to secure equality between shippers in the ordinary sense. The forwarding agent is not a shipper in that sense.

Wight v. United States, 167 U. S. 512, 518, 42 L. ed. 258, 259, 17 Sup. Ct. Rep. 822; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 219, 40 L. ed. 940, 947, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Brownell v. Columbus & C. Midland R. Co. 4 Inters. Com. Rep. 292.

The very cases relied upon by the Commission show clearly that from the outset § 2 of our statute has been given a far broader and more liberal construction than the much narrower language of the English statute has received or could receive.

Interstate Commerce Commission v. Baltimore & O. R. Co. 3 Inters. Com. Rep. 192, 43 Fed. 53; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 219, 40 L. ed. 940, 947, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

The English cases have never been approved or followed by this court.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 282, 36 L. ed. 705, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45.

Since the Wight Case and Alabama Midland Case the doctrine of the Party Rate Case and the Import Rate Case as to § 2 has been followed by the circuit court of appeals in an opinion wholly at variance with the Commission's theories.

United States v. Chicago & N. W. R. Co. 62 C. C. A. 465, 127 Fed. 785.

The Commission's theory of § 2 is at variance not only with all the decisions of this court as to that section, but with the repeated declarations of this court as to the scope and purpose of the act to regulate commerce.

Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 197, 40 L. ed. 935, 939, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 172, 42 L. ed. 414, 425, 18 Sup. Ct. Rep. 45; Southern P. Co. v. Interstate Commerce Commission, 200 U. S. 536, 554, 50 L. ed. 585, 593, 26 Sup. Ct. Rep. 330; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 119, 52 L. ed. 705, 712, 28 Sup. Ct. Rep. 493.

Rates to promote manufacturing have been sustained by the state courts on reasoning in line with the decisions of this court, but inconsistent with the position of the Commission.

Hoover v. Pennsylvania R. Co. 156 Pa. 222, 22 L.R.A. 263, 36 Am. St. Rep. 43, 27 Atl. 282; Louisville & N. R. Co. v. Com. 108 Ky. 628, 57 S. W. 508.

Liability to a multiplicity of actions was a sufficient differentiating circumstance.

Lundquist v. Grand Trunk Western R. Co. 121 Fed. 915.

The business of the forwarding agents is subversive of the spirit and purpose of the act to regulate commerce, and would tend to nullify its most important provisions.

Lundquist v. Grand Trunk Western R. Co. 121 Fed. 917.

The Commission and the Federal authorities have uniformly contended that it is the duty of the carrier and the duty of the Commission and courts to look through the devices, schemes, agencies, and means by which the real nature of transactions between shippers and carriers is sought to be hidden, to strike them down, and expose the real nature of the transactions, and hold the parties to strict accountability therefor.

United States v. Milwaukee Refrigerator Transit Co. 142 Fed. 247.

In the recent decision of the Supreme Court in Bitterman v. Louisville & N. R. Co. 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. Rep. 91, 12 A. & E. Ann. Cas. 693, this court registered its condemnation of discriminations and transportation at less than tariff rates, obtained by passengers dealing not with the carrier direct, but through the intervention of third parties.

Mr. Chief Justice **White** delivered the opinion of the court:

Was the court below wrong in permanently enjoining the enforcement of an order of the Interstate Commerce Commission directed to the railroad companies who are appellees is the subject which this cause requires us to consider. As a preliminary to stating the proceedings before the Commission and the court, we refer to practices under the act to regulate commerce which gave rise to and developed the controversy with which the order of the Commission was concerned. To do this will not only abbreviate the statement of the case, but will serve to broadly define the one question essential to be decided, and point to the principles applicable to its correct solution.

Before the act to regulate commerce it was usual, first, to give reduced rates to persons who shipped quantities of merchandise; and, second, to charge a proportionately less rate for a carload than was asked for a shipment in less than a carload. After the act, lower rates to wholesale shippers were abandoned, it having been declared that to continue them was contrary to the act. Providence Coal Case, 1 I. C. C. Rep. 107, 1 Inters. Com. Rep. 363. The giving, however, a lesser proportional rate for a carload than for a less than carload continued, the Commission having at an early date announced that such a practice was not prohibited. Thurber v. New York C. & H. R. R. Co. 3 I. C. C. Rep. 473, 2 Inters. Com. Rep. 742. Without detailing the theory upon which this conception was based, it suffices broadly to say that it embodied the assumption that a carload was the unit of shipment, and rested upon the difference which existed between the cost of service in the case of a carload shipment *by one consignor to[241 one consignee, and that occasioned by a shipment in one car of many packages by various consignors to various consignees. Leaving aside possible qualifications arising from exceptional conditions, it is true to say that the Commission, however, recognized that the fixing of a lesser rate for a carload was not imperative, but was merely optional. Conformably to these administrative conceptions it came universally to pass that wherever a lesser charge for a carload than for a less-than-carload shipment was established, such charge was only applicable to shipments made at one time by one consignor of merchandise consigned to one consignee at a single destination. While there was this uniformity, there was, however, much divergence between carriers as to the character of traffic which was given the benefit of the lesser rate for carload shipments and the circumstances under which, when such rate was established, it would be applied. This becomes at once manifest when the rules are considered which prevail in the three geographical divisions into which the United States came to be divided by carriers in order that a similar classification might, in a general sense, obtain under like conditions. The divisions in question are the Southern, the

Western, and the Official Classification territory, the first including practically all points east of the Mississippi river and south of the Ohio and Potomac rivers; the second embracing that part of the country west of the Mississippi river and the Great Lakes and an imaginary line extending from St. Louis to Chicago; and the last all of the United States not covered by the two other divisions. In the Southern and Western Classification territory the rules established by carriers allowed the lesser rate for a carload shipment only on a small percentage of the classified articles, and in both these territories restrictions were imposed prohibiting the intermingling of differently classified articles in one car for 242]the purpose of *obtaining the carload rate, even though the articles, if they had been shipped separately in carload quantities, might have been entitled to the carload rate. The extent of these limitations upon the right to enjoy the lesser rate for the carload in the territories in question is shown by a statement made by the then chairman of the Interstate Commerce Commission, in the dissenting opinion delivered by him in Export Shipping Co. v. Wabash R. Co. 14 Inters. Com. Rep. 437, 443, *viz.*:

"A recent careful and authoritative examination of the several classifications shows that in the Southern Classification there are 3,503 less-than-carload and only 773 carload ratings, the carload ratings being 22.1 per cent of the less-than-carload; in the Western Classification there are 5,729 less-than-carload and only 1,690 carload ratings, the carload ratings being 29.8 per cent of the less-than-carload."

In the same opinion it is also stated that in both the Western and Southern Classification territory the small percentage accorded a carload rate was confined to goods embraced within lower grades of classification, taking therefor the lowest rates. In the Official Classification territory, however, a widely different allowance of carload ratings prevailed, since in that territory the carload rating was permitted on a very large number of articles. In that territory, as likewise remarked by Chairman Knapp, "there are 5,852 less-than-carload ratings and 4,235 carload ratings, the carload ratings being 72.4 per cent of the less-than-carload" against, as we have said, 29.8 per cent and 22.1 per cent in the other territories. This large difference was besides in effect made much greater not only by the higher grades of traffic to which the carload rate was extended, but also because of the enlarged right to ship in one car articles embraced in various classes of traffic to which the carload rating was extended.

There can be no doubt that the privilege of shipping at *a lesser rate for the[243 carload shipment than was asked for a less-than-carload shipment came to be interwoven with and inseparable from the movement of commerce through the channels of railroad transportation. And the benefits of the lesser rate came to be obtained not alone by an owner of all the goods shipped in a carload, but by combinations of owners, by agreements between them concerning particular and isolated shipments, by the organization of associations of shippers having for their object the creating of agencies to receive merchandise belonging to the members of the association, and to aggregate and ship them in carload lots in the name of one consignor to a single consignee, at one destination, by the use of commission houses, storage and other companies, etc. It is also undoubted that, in consequence of the facility of shipping at a lesser rate for a carload than for a less-than-carload shipment, there developed a class of persons known as forwarding agents, who embarked in the business of obtaining a carload rate for various owners of merchandise by aggregating their shipments, such agents relying for their compensation upon what they could make from the difference between the carload and less-than-carload rates. The business so carried on by these agents was thus described by Mr. Commissioner Knapp in his dissenting opinion, to which we have previously referred (14 Inters. Com. Rep. 440):

"The business of the forwarding agent, in so far as is material to the question involved, is to collect less-than-carload shipments from different consignors, combine such shipments into carloads, and ship the same in the name of the forwarding agent, or of the owner of one of the less-than-carload shipments, to one consignee, who may be the forwarding agent himself, another forwarding agent at the point of destination with whom he has business relations, or the owner of part of the property transported. The consignee of the shipment, whoever he *may be, receives the carload and dis-[244 tributes its contents to the parties for whom they are intended. The forwarding agent finds his compensation and profit in the difference between the carload and less-than carload rates.

"The saving effected by securing application of the carload rather than the less-than-carload rates may be divided between the forwarding agent and his customer in any agreed proportion. To the extent that the customer secures the carriage of his property at a lower rate than the less-than-carload rate, which would otherwise be applied, he saves money, and the division of the difference between the carload and the

less-than-carload rates is a matter of private bargain between him and the agent."

The extent to which the right to avail of the carload rating in the various modes above stated had come to be a part of the business of the country is described in the opinion of the Commission in California Commercial Asso. v. Wells, F. & Co. 14 Inters. Com. Rep. 422, delivered on the same day that its opinion concerning this controversy was announced. The Commission said (p. 433):

"Few practices have become more firmly established in the transportation world than that of combining small quantities of freight of various owners and shipping at the relatively lower rates applicable to large consignments; and under this practice has developed an immense volume of traffic which otherwise could never have been brought into being. It is not an exaggeration to say that the enforcement of such a rule by the carriers of the United States would bring disaster upon thousands of the smaller industries, and more surely establish the dominance of the greater industrial and commercial institutions."

And the alertness with which those engaged in commerce utilized every means afforded of shipping at lower cost is shown in the following testament made by Mr. 245]*Commissioner Knapp in his opinion to which we have referred (14 Inters. Com. Rep. 441):

"The individual shippers are not necessarily located at the same point, nor are the individual consignees. For instance, if a reduction in rates could be effected, a furniture dealer at Grand Rapids, Michigan, having a shipment for a point in Maine, and a furniture dealer in Rockford, Illinois, having a shipment for a point in Massachusetts, might forward their separate shipments at less-than-carload rates to Chicago; there the two shipments would be consolidated and forwarded at carload rates to Boston; and thence shipped again at less-than-carload rates from Boston to their respective destinations."

It is obviously true that the extent to which the practice prevailed of combining shipments to avail of the benefit of the carload rate differed largely in the various territories, dependent upon the liberality of the tariffs on the subject. That is to say, in Official Classification territory, where the right to carload rates was extended to many items, and the right to combine different articles in one shipment was more liberal than in the other territories, the business of combining diverse shipments into carload lots assumed much greater magnitude than in the other territories. However, about 1899, in Official Classification territory, rules were adopted restricting the liberal right to obtain carload rates and the extended power to combine like or different articles in a car load, the restrictions probably having been brought about by the development of the business of forwarding agents. Buckeye Buggy Co. v. Cleveland, C. C. & St. L. R. Co. 9 Inters. Com. Rep. 620. The modifications in question which took the form of notes to Rule 5-B and to Rule 15-E of the Official Classifications, which regulated carload shipments, in effect forbade the combination of goods belonging to several owners, for the purpose of a carload shipment, and forbade, therefore, not only impliedly, *but express-[246 ly, the combination of goods for the purpose of carload rating by means of forwarding agents. The notes were as follows:

"Rule 5-B. In order to entitle a shipment to the carload rate, the quantity of freight requisite under the rules to secure such carload rate must be delivered at one forwarding station, in one working day, by one consignor, consigned to one consignee and destination, except that when freight is loaded in cars by consignor, it will be subject to the car-service rules and charges of the forwarding railroad. (See note.)

. . . . . ,

"Note. Rule 5-B will apply only when the consignor or consignee is the actual owner of the property.

"Rule 15-E. Shipments of property combined into packages by forwarding agents claiming to act as consignors will only be accepted when the names of individual consignors and final consignees, as well as the character and contents of each package, are declared to the forwarding railroad agent, and such property will be waybilled as separate shipments, and freight charged accordingly. (See note.)

"Note. The term 'forwarding agents,' referred to in this rule, shall be construed to mean agents of actual consignors of the property, or any party interested in the combination of L. C. L. shipments of articles from several consignors at point of origin."

While the restrictions in question were adopted in 1899, from that time to about 1907, when the shipments which provoked this controversy were made, it would seem that there was no general effort to enforce the restrictions, although sporadic attempts to do so were undoubtedly made. The business, therefore, of aggregating the shipments of various owners, for the purpose of obtaining the benefit of the carload rate by all the means and devices which we have hitherto described, continued *substan-[247 tially unchanged. Buckeye Buggy Co. Case, supra. See also statement in the dissenting opinion of Mr. Commissioner Knapp in

the present case. 14 Inters. Com. Rep. p. 442.

In the spring of 1907, the Export Shipping Company, a New Jersey corporation doing business in Chicago and in New York, shipped from Chicago to New York, by the several railroads who are appellees, three cars of freight, consisting of merchandise belonging to various owners which had been aggregated by the export company for the purpose of shipment, and thus becoming entitled to the carload rate. The shipments conformed in all respects to the regulations of the companies except to the extent that they came under the operation of the restrictions above referred to. On the arrival of each car in New York, the carrier, instead of collecting the carload rate, exacted the less-than-carload rate, because of the restrictions in question. In August, 1907, the export company petitioned the Interstate Commerce Commission to award it reparation against the three carriers to the extent of the difference between the less-than-carload rates, which had been exacted, and the sums which would have been paid if the carload rate had been demanded. The right to the relief was based upon the assertion that an unlawful discrimination had been occasioned. The railroad companies having answered, the three complaints were consolidated and heard at the same time. When the hearing had somewhat proceeded, it was agreed that the petitions for reparation should be considered as having been amended so as to challenge the reasonableness of the restrictions referred to. After the case had been submitted to the Commission, the Rockford Manufacturers' & Shippers' Association of Rockford, Illinois, the Manufacturers' Association of Jamestown, and the Judson Freight Forwarding Company were allowed to intervene, and the case was reopened and further testimony 248]was received *in support of and against the contention that the assailed rules were in conflict with the second section of the act to regulate commerce.

The Commission, at the time the complaints were pending, had also before it the complaint of the California Commercial Association against Wells, Fargo & Company, involving an analogous question. On June 22, 1908, the report, opinion, and order of the Commission in both cases were filed. 14 Inters. Com. Rep. pp. 422, 437.

The general subject under consideration in this case was more elaborately discussed in the opinion in the California case, and in the opinion in this case reference was made to the reasoning expounded in that case. The restrictions created by the rules to which we have referred were declared void and reparation was awarded. The carrier was commanded on or before a date named to desist from attempting to enforce the restrictions. Two members of the Commission dissented. Briefly stated, the Commission held (a) that a carrier could not properly look beyond goods tendered to it for transportation "to the ownership of the shipment," as the basis for determining the application of its established rates, because doing so would be a violation of the second section of the act to regulate commerce; (b) that the fact that the carriers in Official Classification territory had voluntarily established both liberal carload rates and opportunities for combining various articles for the purpose of obtaining the carload rate gave the carriers no right to discriminate by depriving one person or class of persons of the right thus granted; (c) that a forwarding agent was equally entitled with others to the benefit of a carload rate when published and established, and that to deprive a forwarding agent of such rights would be a prohibited discrimination; (d) that, in any view, the restrictions formulated by the assailed rules were void because repugnant to the act to regulate commerce, since their enforcement as a matter of fact necessarily *created[249 preferences and engendered discriminations which the act forbade; (e) that this, among other reasons, was the case, because the enforcement of the assailed restrictions would not only create preferences in favor of one set of persons against another, but would create discriminations between places, and would be revolutionary in its operation upon interstate traffic; (f) that irrespective of the abstract right of a carrier to make the ownership of goods offered for shipment a basis for applying its published rates, owing to the practical impossibility of a carrier being able to adequately enforce such a rule by determining who was the owner of the goods offered, such a rule as a matter of fact would, in and of itself, be an unlawful preference and discrimination forbidden by the act; and (g) that the same principle would control as to the attempt to establish a rule applicable alone to forwarding agents, because of the practical impossibility of distinguishing one class of agents from another. The reasons which led two members of the Commission to dissent were expounded in a careful opinion, stating views which were in substance the direct antithesis of those expressed by the Commission. For example, the dissenting opinion maintained first, that to deprive a carrier of the power to exclude a forwarding agent from the benefit of the carload rate would bring about discrimination against places and preferences in favor of persons prohibited by the act; second, that

as the right to the carload rate was the offspring of the voluntary act of the carrier, the right to restrict the privilege thus accorded to particular classes or conditions necessarily obtained; and, third, that in any event, a forwarding agent who was but a dealer in railroad transportation, and therefore in a measure a competitor in business of a railroad carrier, was not within the prohibitions of the second section of the act to regulate commerce.

The railroad companies did not comply 250]with the order, *and before the date fixed for compliance commenced the present suit by filing their joint bill to enjoin the enforcement of the order and have it declared void. It suffices to say in substance that, as a basis for the right to relief, the bill challenged the propositions upon which the Commission had based its order, and affirmatively propounded the grounds which led two members of the Commission to dissent from the conclusions of that body. It also suffices to say that the answer of the Commission traversed the affirmative grounds for relief asserted in the bill, and averred the correctness of the order by it made upon the grounds stated in the opinion and report of that body. The order of the Commission and its report and opinion in this particular case, as also its opinion in the California Commercial Association Case, which, as we have said, was decided on the same day, were made part of the answer, and the opinion in the Buckeye Buggy Company Case was also attached.

A motion for a preliminary injunction was heard before the circuit court, composed of three judges, upon the pleadings, the affidavits of two officials of one of the complainant railroad companies, and the evidence taken before the Commission. The motion was granted, and the enforcement of the order of the Commission was restrained until final hearing. The circuit court rendered no opinion other than the statement that a majority of the court were in accord with the reasoning and conclusions expressed in the dissenting opinion of the chairman of the Commission, and that they did not think it necessary to add anything to his exhaustive discussion of the questions presented. Thereafter the American Forwarding Company, Transcontinental Freight Company, and the Rockford Manufacturers' & Shippers' Association, were made parties defendant, and those concerns filed an answer, which adopted the averments contained in the answer of the Commission. Replications were duly filed. A 251]decree **pro confesso* was entered against the Export Shipping Company and its trustee in bankruptcy, the company having become bankrupt.

Adopting a suggestion made by the court in disposing of the motion for a preliminary injunction, it was stipulated between the solicitors for the various parties that the case should be treated as having been submitted for final hearing. Thereupon a final decree was entered, by which the order of the Commission was set aside and declared to be void. This appeal was then taken.

As shown by the opinion of the Commission and that of the two members who dissented, there were many and wide differences in the views expressed. On their face, however, when ultimately reduced, they will be found, in so far as they are here susceptible of review, to rest on but a single legal proposition: that is, the right of a common carrier to make the ownership of goods tendered to him for carriage the test of his duty to receive and carry; or, what is equivalent thereto, the right of a carrier to make the ownership of goods the criterion by which his charge for carriage is to be measured. We say the contentions all reduce themselves to this, because in their final analysis all the other differences, in so far as they do not rest upon the legal proposition just stated, are based upon conclusions of fact as to which the judgment of the Commission is not susceptible of review by the courts. Baltimore & O. R. Co. v. United States ex rel. Pitcairn, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164. This at once demonstrates the error committed by the lower court in basing its decree annulling the order of the Commission upon its approval and adoption of the reasons stated in the opinion of the dissenting members of the Commission. This follows, since the reasons given by the dissenting members, except in so far as they rested upon the legal proposition we have just stated, proceeded upon premises of fact, which, however cogent they may have been as a matter of original consideration, were not open to be so *considered by the court, because[252 they were foreclosed by the opinion of the Commission. Doubtless the mistake of the court below in this respect was occasioned by overlooking the scope of the Hepburn act [34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1149], and because the decision below was made in June, 1909, before the announcement of the opinion in the Pitcairn Case. The reasons above stated also serve to narrow the contentions pressed at bar, since such contentions likewise in their essence but reiterate the conflict of opinion which developed in the Commission, but which, for the reasons stated, are, for the purpose of our review, substantially reducible to the one legal question which we have stated. We shall therefore confine ourselves to a consideration of that question

and to such brief notice of the other contentions urged as will make clear that they depend ultimately upon conclusions of fact not open in this court for review.

The contention that a carrier, when goods are tendered to him for transportation, can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods, is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers, as to demonstrate the unsoundness of the proposition by its mere statement. We say this because it is impossible to conceive of any rational theory by which such a right could be justified consistently either with the duty of the carrier to transport or of the right of a shipper to demand transportation. This must be, since nothing in the duties of a common carrier by the remotest implication can be held to imply the power to sit in judgment on the title of the prospective shipper who has tendered 253]goods for transportation. *In fact, the want of foundation for the assertion of such a power is so obvious that in the argument at bar its existence is not directly contended for as an original proposition, but is deduced by implication from the supposed effect of some of the provisions of the second section of the act to regulate commerce. In substance, the contention is that, as the section forbids a carrier from charging "a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property, . . . than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions" [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154], authority is to be implied for basing a charge for transportation upon ownership or nonownership of the goods tendered for carriage, upon the theory that such ownership or nonownership is a dissimilar circumstance and condition within the meaning of the section.

But this argument, in every conceivable aspect, amounts only to saying that a provision of the statute which was plainly intended to prevent inequality and discrimination has resulted in bringing about such conditions. Moreover, the unsoundness of the contention is demonstrated by authority. It is not open to question that the provisions of § 2 of the act to regulate commerce were substantially taken from § 90 of the English railway clauses consolidation act of 1845, known as the "equality clause." Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 222, 40 L. ed. 940, 948, 16 Sup. Ct. Rep. 661, 5 Inters. Com. Rep. 405. Certain also is it that, at the time of the passage of the act to regulate commerce, that clause in the English act had been construed as only embracing circumstances concerning the carriage of the goods, and not the person of the sender; or, in other words, that the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before *the[254 service of the carrier began or after it was terminated. It was therefore settled in England that the clause forbade the charging of a higher rate for the carriage of goods for an intercepting or forwarding agent than for others. Great Western R. Co. v. Sutton (1869) L. R. 4 H. L. 226; Evershed v. London & N. W. R. Co. (1878) L. R. 3 App. Cas. 1029, 5 Eng. Rul. Cas. 351, and Denaby Main Colliery Co. v. Manchester, S. & L. R. Co. (1885) L. R. 11 App. Cas. 97. And it may not be doubted that the settled meaning which was affixed to the English equality clause at the time of the adoption of the act to regulate commerce applies in construing the second section of that act; certainly to the extent that its interpretation is involved in the matter before us. Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 166, 42 L. ed. 414, 423, 18 Sup. Ct. Rep. 45.

As these considerations are decisive of the only legal question which, as we have already pointed out, the case involves, and also refute a subordinate contention that a forwarding agent is not a person within the meaning of that word as employed in the second section of the act to regulate commerce, we are brought, as we have hitherto said, to briefly refer to minor considerations pressed in argument, so far as they seem to us to be of sufficient weight to be entitled to particular notice.

First. It is urged that, as the wide range of carload rates and the extent of the facility for combining articles for the purpose of obtaining such rates allowed in Official Classification territory are the result of the voluntary act of the railroads, therefore the power existed in the railroads to restrict and limit the enjoyment of such rate, as was done by the assailed rules. In the interest of the public it is urged a limitation should not be now enforced which would compel the carrier to withdraw the facilities

which shippers enjoy by the voluntary act of the carriers. But the proposition rests upon the fallacious assumption that because a carrier has the authority to fix rates, it 255]has *the right to discriminate as to those who shall be entitled to avail of them. Moreover, the contention is not open for review, because the legal question of the right of the carrier to consider ownership under the second section having been disposed of, the finding of the Commission that to permit the enforcement of the rule would give rise to preferences and engender discriminations prohibited by the act to regulate commerce embodies a conclusion of fact beyond our competency to re-examine.

Second. Conceding, for the sake of the argument, the correctness of the construction which we have given to the second section, it is urged that nevertheless, as a forwarding agent is a "dealer in railroad transportation," and depends for his profit in carrying on his business upon the sum which can be made by him out of the difference between the carload and the less-than-carload rate, and may discriminate between the persons who employ him, therefore the act to regulate commerce should be construed as empowering a carrier to exclude the forwarding agent as a means of preventing such discriminations. But in the absence of any statutory authority to exclude the forwarding agent, and basing the right to exclude merely upon the assumption that the nature and character of his business would produce discrimination, and therefore justify the exclusion, the contention is not open for our consideration, because, like the previous one, it is foreclosed by the finding of fact of the Commission. Indeed, this is not merely the result of an implication from the finding of the Commission, since it was affirmatively found that to permit the carrier to exclude the forwarding agent would be to produce preference and discrimination. The contention, then, comes to this,—that carriers should be permitted to give preferences and make discriminations as a means of preventing those unlawful conditions from arising.

Third. It is said that as the business 256]of the forwarding *agent is in a sense competitive with that of a carrier, and may largely diminish the revenue derived by railroad companies from their less-than-carload rates, and hence cripple their ability to successfully conduct business, therefore the right to exclude the forwarding agent, even if there is no power to exclude the owner or the ordinary agent of owners, should be permitted. This, however, again, in a twofold sense, is directly in conflict with the findings of fact made by the Commission; first, because it disregards the findings as to the operation of the business of a forwarding agent, and, second, because it overlooks the express finding of the Commission that it would be so difficult, if not impossible, for the carrier to determine in practice the nature and character of the title of a person tendering goods for shipment that the necessary result of a rule excluding a forwarding agent would be to embarrass shipments by owners or their special agents, and thus beget universal uncertainty and constant discrimination and preference against owners.

As it follows, from the reasons just stated, that the court below erred in annulling the order of the Commission and enjoining its enforcement, its decree to that effect is reversed, and the case is remanded, with directions to dismiss the bill.

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*UNITED STATES OF AMERICA, [257
Appt.,
v.
LEHIGH VALLEY RAILROAD COMPANY.

(See S. C. Reporter's ed. 257-274.)

Appeal — discretionary matters — amendment.

1. Abuse of discretion which may be reviewed on appeal is committed by the trial court when it refuses to permit an amendment to the bill in a suit by the Federal government to enjoin railway carriers from interstate transportation of commodities with which they are associated or in which they are interested, where such amendment is germane to the original cause of action and was not foreclosed by the decision of the Federal Supreme court, which on appeal, had reversed a prior decree of dismissal founded upon the alleged unconstitutionality of the statute upon which the suit was based, and had remanded the cause for further proceedings.

[For other cases, see Appeal and Error, 4422-4431, in Digest Sup. Ct. 1908.]

Pleading — amendments — when germane to original cause of action.

2. A proposed amendment to the bill in a suit by the Federal government to enjoin railway carriers from interstate transportation of commodities with which they are associated or in which they are interested is germane to the original cause of action where its allegations tend to show such an exercise by the carrier of its power as a stockholder in the corporation manufacturing, mining, producing, or owning the

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Note.—On the right to amend pleadings after final decision on appeal—see note to Todd v. Bettingen, 18 L.R.A.(N.S.) 263.

On conclusiveness of prior decisions on subsequent appeals—see note to Hastings v. Foxworthy, 34 L.R.A. 321.

commodity carried, as to deprive the latter of all independent existence, and to make it virtually but an agency, or dependency, or department of the carrier.

[For other cases, see Pleading, I. n, in Digest Sup. Ct. 1908.]

Judgment — res judicata — what matters concluded.

3. An adjudication that the ownership by a railway carrier of stock in a bona fide corporation manufacturing, mining, producing, or owning the commodity carried is not the interest in such commodity forbidden to the carrier by the Hepburn act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1150), is not *res judicata* of the right of such carrier to exert its power as a stockholder so as to deprive the other corporation of all real independent existence, and to make it virtually but an agency, or dependency, or department of the carrier.

[For other cases, see Judgment, 685–687, in Digest Sup. Ct. 1908.]

Carriers — governmental control — interest in commodity carried — stock ownership in sham corporation.

4. The exercise by a railway carrier of its power as a stockholder in a corporation manufacturing, mining, producing, or owning the commodity carried in such manner as to deprive the latter corporation of all independent existence, and to make it virtually but an agency, or dependency, or department of the carrier, is forbidden by the provisions of the Hepburn act of June 29, 1906, making it unlawful for a railway carrier to transport in interstate commerce articles or commodities "manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect."

[Governmental control of carrier, see Carriers, III., in Digest Sup. Ct. 1908.]

[No. 536.]

Argued January 5, 1911. Decided April 3, 1911.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania to review a decree refusing to allow an amendment to the bill, and dismissing a suit by the Federal government to enjoin a railway carrier from interstate transportation of a commodity with which it is associated or in which it is interested. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Mr. **Wade H. Ellis** argued the cause, and, with Attorney General Wickersham and Mr. Edwin P. Grosvenor, filed a brief for appellant:

The use of the coal company by the railroad under the circumstances set out in the amended bill of complaint is in fact a device for evading the provisions of the commodities clause.

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Harriman v. Northern Securities Co. 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493; United States v. Reading Co. 183 Fed. 427; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 390, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; Re Watertown Paper Co. 94 C. C. A. 528, 169 Fed. 256; Re Muncie Pulp Co. 71 C. C. A. 530, 139 Fed. 546; Re Rieger, 157 Fed. 613; Interstate Teleg. Co. v. Baltimore & O. Teleg. Co. 51 Fed. 50; 1 Morawetz, Priv. Corp. §§ 1, 227; Des Moines Gas Co. v. West, 50 Iowa, 16; Booth v. Bunce, 33 N. Y. 139, 88 Am. Dec. 372; Bennett v. Minott, 28 Or. 339, 39 Pac. 997, 44 Pac. 288.

The government was entitled to a dismissal without prejudice.

Texas & P. R. Co. v. Interstate Transp. Co. 155 U. S. 585, 590, 39 L. ed. 271, 272, 15 Sup. Ct. Rep. 228; Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 612, 37 L. ed. 577, 580, 13 Sup. Ct. Rep. 691; Kendig v. Dean, 97 U. S. 423, 426, 24 L. ed. 1061, 1062; Durant v. Essex Co. 7 Wall. 107, 109, 19 L. ed. 154, 156; House v. Mullen, 22 Wall. 42, 47, 22 L. ed. 838, 839; Willcox v. Consolidated Gas Co. 212 U. S. 19, 55, 53 L. ed. 382, 400, 29 Sup. Ct. Rep. 192, 15 A. & E. Ann. Cas. 1034; Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423; Rio Grande Dam & Irrig. Co. v. United States, 215 U. S. 266, 54 L. ed. 190, 30 Sup. Ct. Rep. 97; Marine Ins. Co. v. Hodgson, 6 Cranch, 206, 2 L. ed. 200; Re Sanford Fork & Tool Co. 160 U. S. 247, 256, 40 L. ed. 414, 416, 16 Sup. Ct. Rep. 291; Neale v. Neale, 9 Wall. 1, 19 L. ed. 590; Ex parte French, 91 U. S. 423, 23 L. ed. 249; Elliott, App. Proc. § 577, p. 490; Perry v. Burton, 126 Ill. 599, 18 N. E. 653; Green v. Springfield, 130 Ill. 515, 22 N. E. 602.

Mr. **John G. Johnson** argued the cause, and, with Messrs. Frank H. Platt and J. F. Schaperkotter, filed a brief for appellee:

The refusal of leave to amend the bill was discretionary, and is not reviewable.

Mexican C. R. Co. v. Pinkney, 149 U. S. 194, 201, 37 L. ed. 699, 702, 13 Sup. Ct. Rep. 859; Chapman v. Barney, 129 U. S. 677, 681, 32 L. ed. 800, 801, 9 Sup. Ct. Rep. 426; Bullitt County v. Washer, 130 U. S. 142, 145, 32 L. ed. 885, 886, 9 Sup. Ct. Rep. 499.

The complainant's motion for a decree dismissing the bill of complaint without prejudice was rightly denied.

Pullman's Palace Car Co. v. Central

Transp. Co. 171 U. S. 138, 146, 43 L. ed. 108, 112, 18 Sup. Ct. Rep. 808; Stevens v. Railroads, 4 Fed. 105; Chicago & A. R. Co. v. Union Rolling Mill Co. 109 U. S. 702, 713, 27 L. ed. 1081, 1085, 3 Sup. Ct. Rep. 594; American Bell Teleph. Co. v. Western U. Teleg. Co. 16 C. C. A. 367, 21 U. S. App. 627, 69 Fed. 670; Hershberger v. Blewett, 55 Fed. 171; Flaherty v. McCormick, 123 Ill. 525, 14 N. E. 846; Georgia Pine Turpentine Co. v. Bilfinger, 129 Fed. 131; Ebner v. Zimmerly, 55 C. C. A. 430, 118 Fed. 820.

Mr. Chief Justice **White** delivered the opinion of the court:

This case is one of what were known as the Commodity Cases, previously decided and reported in 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527. The controversy now is but a sequel to that disposed of in the previous cases. To understand the question now for consideration it is essential to have in mind the contentions which arose for decision upon the previous appeal and the disposition which was made of them. We therefore refer to those subjects.

The United States proceeded, both by suits in equity and mandamus, against certain railroad companies, including the Lehigh Valley, to prohibit them from transporting coal in interstate commerce in violation of what were deemed to be the prohibitions of the fifth paragraph of the 1st section of the act to regulate commerce, as amended on June 29, 1906, usually referred to as the commodities clause of the Hepburn act. The clause is as follows:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any 264]railroad company to transport *from any state, territory, or the District of Columbia to any other state, territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary or intended for its use in the conduct of its business as a common carrier." 34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1150.

In effect, the contention of the government was that the clause in question prohibited railroad companies from moving in the channels of interstate commerce articles or commodities other than the articles excepted by the provision, which had been manufactured, mined, or produced by the companies or under their authority, or which were, at the time of the transportation, owned by them, or which had been previously owned by them in whole or in part, or in which the companies then or previously had any interest, direct or indirect. The government, moreover, insisted that these general propositions embraced the movement by the companies in interstate commerce of a commodity which had been manufactured, mined, or produced by a corporation in which the transporting railroad company was a stockholder, irrespective of the extent of such stock ownership. The railroad companies in effect defended the suits upon the ground that the statute, as construed by the government, was repugnant to the Constitution. Each of the cases was submitted upon bill and answer and petition and return to the circuit court of the United States for the eastern district of Pennsylvania, held by three circuit judges under the expediting act of February 11, 1903, 32 Stat. at L. 823, chap. 544, U. S. Comp. Stat. Supp. 1909, p. 1211. The submission in each case was made as a result of a stipulation between counsel "that the submission on bill and answer and any averment or admission in the pleadings of either party *shall in no wise prejudice the[265 said parties in any other suit or proceeding heretofore or hereafter instituted, and shall be operative and take effect only with respect to the present suit and for the purpose thereof."

Treating the commodities clause in question as having the significance attributed to it by the United States, the court held it to be repugnant to the Constitution. Judgments and decrees were accordingly entered, denying the applications for mandamus, and dismissing the bills of complaint. The reasons which led to this action were expounded in one opinion, made applicable to all the cases, the court briefly but comprehensively stating the facts in each case which were relied upon by the government as bringing the defendant corporation within the clause as the government construed it. The cases were then brought here.

As was done in the lower court, the cases here were all disposed of by one opinion, the facts in each case as summarized by the court below being stated. In deciding the cases, it became necessary first to ascertain the meaning of the commodities clause. In performing this duty, the conclusion was reached that the clause did not have the far-reaching significance attributed to it by the government, and which had been substantially adopted by the court below, but, on the contrary, had a much narrower meaning. Attention was directed to the fact that the statute disjunctively applied four generic prohibitions; that is, it

forbade a railway company from transporting in interstate commerce articles or commodities, 1, which it had manufactured, mined, or produced; 2, which have been so mined, manufactured, or produced under its authority; 3, which it owns in whole or in part; and, 4, in which it has an interest, direct or indirect. All these prohibitions, however, were held to have but a common purpose, "that is, the dissociation of railroad companies prior to transportation from articles or commodities, whether the associa-
266]tion *resulted from manufacture, mining, production, or ownership, or interest, direct or indirect."

In coming to determine whether the government was correct in its contention that these prohibitions operated to prevent a railroad company from transporting a product because it was owned by or had been mined, manufactured, or produced by a corporation in which the railroad company was the owner of stock, irrespective of the amount of such stock ownership, it was expressly decided that the prohibitions of the statute were addressed only to a legal or equitable interst in the commodities to which the prohibitions referred; that they therefore did not prohibit a railroad company from transporting commodities mined, manufactured, produced, or owned by a distinct corporation, merely because the railroad company was the owner of some or all of the stock in such corporation.

Summing up its review as to the true construction of the commodities clause, the court held (p. 415) that it prohibited "a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (a) When the article or commodity has been manufactured, mined, or produced by a carrier or under its authority, and at the time of transportation the carrier has not in good faith, before the act of transportation, dissociated itself from such article or commodity; (b) when the carrier owns the article or commodity to be transported, in whole or in part; (c) when the carrier, at the time of transportation, has an interest, direct or indirect, in a legal or equitable sense, in the article or commodity, not including, therefore, articles or commodities manufactured, mined, or produced or owned, etc., by a bona fide corporation in which the railroad company is a stockholder.

Thus construed, the clause was held to be
267]within the *power of Congress to enact. As this conclusion rendered it necessary to reverse the action of the court below, which had been exclusively predicated upon the unconstitutionality of the statute, the question arose as to what disposition should be made of the cases. That is to say, the constitutionality of the statute being settled and its true meaning being expounded, the question was whether the cases should be finally disposed of or should be left in such a position as to give the government the right to proceed to apply and enforce the prohibitions of the statute against the various corporations which were defendants, if it deemed a good case existed for so doing. Disposing of this subject in the light of the consent upon which the cases had been tried in the court below, and of the error which had obtained as to the true meaning of the statute, and of the consequent concentration of the attention of the court and of the parties to the question of the constitutionality of the statute, instead of its application to the facts, when correctly construed, it was determined that the decree should not conclude the right of the United States in the respective causes to further proceed to enforce the statute as construed, and hence that that subject should be left open for future action. Referring to this matter, it was said (p. 418):

"As the court below held the statute wholly void for repugnancy to the Constitution, it follows from the views which we have expressed that the judgments and the decrees entered below must be reversed. As, however, it was conceded in the discussion at bar that, in view of the public and private interests which were concerned, the United States did not seek to enforce the penalties of the statute, but commenced these proceedings with the object and purpose of settling the differences between it and the defendants concerning the meaning of the commodities clause and the power of Congress to enact it, as correctly interpreted, and upon this view the proceedings were *heard below by submission[268
upon the pleadings, we are of opinion that the ends of justice will be subserved, not by reversing and remanding with particular directions as to each of the defendants, but by reversing and remanding with directions for such further proceedings as may be necessary to apply and enforce the statute as we interpreted it."

Accordingly, the mandate of this court provided that the cause "be, and the same is hereby, remanded to the said circuit court for further proceedings in conformity with the opinion of this court."

Upon the filing of the mandate, the court below vacated its decree dismissing the bill in this (the equity) cause, and reinstated the case upon the docket. The United States then presented an amended bill and asked leave to file it. The amendment contained copious averments in regard to the

actual relations existing between the railroad company and one of the coal companies mentioned in the original bill, *viz.*, the Lehigh Valley Coal Company. In substance it was averred that as to this particular coal company, the railroad company was not only the owner of all the stock issued by the coal company, but that the railroad company so used the power thus resulting from its stock ownership as to deprive the coal company of all real, independent existence, and to make it virtually but an agency or dependency or department of the railroad company. In other words, in great detail facts were averred which tended to establish that there was no distinction in practice between the coal company and the railroad company, the latter using the coal company as a mere device to enable the railroad company to violate the provisions of the commodities clause. It was expressly charged that in consequence of these facts:

"The coal company is not a bona fide mining company, but is merely an adjunct or instrumentality of the defendant. The defendant is in legal effect the owner of 269]*and has a pecuniary interest in the coal mined by the coal company, and which is transported by the defendant."

Not only was it thus charged that the railroad company used its stock ownership to so commingle the operating of the affairs of the mining company with its own as to render it impossible to distinguish as a matter of fact between them, but it was moreover expressly in substance charged that, exerting its influence as the owner of all the stock of the coal company, the railroad company caused the coal company to buy up all the coal produced by other mining companies in the area tributary to the railroad, and fixed the price at which such coal was bought, so as to control the same and the transportation thereof, and establish the price at which the coal thus ostensibly acquired by the coal company by purchase should be sold when it reached the seaboard.

It was charged that by these abuses the production, shipment, and sale of all the coal within the territory served by the railroad company was brought within the dominion of that company practically to the same extent as if it was the absolute owner of the same. Finally it was alleged as follows:

"That by virtue of the facts hereinbefore set out and otherwise, and more particularly by virtue of the control, direction, domination, and supervision exercised by the persons who are the officers of the defendant railroad and by the defendant over all the operations of the said coal company, embracing the mining and production of said coal, the shipment and transportation of the same over the defendant railroad, and the sale thereof at the seaboard, it follows:

"First. That the coal company, not being in substance and in good faith a bona fide corporation, separate from the defendant, but a mere adjunct or instrumentality of the defendant, the defendant, at the time of transportation, *has an interest, direct[270 or indirect, in a legal or equitable sense, in said coal.

"Second. That said coal of said coal company is mined and produced under the authority of defendant, and the defendant, at the time of transportation and before the act of transportation, has not in good faith dissociated itself from all exercise of authority over said coal, but continues to exercise authority over said coal at the time of transportation, and over the subsequent sale thereof."

On the objection of the railway company, the court denied the request of the United States for leave to file the amended bill. The United States then moved for a decree dismissing its original bill without prejudice, and after argument that motion also was denied. Thereupon counsel for the railroad company moved to dismiss the bill absolutely, and upon the statement of counsel for the United States that it "would not proceed any further, in view of the fact that the proposed amendment had been disallowed," the court reached the conclusion "that the bill should be dismissed absolutely upon the allegations of the bill and answer." A decree to that effect was entered, and the government prosecutes this appeal, relying for reversal upon the error which it is insisted was committed in refusing to allow the proposed amended bill to be filed, and in dismissing the suit.

At the threshold it is insisted by the railroad company that the action of the court below in refusing to permit the proposed amendment, however germane that amendment may have been to the cause of action stated in the original bill, and even although the subject-matter of the amendment was not foreclosed by our previous decision, is not susceptible of being reviewed, because the allowance of amendments to pleadings is discretionary with a trial court, and the action of the court below in refusing to permit the amendment, even though erroneous, may not be reversed for error unless a gross abuse of discretion was *committed. The principle[271 is elementary, but is inapplicable to this case for a twofold reason: First, because the analysis which we have hitherto made of the opinion of this court on the prior

hearing makes it certain that the undoubted object was not to foreclose the right of the government to enforce in the pending causes the commodities clause as correctly construed, and therefore in this regard the discretion of the court below was controlled by the action of this court. Second, because, in view of the express reservations in the opinion and the explicit language of the mandate of this court, the conclusion cannot be escaped that an absolute abuse of discretion resulted from refusing to permit the amendment, even although such abuse was obviously occasioned by a misconception of the character of the action of this court and the scope of the mandate.

It remains only to consider, first, whether the proposed amendment was germane to the original cause of action, and if it was, whether it was foreclosed by our previous decision.

As to the first question. When it is borne in mind that the suit was brought by the government to enforce as against the defendant the commands of the commodities clause, the fact that the proposed amendment was germane to such cause of action is too apparent to need anything but statement. Indeed, in the argument at bar on behalf of the railroad company this is in effect conceded, since it is insisted that the amendment should not have been allowed, because in substance its averments virtually constituted part of the original cause of action. And we think it is equally clear that the grounds of the amendment were not foreclosed by our former decision. While that decision expressly held that stock ownership by a railroad company in a bona fide corporation, irrespective of the extent of such ownership, did not preclude a railroad company from transporting 272]the commodities manufactured, *mined, produced, or owned by such corporation, nothing in that conclusion foreclosed the right of the government to question the power of a railroad company to transport in interstate commerce a commodity manufactured, mined, owned, or produced by a corporation in which the railroad held stock, and where the power of the railroad company as a stockholder was used to obliterate all distinctions between the two corporations. That is to say, where the power was exerted in such a manner as to so commingle the affairs of both as by necessary effect to make such affairs practically indistinguishable, and therefore to cause both corporations to be one for all purposes. To what extent the amendment charged this to be the case will be come manifest by again particularly considering its averments concerning the use by the railroad company of the coal company as a purchaser of coal, as also the direct charge made in the proposed amendment that by such acts the railroad company was enabled to control all or a greater portion of the coal produced in the region tributary to its road, and thus to dominate the situation and fix the price, not only at which all the coal could be bought, but at which it could be sold at the seaboard for consumption.

That the facts thus averred and the other allegations contained in the proposed amended bill tended to show an actual control by the railroad company over the property of the coal company and an actual interest in such property beyond the mere interest which the railroad company would have had as a holder of stock in the coal company is, we think, clear. The alleged facts, therefore, brought the railroad company, so far as its right to carry the product of the coal company is concerned, within the general prohibitions of the commodities clause, unless for some reason the right of the railroad company to carry such product was not within the operation of that clause. The argument is that the railroad company was so expected, because any control which is exerted or interest *which it had in the[273 product of the coal company resulted from its ownership of stock in that company, and would not have existed without such ownership. The error, however, lies in disregarding the fact that the allegations of the amended bill asserted the existence of a control by the railroad company over the coal corporation and its product, rendered possible, it is true, by the ownership of stock, but which was not the necessary result of a bona fide exercise of such ownership, and which could only have arisen through the use by the railroad of its stock ownership for the purpose of giving it, the railroad company, as a corporation, for its own corporate purposes, complete power over the affairs of the coal company, just as if the coal company were a mere department of the railroad. Indeed, such a situation could not have existed had the fact that the two corporations were separate and distinct legal entities been regarded in the administration of the affairs of the coal company. Granting this to be the case, however, it is in effect urged, as the railroad company held all the stock in its coal company, and therefore any gain made or loss suffered by that company would be sustained by the railroad company, no harm resulted from commingling the affairs of the two corporations and disregarding the fact that they were separate juridical beings, because, ultimately considered, they were but one and the same. This, however, in substance but amounts to as-

serting that the direct prohibitions of the commodities clause ought to have been applied to a case of stock ownership,—particularly to a case where the ownership embraced all the stock of a producing company,— and therefore that a mistake was committed by Congress in not including such stock ownership within the prohibitions of the commodities clause. We fail, however, to appreciate the relevancy of the contention. Our duty is to enforce the statute, and not to exclude from its prohibitions things which are properly em-
274]braced within them. Coming to *discharge this duty it follows, in view of the express prohibitions of the commodities clause, it must be held that while the right of a railroad company as a stockholder to use its stock ownership for the purpose of a bona fide separate administration of the affairs of a corporation in which it has a stock interest may not be denied, the use of such stock ownership in substance for the purpose of destroying the entity of a producing, etc., corporation, and of commingling its affairs in administration with the affairs of the railroad company, so as to make the two corporations virtually one, brings the railroad company so voluntarily acting as to such producing, etc., corporation within the prohibitions of the commodities clause. In other words, that by operation and effect of the commodities clause there is a duty cast upon a railroad company proposing to carry in interstate commerce the product of a producing, etc., corporation in which it has a stock interest, not to abuse such power so as virtually to do by indirection that which the commodities clause prohibits, —a duty which plainly would be violated by the unnecessary commingling of the affairs of the producing company with its own, so as to cause them to be one and inseparable.

Deciding, as we do, that error was committed in denying leave to file the proposed amended bill, the decree below is reversed and the cause remanded with directions for further proceedings in conformity with this opinion.

275]*UNITED STATES OF AMERICA, Appt.,
v.
ERIE RAILROAD COMPANY. (No. 537.)

UNITED STATES OF AMERICA, Appt.,
v.
CENTRAL RAILROAD COMPANY OF NEW JERSEY. (No. 538.)

UNITED STATES OF AMERICA, Appt.,
v.
PENNSYLVANIA RAILROAD COMPANY. (No. 539.)

(See S. C. Reporter's ed. 275, 276.)

Appeal — compliance with mandate — dismissal.

Decrees for the absolute dismissal of suits by the Federal government to enjoin railway carriers from interstate transportation of commodities with which they are associated or in which they have an interest were in conformity with the mandate of the Federal Supreme Court, which had reversed prior decrees of dismissal founded upon the alleged unconstitutionality of the statute upon which the suits were based, and had remanded the causes for further proceedings, where leave to amend was not asked, and upon the facts appearing and admitted upon the record, no violation of the statute was shown.

[For other cases, see Appeal and Error, 5565–5583, in Digest Sup. Ct. 1908.]

[Nos. 537, 538, and 539.]

Argued January 5, 1911. Decided April 3, 1911.

APPEALS from the Circuit Court of the United States for the Eastern District of Pennsylvania to review decrees dismissing suits by the Federal government to enjoin railway carriers from interstate transportation of commodities with which they are associated or in which they have an interest. Affirmed.

Mr. **Wade H. Ellis** argued the cause, and, with Attorney General Wickersham and Mr. Edwin P. Grosvenor, filed a brief for appellant.

For contentions of counsel, see their brief as reported in United States v. Lehigh Valley R. Co. ante, 458.

Mr. **John G. Johnson** argued the cause and filed a brief for appellee the Pennsylvania Railroad Company:

The dismissal without prejudice was well within the general rule that the matter was not presented in such form as to make out a case in equity, and accordingly the situation was similar in all respects to that presented by the cases showing a dismissal for want of juridiction.

2 Foster, Fed. Pr. 4th ed. § 300: House v. Mullen, 22 Wall. 42, 46, 22 L. ed. 838, 839; Dowell v. Mitchell, 105 U. S. 430, 432, 26 L. ed. 1142, 1143; Kendig v. Dean, 97 U. S. 423, 426, 24 L. ed. 1061, 1062; Gaylord v. Kelshaw, 1 Wall. 81, 17 L. ed. 612; Hollins v. Brierfield Coal & I. Co. 150 U. S. 371, 37 L. ed. 1113, 14 Sup. Ct. Rep. 127; Walden v. Bodley, 14 Pet. 156, 161,

10 L. ed. 398, 400; Hartell v. Tilghman, 99 U. S. 547, 556, 25 L. ed. 357, 360; Durant v. Essex Co. 7 Wall. 107, 108, 19 L. ed. 154.

The utmost that can be asked under the decisions, where there is a dismissal because the bill is defective in substance, is that the court shall show the reasons for the dismissal.

Peirsoll v. Elliott, 6 Pet. 95, 8 L. ed. 332; Miles v. Caldwell, 2 Wall. 35, 44, 17 L. ed. 755, 758.

The practice in the lower Federal courts is apparently fully in accord with the principles upon which this court has from time to time acted.

Indian Land & T. Co. v. Shoenfelt, 68 C. C. A. 196, 135 Fed. 484; Fowler v. Osgood, 4 L.R.A.(N.S.) 824, 72 C. C. A. 276, 141 Fed. 20; Lake Street Elev. R. Co. v. Ziegler, 99 Fed. 114.

In England the rule is believed to be the same.

Gloucester v. Wood, 3 Hare, 148, 7 Jur. 1125.

Decisions in the state courts show that this practice is a general one.

Reed v. Welsh, 11 Bush, 450; Clackson v. Scrogins, 2 T. B. Mon. 52; Martin v. Reese, — Tenn. —, 57 S. W. 422; Dogget v. Lane, 12 Mo. 222; Rumbly v. Stainton, 24 Ala. 712; Bigelow v. Winsor, 1 Gray, 301; Foote v. Gibbs, 1 Gray, 412.

Messrs. Adelbert Moot and George F. Brownell also filed a brief for appellee the Erie Railroad Company:

The court properly refused to dismiss this case without prejudice.

Brinckerhoff v. Brown, 7 Johns. Ch. 222; Reynolds v. First Nat. Bank, 112 U. S. 409, 28 L. ed. 735, 5 Sup. Ct. Rep. 213; Banks v. Manchester, 128 U. S. 250, 251, 32 L. ed. 428, 9 Sup. Ct. Rep. 36; Re Sanford Fork & Tool Co. 160 U. S. 257, 40 L. ed. 417, 16 Sup. Ct. Rep. 291.

To avoid passing upon the constitutional rights of defendant and its stockholders this court was compelled to decide, and it did decide, as to the effect of owning substantially all the stock in such coal corporations and managing the same in accordance with Pennsylvania statutes.

United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 413, 414, 53 L. ed. 851, 29 Sup. Ct. Rep. 527.

If there is any omission, in the bill, of anything needful to be legally alleged, the government is not concluded upon that.

Gould v. Evansville & C. R. Co. 91 U. S. 526, 23 L. ed. 416.

Mr. Chief Justice **White** delivered the opinion of the court:

These three cases were embraced in the commodities cases previously before this court, and, like the Lehigh *Valley[276 Railroad Company Case, No. 536, just decided [220 U. S. 257, ante, 458, 31 Sup. Ct. Rep. 387], they are but sequels of the controversy pointed out in the opinion in that case as having been formerly passed upon in the opinion reported in 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527. These cases, however, differ from the Lehigh Valley Case in this respect: Upon the filing in the circuit court of the mandate of this court, the United States in each case, upon the same record on which the reversed decree was based, without offering to show any further facts, or withdrawing the stipulation to submit the cause on bill and answer, referred to in the opinion in the Lehigh Valley case, moved that the decree to be entered be "that the bill be dismissed without prejudice." This motion was denied, whereupon the court was informed that the government did not intend to proceed further with the cause, and in each case a decree was entered dismissing the cause absolutely.

The error alleged is, in substance, that the circuit court erred in each case in dismissing the bill of complaint absolutely. But leave to amend was not asked, and as, upon the facts appearing and admitted on each record, no violation of the commodities clause was shown, the decree entered may properly be held to have been in strict "conformity with the opinion of this court." Whatever, therefore, in view of the stipulation made below, may be the scope and effect of the decree as *res judicata*, we see no reason for concluding that error was committed by the circuit court in refusing to qualify its decree. The decree in each case is therefore affirmed.

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*STATE OF OKLAHOMA, Complain-[277
ant,
v.
ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Deft.

(See S. C. Reporter's ed. 277–289.)

States — effect of admission on congressional legislation.

1. Upon the admission of Oklahoma into the Union under the enabling act of June 16, 1906 (34 Stat. at L. 267, chap. 3335), § 4, "on an equal footing with the original states," the congressional requirement that the Kansas rates should be the test of the rates which the Southern Kansas Railway Company might charge the inhabitants of the Indian territory, made by the act of Congress of July 4, 1884 (23 Stat. at L. 73, chap. 179), reserving to Congress the

right to regulate rates until a state government should exist, when that government should possess the right of regulation, ceased to be of any force, and the whole subject of domestic rates passed under the control of the state.

[For other cases, see States, 373–379, in Digest Sup. Ct. 1908.]

Federal Supreme Court — original jurisdiction — suit by state — interest in suit.

2. The state of Oklahoma has no such interest in its corporate capacity as enables it to invoke the original jurisdiction of the Federal Supreme Court by a suit to enjoin a foreign railway company from charging more than certain specified rates on domestic shipments of lime, cement plaster, brick, stone, and crude and refined oil, the state not being engaged, in its governmental capacity, in the sale or transportation of such commodities, and having no property interest in them.

[For other cases see Supreme Court of the United States, 106–111, in Digest Sup. Ct. 1908.]

[No. 13, Original.]

Argued February 23 and 24, 1911. Decided April 3, 1911.

ORIGINAL bill in equity, brought by the State of Oklahoma to enjoin the Atchison, Topeka, & Santa Fe Railway Company from charging rates on domestic shipments greater than those authorized by the state of Kansas. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Mr. **Charles West**, Attorney General of Oklahoma, argued the cause and filed a brief for complainant:

The state has justiciable rights here.

Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 519, 14 L. ed. 249; South Carolina v. Georgia, 93 U. S. 4, 23 L. ed. 782; Wisconsin v. Duluth, 96 U. S. 379, 24 L. ed. 668; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; Louisiana v. Texas, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251; Kansas v. Colorado, 185 U. S. 141, 46 L. ed. 844, 22 Sup. Ct. Rep. 552; Georgia v. Tennessee Copper Co. 206 U. S. 233, 51 L. ed. 1044, 27 Sup. Ct. Rep. 618, 11 A. & E. Ann. Cas. 488; Hudson County Water Co. v. McCarter, 209 U. S. 355, 52 L. ed. 831, 28 Sup. Ct. Rep. 529, 14 A. & E. Ann. Cas. 560.

Mr. **Robert Dunlap** argued the cause, and, with Mr. Gardiner Lathrop, filed a brief for defendant:

The bill does not set up a controversy between the state and the railway company justiciable in this court under the exercise of its original jurisdiction.

Louisiana v. Texas, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251.

Mr. Justice **Harlan** delivered the opinion of the court:

This is an original suit in this court by the state of Oklahoma against the Atchison, Topeka, & Santa Fe Railway Company, a corporation of Kansas.

The case as *made by the allegations of the bill*, in connection with acts of Congress and with the Constitution and laws of Oklahoma, is substantially as will be now stated.

The treaty of April 30th, 1803 [8 Stat. at L. 202], between the United States and France, by which the territory of Louisiana was ceded to the United States, provided that the inhabitants of that territory should be incorporated into the Union and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; in the meantime to be maintained and protected in the free enjoyment of their liberty, property, and the religion they profess. Art. 3. The state of Oklahoma was formed out of a part of this ceded territory.

By an act of Congress of July 4th, 1884, the Southern Kansas Railway Company of Kansas was empowered to locate, construct, own, equip, operate, use, and maintain a railway, telegraph, and telephone line through the Indian territory, over a specified route. The act forbade the company to charge "the inhabitants of said territory a greater rate of freight than the rate authorized by the laws of the state of Kansas for services or transportation of the same kind," and provided that "passenger rates on said railway shall not exceed 3 cents per mile." And Congress expressly reserved the right to regulate the charges for freight and passengers on the railway as well as messages on telegraph and telephone lines, "until a state government or governments shall exist in said territory, *within the limits of which [283 said railway or a part thereof shall be located; and then such state government or governments shall be authorized to fix and regulate the cost of transportation of persons and freights within their respective limits by said railway." Congress also reserved "the right to fix and regulate at all times the cost of such transportation by said railway or said company whenever such transportation shall extend from one state into another, or shall extend into more than one state: Provided, however, That the rate of such transportation of passengers, local or interstate, shall not

exeeed the rate above expressed." 23 Stat. at L. 73, 74, chap. 179, §§ 1, 4.

The above grant was aecepted by the Southern Kansas Railway Company, and the road now eontrolled by the appellee, the Atchison, Topeka, & Santa Fe Railway Company, in Oklahoma, is operated under that grant. The bill alleged "that ever since the defendant eompany took over the operation of said line of railway under said grant, it had eontinuously violated the above condition, in that it has charged the inhabitants of said territory a greater rate of freight than that authorized by the laws of Kansas for services or transportation of the same kind;" and that the eompany's tariffs of freight charges show in detail said excessive eharges. After setting forth the rates charged in Oklahoma and Kansas, respectively, for carrying, for the same distances, lime, eement, plaster, brick, crude oil and refined oil, the bill proceeds: "That the state of Oklahoma at this time has about two million inhabitants, is developing and building towns, villages, and individual farmhouses, and that lime, eement, plaster, brick, and stone are very essential to its growth; that at this time in the state of Oklahoma there are very large and extensive petroleum oil wells, and the manufacture or refining of the same is an industry eontinually growing in said state; that the transportation rates on erude and refined oil, lime, cement, plas-[284]ter, briek, and stone are very *important and essential to the development of said state; and that the violation by said respondent of the said conditions of said grant is a menace to the future of said state." The state further alleged that if the defendant was permitted further to operate the railroad in violation of the condition of the grant, it would be a hindrance to the growth of the state, as well as an injury to the property rights of its inhabitants.

The relief asked was that the grant eontained in the above act of Congress be eaneeled and the property granted by it eonfirmed and deereed to be in the state of Oklahoma as *cestui que trust;* that the defendant be perpetually enjoined and restrained, and, pending the determination of this action, be enjoined and restrained, from charging the inhabitants of the state of Oklahoma a greater rate of freight than that authorized by the laws of Kansas for services or transportation of the same kind, and from charging "for lime, eement, plaster, briek, stone, crude and refined oil, the rates speeified" in its tariff in so far as the same are greater than those authorized for like transportation by the laws of Kansas until the determination of this eause; and that for the eontinual violation of the terms of the grant it be perpetually enjoined and restrained from operating a railroad in the state of Oklahoma. The bill also eontains a prayer for such further or different relief as may be required by the nature of the case, and be agreeable to equity and good conscience.

The railroad company filed a demurrer upon the ground that the bill did not show that the state was entitled to the relief asked, nor set forth any eontroversy between the state and the defendant within the original jurisdiction of this court.

The difficulty in the way of granting the relief asked by the state is, in our judgment, insurmountable. The aet of 1884 appears to have had in view, primarily, the protection of the inhabitants of the Indian *territory* from being *eharged unrea-[285 sonable rates by the railway eompany when using its right of way through that territory. Congress undoubtedly supposed that it would be safe, at least for a time, to adopt as a test of the reasonableness of rates in Oklahoma, on domestic shipments, those which Kansas had prescribed as between its people and the eorporation it had ereated; in other words, the inhabitants of the *territory* were to have the same rights, in respect to railroad rates, as Kansas had prescribed for its eorporations and people. But that the railway company might not act unjustly towards the inhabitants of the territory, Congress reserved the right to regulate charges to be made by the railway eompany for freight and passengers transported on the railway in question. This, of course, Congress could have done without regard to any rates allowed by or in Kansas at any particular time; for while the *territorial* eonditions lasted, the governmental power of Congress over the territory and its inhabitants was exclusive and paramount there being no restrictions upon the exercise of that power, exeept sueh as were imposed by the supreme law of the land. It is to be observed, however, that the regulations prescribed by the act of Congress were to exist and be in force "*until* a *state* government or governments shall exist in said territory within the limits of which said railway or a part thereof shall be located; and *then* such *state* government or governments shall be authorized to fix and regulate the cost of transportation of persons and freights within their respeetive limits by said railway." So, when Oklahoma was organized as a state and admitted into the Union "on an equal footing with the original states" (34 Stat. at L. 267, 271, § 4, chap. 3335), the clause in the aet of 1884, prescribing the Kansas rates as the test for rates that

might be charged against the inhabitants of the territory, necessarily ceased to be of any force in the state, and the whole subject of rates in domestic or local business 286]passed under the full control of *the *state* in its corporate capacity, subject, of course, to the fundamental condition that it should authorize only such rates as were legal, and not inconsistent with the constitutional rights of the railway company. If, after Oklahoma became a state, the company still charged the Kansas rates on local business in Oklahoma, and if those rates would have been illegal under any state regulations, or were, in themselves, unreasonable and purely arbitrary, a controversy, in the constitutional sense, would have arisen between each shipper and the company, which could have been determined by suit brought by the shipper in the proper state court, or even in the proper Federal court, where the controversy, by reason of the grounds alleged by the shipper, was one of which the latter court, under the statutes regulating the jurisdiction of the Federal courts, could take judicial cognizance. But, plainly, the *state*, in its corporate capacity, would have no such interest in a controversy of that kind as would entitle it to vindicate and enforce the rights of a particular shipper or shippers, and, incidentally, of all shippers, by an original suit brought in its own name, in this court, to restrain the company from applying the Kansas rates, as such, to shippers generally in the local business of Oklahoma. The opposite view must necessarily rest upon the ground that the Constitution, when conferring *original* jurisdiction on this court "in all cases affecting ambassadors and other public ministers and consuls *and those in which a state is a party*" (art. 3, § 1), intended to include any and every judicial proceeding of whatever nature which the state may choose to institute in this court, for the purpose of enforcing its laws, although the state may have no direct interest in the particular property or rights immediately affected or to be affected by the alleged violation of such laws. In the present case, the state seeks to enjoin the defendant company from charging more than the Kansas rates on the transportation of lime, cement, 287]*plaster, brick, stone, crude and refined oil. But the state, as such, in its governmental capacity, is not engaged in their sale or transportation, and has no property interest in such commodities. It seeks only, as between the railway company and shippers, by a general, comprehensive decree to enforce certain rates, and to compel the railway company to respect the rights of *all* of the people of Oklahoma who may have occasion to ship such commodities over the railway.

Upon this general subject the case of Louisiana v. Texas, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251, is instructive. The state of Louisiana, by an original suit in this court against the state of Texas, her governor and health officer, sought to restrain the latter state from enforcing by its officers certain quarantine regulations it had established, which Louisiana alleged were illegal and discriminative against it and injurious to the trade and business of its people, particularly interstate commerce as conducted between New Orleans and Texas. There was a demurrer to the bill upon these grounds: 1. That, within the meaning of the Constitution of the United States, the controversy was not one between Louisiana and Texas. 2. That the controversy was between Texas or her officers and certain persons in Louisiana engaged in interstate commerce, and did not concern Louisiana as an aggregate, corporate body or state. 3. That by the suit brought in this court, Louisiana was only lending its name to certain individuals in New Orleans, who were the real parties in interest. 4. That it appeared from the face of the bill that "the state of Louisiana, in her right of sovereignty, is seeking to maintain this suit for the redress of the supposed wrongs of her citizens in regard to interstate commerce, while under the Constitution and laws the said state possesses no such sovereignty as empowers her to bring an original suit in this court for such purpose." 5. That "no property right of the state of Louisiana is in any manner affected *by the quarantine complained[288 of, nor is any such property right involved in this suit as would give this court original jurisdiction of this cause."

This court, speaking by Chief Justice Fuller, after referring to the provisions of the Constitution enumerating the cases and controversies to which the judicial power of the United States extended and of which the circuit courts of the United States could take original cognizance, and to numerous adjudged cases, said: "In order, then, to maintain jurisdiction of this bill of complaint as against the state of Texas, it must appear that the controversy to be determined is a controversy arising directly between the state of Louisiana and the state of Texas, and not a controversy in the vindication of the grievances of particular individuals. . . . Inasmuch as the vindication of the freedom of interstate commerce is not committed to the state of Louisiana, and that state is not engaged in such commerce, the cause of action must be regarded not as involving any infringement of the powers of the state of Louisiana, or any special injury to her property, but as asserting that the state is entitled to seek

relief in this way because the matters complained of affect her citizens at large. Nevertheless, if the case stated is not one presenting a controversy between these states, the exercise of original jurisdiction by this court as against the state of Texas cannot be maintained. . . . But in order that a controversy between states, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one state are injured by the maladministration of the laws of another. The states cannot make war or enter into treaties, though they may, with the consent of Congress, make compacts and agreements. When there is no agreement whose breach might create it, a controversy between states does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of 289]their powers cannot be laid *hold of as in themselves committing one state to a distinct collision with a sister state."

These doctrines, we think, control this case, and require its dismissal as not being within the original jurisdiction of this court, as defined by the Constitution. Under a contrary view that jurisdiction could be invoked by a state, bringing an original suit in this court against foreign corporations and citizens of other states, whenever the state thought such corporations and citizens of other states were acting in violation of its laws to the injury of its people generally or in the aggregate; although an injury in violation of law, to the property or rights of particular persons through the action of foreign corporations or citizens of states, could be reached, without the intervention of the state, by suits instituted by the persons directly or immediately injured.

We are of opinion that the words in the Constitution conferring original jurisdiction on this court in a suit "in which a state shall be a party" are not to be interpreted as conferring such jurisdiction in every cause in which the state elects to make itself strictly a party plaintiff of record, and seeks not to protect its own property, but only to vindicate the wrongs of some of its people, or to enforce it own laws or public policy against wrongdoers generally.

Other questions of interest and importance have been elaborately discussed by counsel, but we deem it unnecessary to extend this opinion by an examination of them. What has been said is quite sufficient to show that the demurrer is well taken, and that the bill must, in any event, be dismissed for want of jurisdiction in this court to entertain it by original suit on behalf or in the name of the state.

Dismissed.

*STATE OF OKLAHOMA, ON THE[290 INFORMATION AND RELATION OF CHARLES WEST, Attorney General, Complainant,

v.

GULF, COLORADO, & SANTA FE RAILWAY COMPANY; Atchison, Topeka, & Santa Fe Railway Company; St. Louis, Iron Mountain, & Southern Railway Company; St. Louis & San Francisco Railway Company; Missouri, Kansas, & Texas Railway Company; Midland Valley Railway Company; Kansas City Southern Railway Company; Missouri, Oklahoma, & Gulf Railway Company; Fort Smith & Western Railway Company; Arkansas & Western Railway Company; Oklahoma Central Railway Company; Poteau Valley Railroad Company; Chicago, Rock Island, & Pacific Railway Company; Adams Express Company; American Express Company; Pacific Express Company; United States Express Company; and Wells Fargo Express Company, Defts.

(See S. C. Reporter's ed. 290-301.)

Federal Supreme Court — original jurisdiction — suit by state — enforcement of criminal or penal laws.

1. The Federal Supreme Court cannot take original jurisdiction of a suit by a state against persons or corporations of other states, where such suit, though in the form of a civil action, is, in its essential character, one to enforce by injunction the penal or criminal legislation of the state against traffic in intoxicating liquors.

[For other cases, see Supreme Court of the United States, 103-105, in Digest Sup. Ct. 1908.]

Federal Supreme Court — original jurisdiction — suit by state — interest in suit.

2. A state may not invoke the original jurisdiction of the Federal Supreme Court by suit on its behalf against persons or corporations of other states, where the primary purpose of the suit is to protect its citizens generally against the violation of its laws by the corporations or persons sued.

[For other cases, see Supreme Court of the United States, 106-111, in Digest Sup. Ct. 1908.]

[No. 14, Original.]

Argued February 24, 1911. Decided April 3, 1911.

ORIGINAL bill in equity, brought by the State of Oklahoma to enjoin persons and corporations of other states from violating the penal or criminal laws of the state against traffic in intoxicating liquors. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Mr. **Charles West**, Attorney General of Oklahoma, argued the cause and filed a brief for complainant.

Mr. **Lawrence Maxwell** argued the cause and with Messrs. Joseph S. Graydon and James L. Minnis, filed a brief for defendant the Pacific Express Company:

The bill does not present a justiciable controversy within the jurisdiction of the court.

Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 287, 290, 293, 32 L. ed. 239, 242, 243, 244, 8 Sup. Ct. Rep. 1370; Chisholm v. Georgia, 2 Dall. 431, 432, 1 L. ed. 445, 446; Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257; Washington v. Northern Securities Co. 185 U. S. 254, 46 L. ed. 897, 22 Sup. Ct. Rep. 623.

Mr. **S. T. Bledsoe** also argued the cause, and, with Messrs. Gardiner Lathrop, Robert Dunlap, J. R. Cottingham, C. O. Blake, R. A. Kleinschmidt, and C. E. Warner, filed a brief for defendants, the Atchison, Topeka, & Santa Fe Railway Company, the Kansas City Southern Railway Company, the Chicago, Rock Island, & Pacific Railway Company, the St. Louis & San Francisco Railroad Company, and the Ft. Smith & Western Railway Company.

Messrs. Williams W. Green and Charles W. Stockton filed a brief for defendant Wells Fargo & Company.

Messrs. Joseph W. Welsh and T. B. Harrison, Jr., filed a brief for defendant the American Express Company.

Messrs. Joseph M. Bryson, Clifford L. Jackson, William R. Allen, James Hagerman, and A. B. Browne filed a brief for defendant the Missouri, Kansas, & Texas Railway Company.

291] *Mr. Justice **Harlan** delivered the opinion of the court:

The state of Oklahoma, by the present suit, invokes the original jurisdiction of this court for its protection against certain acts, alleged to have been done or threatened to be done by the respective defendants in derogation of its rights as a state. The case has been heard upon demurrers filed by the several defendants. Some of the demurrers proceed upon the specific ground that this court cannot take jurisdiction of the cause, while others add the general ground that the bill does not show any facts entitling the state to the relief sought by the bill.

As the case involves some questions of a grave character, it is proper to set forth with some fullness the grounds upon which the state bases its claim for relief.

It is alleged in the bill that the defendant companies are corporations of states other than Oklahoma, except that the American Express Company is a partnership, composed of individuals who are citizens and residents of New York; that what were formerly the territory of Oklahoma and the Indian territory constitute the present state of Oklahoma; that the lands in the Indian territory, owned by various Indian tribes, were, by agreement or treaties with the United States, to be allotted in severalty among the members of such tribes, with certain exceptions named in the treaties, which it is not necessary to set out here; that by said agreement or treaties the United States agreed to maintain strict laws in said territory, particularly in the allotted lands, against the introduction, sale, barter, or the giving away of liquors and intoxicants of any kind or quality; and that, pursuant to said agreement and treaties, Congress, by the act of June 16th, 1906 (34 Stat. at L. 267, chap. 3335), § 3, made it a condition of the admission of Oklahoma into the Union as a state that it should provide by its Constitution that "the manufacture, sale, barter, giving away, or otherwise *furnishing,[292 except as therein provided, of intoxicating liquors within those parts of the proposed state then known as the Indian territory and the Osage Reservation, and within any other parts of the proposed state which existed as an Indian reservation on the 1st day of January, 1906, should be prohibited for twenty-one years from the date of the admission of the state into the Union, and that in said act no reservation or exception was made whereby any one of the defendants might import into the said named portion of said state, or in any other manner furnish, any intoxicating liquors whatsoever, and the power to regulate interstate commerce in intoxicating liquor was thereby surrendered to the state of Oklahoma as to said portions of said state; and by the said act it was not provided that intoxicating liquor should be furnished to any person in what was formerly the Indian territory, including the Osage Reservation and any other parts of the state which existed as Indian reservations on the 1st day of January, 1906, in the manner and form that the same is now furnished and imported by said defendants, as hereinafter more fully set forth, or in any other manner or form."

The bill also alleged that, by ordinance irrevocable, Oklahoma had accepted the terms and conditions of the act of June 16th, 1906, including the provision relating to intoxicating liquors; and thereby the state was obligated in place of the United States, so far as the power was lodged in it, to carry out the treaty and agreements made with the said Indian tribes against the introduction, sale, or in any manner the furnishing, of intoxicating liquors in what was formerly the Indian territory;

but that defendants, in violation of the law and the rights of said Indian tribes therein, and to the injury of the state of Oklahoma and its inhabitants, have, since November 16th, 1907, and up to this time, continuously violated all said provisions against furnishing, carrying, and conveying beer, 293]ale, *wine, and intoxicating liquors into Indian territory; that such violation of law deeply injures and irreparably destroys the good citizenship and property of the state and its inhabitants, and the defendants threaten to continue the same unless restrained; and that in continuing so to do, the defendants and each of them have committed acts that amount to the surrender and abandonment of their corporate right to be engaged and doing business in interstate commerce between the states, and against such acts the plaintiff has no adequate remedy according to the course of the common law.

The state also complains that various persons, about two hundred in number, within its limits (the names of such persons being all set forth in a list made part of the bill), have made payment of the special tax required of liquor dealers under the laws of the United States; that by the above act of Congress of June 16th, 1906, it was made a condition precedent to the admission of Oklahoma into the Union that, "in its Constitution, it should provide that the payment of the special tax required of liquor dealers by the United States, of any person within those parts of the proposed state then known as the Indian territory and the Osage Reservation, and within any other parts of said proposed state which existed as Indian reservations on the 1st day of January, 1906, should constitute prima facie evidence of the intention of such persons to violate that provision of the act of June 16, 1906, in reference to the prohibition of the manufacture, sale, barter, giving away, or otherwise furnishing intoxicating liquors which it was provided as a condition precedent that the Constitution of said proposed state should provide for."

The bill further shows that the state, through its Constitutional Convention, submitted to the popular vote the question of adopting a provision prohibiting the manufacture, barter, sale, giving away, or other-294]wise furnishing *intoxicating liquors in the state, and the result was the approval by the electors of a constitutional provision of that kind, which has been in force since November 16th, 1907; that, pursuant to that constitutional provision, the legislature of the state, on March 24th, 1908 (Okla. Laws 1907-08, p. 594), passed a general statute, establishing a state agency and local agencies for the sale of intoxicating liquors for certain purposes, and prohibiting the manufacture, sale, barter, giving away, or otherwise furnishing intoxicating liquors, except as provided in the act; that by the terms of said act (art. 3, § 2), it was provided that "the payment of the special tax required of liquor dealers by the United States by any person within this state, except the local agents of said state by said act, should constitute prima facie evidence of an intention to violate the provisions of said act;" and that the defendants, each and all of them, had due notice in writing from the state, by its constituted authorities, of the provisions of the act of Congress, and of the Constitution and laws of Oklahoma, referred to herein.

It should be here stated that the above Oklahoma statute of March 24th, 1908, prescribed various penalties of fine and imprisonment for violations of its provisions.

The bill finally alleges that the state of Oklahoma gave to each of the defendants due notice that it would hold all shipments made by each of them "whereby either of them undertook to receive at points without the state of Oklahoma intoxicating liquors of any kind, and to transport, carry, or otherwise convey such liquors or compounds to or to the order of any of the persons, companies, corporations, firms, or associations named in said list, as illegal, contrary to good morals, against the public policy, and in direct violation of the positive laws of the state of Oklahoma; that the importation of any prohibited intoxicating liquors to or to the order of any of said persons by either or any of said defendants was and is a public nuisance *within the state of Oklahoma, and[295 were not importations in good faith, intended for the use of the importer and consignee, nee, and not for sale within the state; that all shipments or deliveries made by defendants by interstate shipment to any or all of the persons named in said list were intended for and were for the violation of the laws of the state of Oklahoma, and to commit a public nuisance in said state; that the state of Oklahoma thereby was not undertaking to object or restrict the defendants in the importation of intoxicating liquors by interstate shipment to any person in said state outside of what was formerly the Indian territory, the Osage Indian Reservation, and an Indian Reservation, January 1st, 1906, intending it for his own use, and not for sale in said state, but that, under the law of said state, each and all of said persons intended to use all the liquor in their possession to sell the same in said state, in violation of its laws, and

that any delivery of prohibited intoxicating liquors to any of said persons would have the necessary effect of aiding such consignee to violate the laws of the state of Oklahoma, and would be a public nuisance and injury to the said state."

That in addition thereto, under the terms of said chapter 69 of the Session Laws of 1907–1908, of Oklahoma, as therein provided, the state of Oklahoma, for the benefit of its citizens, undertook to furnish intoxicating liquor to all persons in said state wherever a sale of the same was by the law authorized, for reason of necessary use of the same for preservation, or health, or like purposes, and that, under the laws of the state of Oklahoma, the state of Oklahoma was the sole and only person authorized to sell liquors in said state; that the state is pecuniarily interested in the sale of said liquors, and irreparably injured by said importation by defendants to the persons named in said list who had paid the special tax required by the United States of liquor dealers, in that the said importa-[296]tion *to the said persons named on said list, being for the purpose of a resale of such importations in said state, operated to the injury to the exclusive right to the sale of intoxicating liquors in said state, claimed and exercised by the state of Oklahoma.

That since the 16th of November, 1907, after the said notices were received by the said defendants, and up to this time, the said defendants have continuously and continually, each and all of them, imported to and to the order of each firm and all of the persons named in said list as having paid a special tax, as required by the United States of liquor dealers. And the said persons named in said lists have continued continuously to resell said intoxicating liquors so imported by the defendants; that the said resale has at all times been in violation of the law of the state of Oklahoma, and has been a cause of enormous expense and irreparable injury to the state of Oklahoma and the inhabitants thereof, and each and all of the counties and other municipalities therein, in that the enforcement of the laws against the sale of intoxicating liquors is extremely difficult, expensive, and exhaustive, and that the importation and furnishing to said persons named in said list by said defendants of such intoxicating liquors, with the intent that the same shall be used for resale in the said state, has caused a large imposition of expenses upon said state, and a violation of its laws, and a constant source of friction and corruption in its government, and is against the peace and dignity of the government of said state, and totally against the public policy thereof and good morals therein, and is a public nuisance in said state; that the defendants, in violation of law and in injury to the rights of the state and inhabitants thereof, have openly, persistently, and continuously imported intoxicating liquors, whose manufacture, sale, barter, or furnishing is prohibited by the laws of the state of Oklahoma to each and all of the persons named in said list by *furnishing, carrying,[297 and conveying the same to and to the order of each and all of the said persons named in said list, on divers and sundry occasions, continuously; and that defendants threaten to continue in the said violation unless restrained, and in continuing so to do said defendants, and each of them, have committed acts which amount to a surrender and an abandonment of their corporate right to do business in interstate commerce in the carriage of intoxicating liquors, and for the same the plaintiff has no adequate remedy according to the course of the common law, for the reason that said shipments originate outside of the state."

The relief asked is that the defendants be severally enjoined and restrained from further introducing, conveying, and furnishing intoxicating liquors, including ale, wine, and beer *in any form, at any place, at any time, and in any manner* in the state within the limits of what was formerly the Indian territory, including the Osage Reservation, and other parts of the state that existed as Indian reservations on the 1st day of January, 1900; that the several defendants be further enjoined from carrying, conveying, delivering, and furnishing intoxicating liquors, including ale, wine, and beer, in any form and in any place, at any time or in any manner, in the state, to any or all of the persons named in the above list as being persons who have paid the special tax required by the United States of liquor dealers; and that, in default of obedience to the order of injunction prayed for, the corporate rights of the defendants to do a business in interstate commerce with persons in Oklahoma be forfeited.

Such is the case made by the bill, and we come now to consider the controlling questions presented by it.

It is manifest that the object of this suit by the state is, by means of an injunction issued by this court, to prevent the defendant companies from violating the penal or criminal laws of Oklahoma. It is, therefore, in its essence, *a suit to enforce[298 those laws. But of such a suit this court cannot take original cognizance, although the suit is in form of a civil nature. The Constitution, after enumerating, in the first clause of § 2 of article 3, the cases, in law and equity, as well as the controversies, to

which the judicial power of the United States shall extend, provides that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction,"—in all the other cases enumerated in the article, the court to have appellate jurisdiction, both as to law and facts, with such exceptions and under such regulations as Congress shall make.

The words "in which a state shall be party," literally construed, would embrace original suits of a civil nature brought by a state in this court to enforce a judgment rendered for a violation of its penal or criminal laws. But it has been adjudged, upon full consideration, that that result was inadmissible under the Constitution. This will appear from an examination of the opinion and judgment in Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 267, 290, 293, 32 L. ed. 239, 243, 244, 8 Sup. Ct. Rep. 1370. That was an original action brought in this court by the state of Wisconsin against the Pelican Insurance Company of Louisiana, to recover the amount of a judgment rendered in a Wisconsin court against that company for certain penalties incurred by it for violating the laws of that state relating to the business of fire insurance companies. The question was distinctly presented whether the *state* could invoke the original jurisdiction of this court, to enforce the collection of such judgment. It was argued in that case that the suit was simply an action of debt, founded upon a contract of record, to wit, a judgment, and was therefore to be regarded only as a civil suit, as distinguished from a criminal prosecution. But that view was overruled. The court said that notwithstanding the comprehensive words of 299]*the Constitution, "the mere fact that a state is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another state or her citizens." After an examination of the authorities it was further said, the court speaking by Mr. Justice Gray: "The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and *to all judgments for such penalties.* If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment. Wharton, Confl. L. § 833; Westlake, International Law, 1st ed. § 388; Piggott, Foreign Judgm. 209, 210." Further: "From the first organization of the courts of the United States, nearly a century ago, it has always been assumed that the original jurisdiction of this court over controversies between a state and citizens of another state, or of a foreign country, does not extend to a suit by a state to recover penalties for a breach of her own municipal law. . . . The real nature of the case is not affected by the forms provided by the law of the state for the punishment of the offense. It is immaterial whether, by the law of Wisconsin, the prosecution must be by indictment or by action, or whether, under that law, a judgment there obtained for the penalty might be enforced by execution, by scire facias, or by a new suit. In whatever form the state pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end,—the compelling the offender to pay a pecuniary fine by way of punishment for the offense. This court, therefore, cannot entertain an original action to compel the defendant to pay to the state of Wisconsin a sum of money in satisfaction *of the judgment[300 for that fine. The original jurisdiction of this court is conferred by the Constitution, without limit of the amount in controversy, and Congress has never imposed (if, indeed, it could impose) any such limit. If this court has original jurisdiction of the present case, it must follow that any action upon a judgment obtained by a state in her own courts against a citizen of another state, for the recovery of any sum of money, however small, by way of a fine for any offense, however petty, against her laws, could be brought in the first instance in the Supreme Court of the United States. That cannot have been the intention of the Convention in framing, or of the people in adopting, the Federal Constitution." The principles announced in Wisconsin v. Pelican Ins. Co. supra, have been recognized in many subsequent cases. (Postal Teleg. Cable Co. v. United States). Postal Teleg. Cable Co. v. Alabama, 155 U. S. 482, 487, 39 L. ed. 231, 232, 15 Sup. Ct. Rep. 192; California v. Southern P. Co. 157 U. S. 229, 259, 39 L. ed. 683, 694, 15 Sup. Ct. Rep. 591; Missouri v. Illinois, 180 U. S. 208, 232, 45 L. ed. 497, 509, 21 Sup. Ct. Rep. 331; Minnesota v. Northern Securities Co. 184 U. S. 199, 234, 235, 46 L. ed. 499, 512, 515, 22 Sup. Ct. Rep. 308; Kansas v. Colorado, 206 U. S. 46, 83, 51 L. ed. 956, 968, 27 Sup. Ct. Rep. 655.

Those principles must, in our opinion, determine the present case adversely to the state. Although the state does not ask for judgment against the defendant railroad

company for the penalties prescribed by the Oklahoma statutes for violations of its provisions, she yet seeks the aid of this court to enforce a statute one of whose controlling objects is to impose punishment in order to effectuate a public policy touching a particular subject relating to the public welfare. The statute, viewed as a whole, is to be deemed a penal statute. The present suit, although in form one of a civil nature is, in its essential character, one to enforce by injunction regulations prescribed by a state for violations of one of its penal statutes, and is therefore one of which this court cannot take original cognizance at the instance of the state.

But there is another ground which is 301]equally fatal to the *claim that this court may give the relief asked by an original suit brought by the state. In the provisions of the Constitution relating to the judicial power of the courts of the United States, it is provided, as we have seen, that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction." In Oklahoma v. Atchison, T. & S. F. R. Co. No. 13, Original, just decided [220 U. S. 277, ante, 465, 31 Sup. Ct. Rep. 434], it was held that a *state* could not invoke the original jurisdiction of the court, by suit on its behalf, where the primary purposes of the suit was to protect its citizens *generally*, against the violation of its laws by the corporations or persons sued; that the above words, "those in which a state shall be party," were not to be so interpreted as to embrace suits of that kind. We need not repeat what was said in the other case. Without stopping to consider other questions discussed by learned counsel, we hold, for the reasons stated in the opinion in that case, as well as because this suit is, in its essence and mainly, one to enforce a penal statute of a state, that the bill must be dismissed for want of jurisdiction in this court.

It is so ordered.

302]*STATE OF OKLAHOMA ON THE RELATION OF CHARLES WEST, Attorney General, as Successor to the Territory of Oklahoma, Plff. in Err.,

v.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY.

(See S. C. Reporter's ed. 302–306.)

State — effect of admission on congressional legislation.

Upon the admission of Oklahoma into the Union under the enabling act of June 16, 1906 (34 Stat. at L. 267, chap. 3335), the congressional requirement that the Kansas rates should be the test of the rates which the Chicago, Kansas, & Nebraska Railway Company might charge the inhabitants of the Indian territory for domestic shipments. made by the act of March 2, 1887 (24 Stat. at L. 446, chap. 319), reserving to Congress the right to regulate such rates until a state government should exist, when that government should possess the right of regulation, ceased to be of any force in the state, and the whole subject of domestic rates passed under the control of the state.

[For other cases, see States, 373–379, in Digest Sup. Ct. 1908.]

[No. 96.]

Argued March 13, 1911. Decided April 3, 1911.

IN ERROR to the Supreme Court of the State of Oklahoma to review a decree which, reversing the decree of the District Court of Garfield County in that state, dismissed a suit to enjoin a railroad company from charging rates for domestic shipments greater than those authorized by the state of Kansas. Affirmed.

See same case below, 21 Okla. 334, 97 Pac. 267.

The facts are stated in the opinion.

Mr. **Charles West**, Attorney General of Oklahoma, argued the cause and filed a brief for plaintiff in error.

Mr. **M. A. Low** argued the cause and filed a brief for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought by the territory of Oklahoma in one of its courts against the Chicago, Rock Island, & Pacific Railway Company, for the purpose of obtaining an injunction restraining the railway company from making certain charges against the inhabitants of the territory for the transportation of freight.

The petition showed that, by the act of Congress of March 2d, 1887, chap. 319, a right of way through *the territory[303 was granted to the Chicago, Kansas, & Nebraska Railway Company upon certain conditions, one of which was that the company should not charge the "inhabitants of the territory" a greater rate of freight than that authorized by the state of Kansas for transportation service of the same kind (24 Stat. at L. 446); that under the authority of the act of Congress of June 27th, 1890, the Chicago, Rock Island, & Pacific Railway Company, a state corporation, the defendant herein, acquired all the rights, privileges, and franchises granted to, and became subject to all the burdens imposed

upon, the original grantee company (26 Stat. at L. 181, chap. 633); and that the defendant occupied and used said right of way; but, in violation of the act of Congress and of the rights of the inhabitants of the territory, it daily charged shippers of wheat a greater rate for shipping than was authorized by the laws of Kansas. The relief asked by the territory was an injunction restraining the railway company from demanding, collecting, receiving, or charging, directly or indirectly, greater rates for the transportation of freight and goods, according to local distance, than those named in the petition, which, it is alleged, are in accordance with the conditions upon which Congress granted the right of way through the territory of Oklahoma.

The railway company, by its answer, denied the allegations of the petition, and, in addition, alleged that the court was without jurisdiction of the subject-matter of the action, and that jurisdiction was vested exclusively in the Interstate Commerce Commission and the circuit court of the United States. The territory filed a reply, and the court granted a temporary injunction restraining the railway company, until the further order of the court, from demanding, collecting, receiving, or charging for the transportation of freight greater rates than those named in the order of injunction.

From the order of injunction the case was 304]taken on appeal *to the supreme court of the territory, and was afterwards "transferred to the supreme court of the state under the terms of the enabling act and the schedule to the Constitution." It is so stated in the opinion of the supreme court of the state. By the enabling act of June 16th, 1906, it was provided that "all cases pending in the supreme court of said territory of Oklahoma and in the United States court of appeals in the Indian territory, not transferred to the United States circuit and district courts in said state of Oklahoma, shall be proceeded with, held, and determined by the supreme or other final appellate court of such state, as the successor of said territorial supreme court and appellate court, subject to the same right to review upon appeal or error to the Supreme Court of the United States now allowed from the supreme or appellate courts of a state under existing laws. Jurisdiction of all cases pending in the courts of original jurisdiction in said territories not transferred to the United States circuit and district courts shall devolve upon and be exercised by the courts of original jurisdiction created by said state. That the supreme court or other court of last resort of said state shall be deemed to be the successor of said territorial appellate courts, and shall take and possess any and all jurisdiction as such, not herein otherwise specifically provided for, and shall receive and retain the custody of all books, dockets, records, and files not transferred to other courts, as herein provided, subject to the duty to furnish transcripts of all book entries in any specific case transferred to complete the record thereof." 34 Stat. at L. 267, 276, chap. 3335, §§ 17, 18.

Upon the authority of one of its former cases, Chicago, R. I. & P. R. Co. v. Territory, 21 Okla. 329, 97 Pac. 265, the supreme court of the state dismissed the present case, "for the reason that the change from a territorial form of government to statehood so changed conditions that the questions involved, while they may have been vital *enough at the time the cases were[305 appealed to the supreme court of the territory, are now merely abstract, hypothetical questions, from the determination of which no practical relief can follow." [21 Okla. 339, 97 Pac. 269.] Thereupon the state sued out the present writ of error.

The state contends that this court has authority, under § 709, of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 575), to review the final judgment of the supreme court of Oklahoma, and that the dismissal of the case without giving the state the relief asked was a denial of its right, based on the enabling act of Congress, to have the railway company restrained from charging the people of the state, doing business with it, with greater rates of freight than were allowed by Kansas for like services.

We concur with the supreme court of the state in the view that this question, raised by the original petition, has become and is wholly abstract.

The Chicago, Rock Island, & Pacific Railway Company is the successor in interest, subject to all the burdens imposed and having all the rights granted by the act of Congress of March 2d, 1887 (24 Stat. at L. 446, chap. 319). The Chicago, Kansas, & Nebraska Railway Company, the predecessor in interest of the present defendant, was, as we have seen, authorized to locate and maintain a railway through the Indian territory, charging the inhabitants of said territory no greater rate of freight than the rate authorized by the laws of Kansas for services or transportation of the *same kind.[306 But by the same act, Congress reserved "the right to regulate the charges for freight and passengers on said railway . . . *until* a state government or governments shall exist in said territory within the limits of which said railway or a part thereof shall be located; and *then* such state government or governments shall be authorized to fix and regulate the cost of transportation of

persons and freights within their respeetive limits by said railway." The same provision was in the aet of July 4th, 1884 [23 Stat. at L. 73, chap. 179], granting a right of way through the Indian territory to the Southern Kansas Railway Company.

In 13, Original, just decided [220 U. S. 277, ante, 465, 31 Sup. Ct. Rep. 434], the provision in the aet prohibiting the inhabitants of the territory from being charged greater rates than those allowed in Kansas was held not to be binding when the state government was established in Oklahoma, after whieh the whole subject of rates passed under the eontrol of the state. Whatever may have been the rights of the inhabitants of the territory and of the railway company, under the act of 1887, the state cannot insist that, under the authority of the United States, and after Oklahoma became a state, that the railway eompany was bound to accept, in the matter of rates for domestic business, the test furnished by the laws of Kansas. Whether any partieular rates charged by the railroad company after Oklahoma became a state were illegal, as being unreasonable and purely arbitrary, depended upon the laws of that state touching the matter, or upon the provision of the Federal Constitution, proteeting property against unjue exactions without due proeess of law.

Passing by other questions, the determination of whieh eannot affeet the result, we hold, for the reasons stated by it, that the judgment of the state court was right, and its judgment must be affirmed.

It is so ordered.

307]*RAFAEL ENRIQUEZ, in His Own Name and as Administrator of the Estate of Antonio Enriquez, Deeeased, et al., Appts.,

v.

FRANCISCO SAEZ GO-TIONGCO, Florencia Victoria, Franeiseo Enriquez, and Cho Jan-Ling.

(See S. C. Reporter's ed. 307-310.)

Executors and administrators — community estates.

1. On the death of the wife, the husband, if surviving, was entitled, under the Spanish law in foree in the Philippine Islands, to settle the affairs of the eommunity, and on his death his exeeutor was the proper administrator of the same.

Executors and administrators — claim against community estate.

2. Serviees rendered in aid of winding up the eommunity business were a proper charge on the community estate, under P. I. Civ. Code 1889, art. 1064, even though rendered after the death of both husband and wife.

Judgment — against representative — when binding community estate.

3. A judgment against an executor and general administrator administering the estates of both his deeeased parents, for services rendered to both estates by the wish of all the heirs, in aid of winding up the community business, bound the community estate, under the Spanish law in foree in the Philippine Islands.

[Conclusiveness of judgment against representative, see Judgment, III. k, 6, in Digest Sup. Ct. 1908.]

[No. 95.]

Argued March 13, 1911. Deeided April 3, 1911.

APPEAL from the Supreme Court of the Philippine Islands to review a deeree which affirmed a decree of the Court of First Instance of the City of Manila, dismissing a suit to set aside a judgment sale of community property. Affirmed.

See same case below, 10 Philippine, 10.

The faets are stated in the opinion.

Mr. **Jackson H. Ralston** argued the cause, and with Messrs. Frederick L. Siddons and Williams E. Richardson, filed a brief for appellants.

Mr. **Aldis B. Browne** argued the cause, and, with Messrs. Alexander Britton and Evans Browne, filed a brief for appellees.

Mr. Justiee **Holmes** delivered the opinion of the eourt:

This is an appeal from a judgment of the supreme court of the Philippine Islands, affirming the judgment of the court of first instance for the eity of Manila, which dismissed this suit. The action was brought to set aside a judgment sale of land in Manila, known as the Old Theater, formerly the eommunity property of Antonio Enriquez and his wife, Ciriaea Villanueva. The plaintiffs *and appellants are the[308 administrator of the estate of Antonio, including the interest of Ciriaca Villanueva, and all of the heirs of the two, exeept Franciseo Enriquez, one of the defendants. The other defendants now before the eourt are the purehaser at the sale and a subsequent purehaser from him.

Ciriaea Villanueva died intestate in 1882. Thereafter her husband administered the community property until his death in 1884. By a codieil to his will, as stated by the supreme court, he provided "that the inventory, valuation, and partition of this estate be made extrajudicially, and by virtue of the power whieh the law grants him, he forbids any judicial interferenee in the settlement thereof, conferring upon his exeeu-

tors the necessary authority therefor, without any restriction whatever, and extending their term of office for such period as may be required for this purpose." The defendant Francisco Enriquez was the executor, and in April, 1886, was appointed the general administrator of the estate, including the interest of Ciriaca Villanueva, with directions to proceed in accordance with the codicil, which he did until March, 1901, except for a short time in May, 1900. There were no testamentary or other proceedings in court, and could not be, by Spanish law, in view of the codicil, but it lay with Francisco Enriquez to carry out the trust. There were differences among the heirs, and they made an agreement in August, 1897, for an extrajudicial partition, subject to the provisions of the will, in which José Moreno Lacalle was to act as an arbitrator. The partition fell through, but Lacalle rendered services to the two estates, as both courts have found, and on October 23, 1897, it was agreed by Francisco Enriquez, the defendant, and Rafael Enriquez, on behalf of the plaintiffs, that the land in question should be sold, for the purpose, among others, of paying Lacalle. No sale was made, however, and in 1898 Lacalle sued Francisco Enriquez 309]as executor and administrator, *as aforesaid. The defendant admitted the debt, stated that he had no money, and pointed out this land for execution. On September 10, 1899, the land was sold for more than the appraised value to the defendant Go-Tiongco, who bought in good faith, and without notice of any claim unless notice is implied by law.

There is no question that every consideration of justice is in favor of the defendants, from whom the plaintiffs are endeavoring to get back the land without restitution of the purchase price, and after the last purchaser has made costly improvements. The owners of the land agreed to the rendering of the services, but they attempt to avoid the payment on technical grounds. They say that the debt, having been incurred after the death of the husband and wife, did not bind their estates; that if the claim had been good against the estate of the husband, the suit should have been brought against his heirs; and finally, that the judgment against Francisco Enriquez could not bind the estate of Ciriaca, so that the sale must be void, at least in part. But in our opinion these objections ought not to prevail, on the facts as stated by both courts below, and the law as it was administered in the Philippines at the time of the acts.

It seems to have been understood by everybody that Francisco Enriquez was administering both estates in fact, and to have been intended by his appointment in April, 1886, that he should do so by authority of law. The decree under which the plaintiff Rafael Enriquez now is administrator of the estate of both parents, on the face gives him the same authority that Francisco had had before. The supreme court holds in this case that on the death of the wife, the husband, if surviving, is entitled to settle the affairs of the community, and that, on his death, his executor is the proper administrator of the same. See Alfonso v. Natividad, 6 Philippine, 240; Prado v. Lagera, 7 Philippine, 395; Johnston v. San Francisco Sav. *Union, 75 Cal. 134, 7 Am. St.[310 Rep. 129, 16 Pac. 753; Moody v. Smoot, 78 Tex. 119, 14 S. W. 285; Lamm's Succession, 40 La. Ann. 312, 4 So. 53; Crary v. Field, 9 N. M. 222, 229, 50 Pac. 342, s. c. 10 N. M. 257, 61 Pac. 118. We should be slow to disturb their decision, even if we did not believe it to be right, as we do. But when without dispute Antonio was acting, there seems to be no necessity for inquiring whether the appointment could have been avoided if the attempt had been made. The contract with Lacalle, if made by Francisco Enriquez, as seems to have been assumed below, was made, as we have said, by the wish of all. The services were rendered in aid of winding up the community business, and were a proper charge upon the estate. See Civil Code of 1889, art. 1064. Sy Chung-Quiong v. Sy-Tiong Tay, 10 Philippine, 141. Francisco Enriquez was the only representative of the estate. The only practicable means of collecting the debt was by suit against him. The record of the suit that was brought most frequently refers to him as executor, but at times as executor and administrator; and the supreme court says that, as matter of law, the suit was directed against him in the latter as well as the former capacity. The judgment must be taken to have bound the community estate. Carter v. Conner, 60 Tex. 52; Landreaux v. Louque, 43 La. Ann. 234, 9 So. 32. Other matters would have to be discussed before we could reverse the judgment below, but we see no ground for doubting that it should be affirmed.

Judgment affirmed.

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*THERESA ARNETT, Katie Reade,[311 Robert Lea, Mary Buquor, and Aaron H. Lea, Appts.,

v.

D. M. READE.

(See S. C. Reporter's ed. 311–320.)

Husband and wife — community property — alienation without consent of wife.

1. Community property acquired by the

husband before the passage of N. M. Laws 1901, chap. 62, § 6 (a), is subject to the provision of that section that neither husband nor wife shall dispose of real estate acquired during coverture by onerous title unless both join in the execution of the deed.

[For other cases, see Husband and Wife, II. c; III. g, in Digest Sup. Ct. 1908.]

Constitutional law — vested rights — alienation of community property.

2. A husband had no vested rights in the community property acquired prior to the passage of N. M. Laws 1901, chap. 62, § 6 (a), of which he would be deprived by applying to such property the provision of that section that neither husband nor wife shall dispose of real estate acquired during coverture by onerous title unless both join in the execution of the deed.

[For other cases, see Constitutional Law, II. b, 5; IV. c, in Digest Sup. Ct. 1908.]

[No. 98.]

Argued March 13 and 14, 1911. Decided April 3, 1911.

APPEAL from the Supreme Court of the Territory of New Mexico to review a decree which affirmed a decree of the District Court for Doña Ana County, in that territory, in favor of plaintiff in a suit to quiet title to community property bought from the husband without the wife's participation in the conveyance. Reversed.

See same case below, 14 N. M. 442, 95 Pac. 131.

The facts are stated in the opinion.

Messrs. **N. C. Frenger** and **Clifford S. Walton** argued the cause and filed a brief for appellants:

A husband cannot dispose of, by will, more than half of the community property.

Beard v. Knox, 5 Cal. 256, 63 Am. Dec. 125; Re Buchanan, 8 Cal. 507; Walton, Civil Law, art. 1414, p. 378; Thompson v. Cragg, 24 Tex. 582; Schmidt, Civil Law of Spain & Mexico, art. 52.

The law, in vesting in the husband the absolute power of disposition of community property, designed to facilitate bona fide alienation, and to prevent clogs by claims of wife.

Smith v. Smith, 12 Cal. 217, 73 Am. Dec. 533; Godey v. Godey, 39 Cal. 157.

Upon the dissolution of marriage by divorce, the wife is entitled to half of the community property.

Smith v. Smith, 12 Cal. 217, 73 Am. Dec. 533; Godey v. Godey, 39 Cal. 157; Galland v. Galland, 38 Cal. 265; Schmidt, Civil Law of Spain & Mexico, art. 56.

The basis and essence of community property is that the industry and contributions of both spouses create the fund.

Meyer v. Kinzer, 12 Cal. 248, 73 Am. Dec. 538; Godey v. Godey, 39 Cal. 157; Galland v. Galland, 38 Cal. 265; Johnston, Civil Law of Spain, p. 67; McKay, Community Property, § 168; Ballinger, Community Property, § 11.

The husband's power to dispose of community property is because he is the head of the community. As soon as he ceases to be the head, as in case of divorce, his power fails.

Godey v. Godey, 39 Cal. 157.

The term, "a mere expectancy," is a term not to be taken literally.

Ibid.

The wife's right of dower depends upon whether or not the wife survives the husband, but the wife's right in community property does not.

Galland v. Galland, 38 Cal. 265.

Under the French law, until the marriage is dissolved, or the community otherwise terminates, the wife has no right whatever; she has nothing but a mere expectancy.

Dixon v. Dixon, 4 La. 188, 23 Am. Dec. 478.

But the law of community property as known in Spain was not derived from the French or from the Roman law, and under the Spanish law the rights of husband and wife in community property grow out of the marriage contract, and do not originate in its dissolution.

Walton, Civil Law in Spain, pp. 32, 33, 42, 43; 1 Estudios de Derecho Civil, por Felipe Sanchez Roman, tomo quinto, 2d ed. Madrid, 1898, pp. 339, 340, 818, 820; Sentencia, 28 Enero, 1898, Gac. 26, Febrero, p. 135.

Upon the death of the wife her heirs inherit her share of the community property. An inheritable interest passes. How could they inherit unless their ancestor was owner?

Dixon v. Dixon, 4 La. 188, 23 Am. Dec. 478; Thompson v. Cragg, 24 Tex. 582; Crary v. Field, 9 N. M. 222, 50 Pac. 342; Upton & J. Civil Laws of La. art. 2392; Garrozi v. Dastas, 204 U. S. 64, 51 L. ed. 369, 27 Sup. Ct. Rep. 224; Garrosi v. Garrosi, 1 Porto Rico Fed. Rep. 230; Aran y Aran v. Fritze, 3 Porto Rico Fed. Rep. 509; Martinez y Nadal v. May, 5 Porto Rico Fed. Rep. 582; Scott v. Maynard, Dallam (Tex.) 548.

Upon desertion of the husband the wife may administer and sell community property.

Wright v. Hays, 10 Tex. 130, 60 Am. Dec. 200; Codigo Civil (Chihuahua) art.

NOTE.—On acknowledgment of deed by a married woman—see note to Drury v. Foster, 17 L. ed. U. S. 780.

1903; Civil Code of Mexican Federal District & Territories, art. 2031; Walton, Civil Law, art. 1441, p. 382; Schmidt, Civil Law, art. 42; Thompson v. Cragg, 24 Tex. 582; Parker v. Chanee, 11 Tex. 513; Cheek v. Bellows, 17 Tex. 613, 67 Am. Dec. 686; Fullerton v. Doyle, 18 Tex. 4; Babb v. Carroll, 21 Tex. 765; Forbes v. Moore, 32 Tex. 196; Johnson v. Harrison, 48 Tex. 257; Veramendi v. Hutchins, 48 Tex. 531; Zimpleman v. Robb, 53 Tex. 274; Caruth v. Grigsby, 57 Tex. 265; Edwards v. Brown, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87; Slator v. Neal, 64 Tex. 222; Patty v. Middleton, 82 Tex. 586, 17 S. W. 909.

The wife may by will dispose of her share of community property.

Pedro Murillo Velarde's Practica de Testamentos; Schmidt, Civil Law, art. 969; Upton & J. Civil Laws of La. art. 133; Hall, Mexican Law, § 2707; Walton, Civil Law of Spain & Spanish America, arts. 1392, et seq.

Not merely by way of analogy, but in fact, the community is a species of partnership.

Walton, Civil Law of Spain & Spanish America, art. 1395; Schmidt, Civil Law of Spain & Mexico, arts. 40 et seq. White, New Recopilacion, p. 60; Johnston, Civil Law of Spain, pp. 67, 69; Upton & J. Civil Laws of La. art. 2312; Ballinger, Community Property, §§ 5 et seq.

Community may be dissolved by confiscation of the share of either spouse, but the other spouse is not thereby interfered with in the rights to his or her share.

Schmidt, Civil Law of Spain & Mexico, arts. 56, 59; White, New Recopilacion, p. 63.

The heirs of deceased spouse and surviving spouse may form a new community.

Schmidt, Civil Law of Spain & Mexico, art. 58.

The wife may renounce her community rights.

Schmidt, Civil Law of Spain & Mexico, arts. 43, 64, 65.

Upon the death of the husband, the wife is entitled to half of the community property, not as heir nor through arbitrary diverting from the husband, but by virtue of her community right.

Kircher v. Murray, 54 Fed. 617; Barnett v. Barnett, 9 N. M. 205, 50 Pac. 337.

If there is no issue, upon the death of one spouse the other does not inherit, but the share of the deceased in the community property escheats.

Kircher v. Murray, 54 Fed. 617; Babb v. Carroll, 21 Tex. 765.

The wife loses her gains in community property if she commits adultery.

Schmidt, Civil Law of Spain & Mexico, art. 68.

Absolute ownership means the right to enjoy and dispose of property as one pleases (by testament or otherwise).

Schmidt, Civil Law of Spain & Mexico, art. 67, 188; Upton & J. Civil Laws of La. arts. 2312, 2369, 2371, 2373, 2375; White, New Recopilacion, pp. 60–63; Johnston, Civil Law of Spain, pp. 67 et seq.; Crary v. Field, 9 N. M. 222, 50 Pac. 342; Gillett v. Warren, 10 N. M. 523, 62 Pac. 975; Carpenter v. Lindauer, 12 N. M. 388, 78 Pac. 57.

The power of a husband to alienate community property is that of an administrator or trustee; therefore he is not thereby possessed of a vested right in property, and to change or modify this power is not depriving him of any vested right.

Holyoke v. Jackson, 3 Wash. Terr. 235, 3 Pac. 841; Warburton v. White, 176 U. S. 484, 44 L. ed. 555, 20 Sup. Ct. Rep. 404; Dixon v. Dixon, 4 La. 188, 23 Am. Dec. 478; Myer, Vested Rights, §§ 278, 1083; Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723; Bank of Hamilton v. Dudley, 2 Pet. 492, 7 L. ed. 496; McGehee, Due Process of Law, pp. 35 et seq.

Mr. **J. H. Paxton** argued the cause and filed a brief for appellee:

The laws in force where a contract is made and where it is to be performed enter into it and form a part of it, as if they were expressly referred to or incorporated in its terms; and this is true of a contract of marriage.

Von Hoffman v. Quincy, 4 Wall. 535–550, 18 L. ed 403–409; McCreery v. Davis, 44 S. C. 195, 28 L.R.A. 658, 51 Am. St. Rep. 794, 22 S. E. 178; Gaines v. Gaines, 9 B. Mon. 306, 48 Am. Dec. 436; Conner v. Elliott, 18 How. 591, 15 L. ed. 497.

The rights incident to the community property system are incidents engrafted by the laws of the state on the contract of marriage.

Dixon v. Dixon, 4 La. Ann. 188, 23 Am. Dec. 480.

The extent of the impairment of the obligation of a contract is immaterial. Whatever legislation diminishes the efficacy impairs the obligation.

Louisiana v. New Orleans, 102 U. S. 206, 207, 26 L. ed. 133.

A vested right means the power to do certain actions or possess certain things according to the laws of the land.

Calder v. Bull, 3 Dall. 394, 1 L. ed. 652; Bailey v. Philadelphia, W. & B. R. Co. 4 Harr. (Del.) 389, 44 Am. Dec. 602; Chicago City R. Co. v. Chicago, 142 Fed. 847;

Mandelbaum v. McDonell, 29 Mich. 78, 18 Am. Rep. 83.

Under the Spanish-Mexican community property law, in force in New Mexico when the marriage was celebrated and when the land in question in this suit was acquired, the husband acquired the land by an absolute and vested title during the subsistence of the community, save only that he could not dispose of the land in fraud of his wife's expectancy; and the wife, during the subsistence of the community, acquired no vested interest or title in or to the land, but only a revocable and fictitious ownership or a mere expectaney.

Escriche, Diccionario Razonado de Legislacion y Jurisprudencia, tom. II. p. 86 (Bienes Gananciales); Febrero, bk. 1, chap. 4, ¶ 1, Nos. 29, 30, Tapia on Febrero, vol. 1. chap. 8, §§ 17, 20; Schmidt, Civil Law of Spain & Mexico, art. 51; Ballinger, Community Property, p. 396, §§ 5, 6; Barnett v. Barnett, 9 N. M. 214, 50 Pac. 337; Hagerty v. Harwell, 16 Tex. 665; Meyer v. Kinzer, 12 Cal. 247, 73 Am. Dec. 539; People v. Swalm, 80 Cal. 46, 13 Am. St. Rep. 97, 22 Pac. 67, 8 Am. Crim. Rep. 477; Greiner v. Greiner, 58 Cal. 119; Spreckels v. Spreckels, 116 Cal. 339, 36 L.R.A. 499, 58 Am. St. Rep. 177, 48 Pac. 228; Guice v. Lawrence, 2 La. Ann. 226; Van Maren v. Johnson, 15 Cal. 312; Packard v. Arellanes. 17 Cal. 539; Garrozi v. Dastas, 204 U. S. 79, 51 L. ed. 379, 27 Sup. Ct. Rep. 224; Reade v. De Lea, 14 N. M. 442, 95 Pac. 131.

The marriage having been contracted under the Spanish-Mexican law, the husband's right to dispose of the community property cannot be taken away or impaired, as to property already acquired, by a statute enacted subsequently to the acquisition of the property and the vesting of the right.

Moreau v. Detchemendy, 18 Mo. 526; Maynard v. Hill, 125 U. S. 206, 31 L. ed. 657, 8 Sup. Ct. Rep. 723; O'Connor v. Harris, 81 N. C. 283; Westervelt v. Gregg, 12 N. Y. 205, 62 Am. Dec. 166; Sutton v. Askew, 66 N. C. 172, 8 Am. Rep. 500; Cooley, Const. Lim. 7th ed. 513; Rose v. Rose, 104 Ky. 48, 41 L.R.A. 354, 84 Am. St. Rep. 430, 46 S. W. 524; Gladney v. Sydnor, 172 Mo. 318, 60 L.R.A. 880, 95 Am. St. Rep. 521, 72 S. W. 554; Huber v. Merkel, 117 Wis. 355, 62 L.R.A. 589, 98 Am. St. Rep. 941, 93 N. W. 354; Spreckels v. Spreckels, 116 Cal. 339, 36 L.R.A. 499, 58 Am. St. Rep. 177, 48 Pac. 228.

The wife's community property right is, in effect, a form of dower.

Beard v. Knox, 5 Cal. 252, 63 Am. Dec. 127.

The husband was, at the time of the treaty of Guadalupe Hidalgo and of the Gadsden purchase, in effect the absolute owner of the community property during the subsistence of the matrimony, but he could not defraud the wife of her expectancy.

Garrozi v. Dastas, 204 U. S. 81, 51 L. ed. 380, 27 Sup. Ct. Rep. 224; Schmidt, Laws of Spain & Mexico, Historical Outline, p. 98, art. 40; Van Maren v. Johnson 15 Cal. 311; United States v. Castillero, 2 Black, 17, 17 L. ed. 360; 1 White, New Recopilacion, title II. chap. 1, p. 85.

Statutes should not be allowed a retroactive operation, where this is not required by express command or by necessary and unavoidable implication.

Sturges v. Carter, 114 U. S. 519, 29 L. ed. 243, 5 Sup. Ct. Rep. 1014; Ingoldsby v. Juan, 12 Cal. 577; Nilson v. Sarment, 153 Cal. 524, 126 Am. St. Rep. 93, 96 Pac. 315; Murray v. Gibson, 15 How. 423, 14 L. ed. 756; Potter v. Rio Arriba Land & Cattle Co. 4 N. M. 661, 17 Pac. 609.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a suit to quiet title, brought by the appellee against the widow of Adolpho Lea, for whom her heirs were substituted upon her decease. Adolpho Lea married in 1857. He bought the land in question in 1889 and 1893, and it became community property. In 1902 he sold it to the appellee, shortly before his death in the same year, his wife not joining in the conveyance. By the laws of New Mexico of 1901, chap. 62, § 6 (a), "neither husband nor wife shall convey, mortgage, encumber, or dispose of any real interest or legal or equitable interest therein acquired during coverture by onerous title unless both join in the execution thereof." The courts of New Mexico gave judgment for the plaintiff on the ground that the husband had vested rights that would be taken away if the statute were allowed to apply to land previously acquired; citing Guice v. Lawrence, 2 La. Ann. 226, Spreckels v. Spreckels, 116 Cal. 339, 36 L.R.A. 497, 58 Am. St. Rep. 170, 48 Pac. 228, etc. The defendants appealed to this court.

There was some suggestion at the argument that the husband acquired from his marriage rights by contract that could not be impaired; but of course there is nothing in that, even if it appeared, as it does not, that the parties were married in New Mexico, then being domiciled there. Maynard v. Hill, 125 U. S. 190, 210, 31 L. ed. 654, 658, et seq. 8 Sup. Ct. Rep. 723; Baker v. Kilgore (Neilson v. Kilgore), 145 U. S. 487, 490, 491, 36 L. ed. 786–788, 12 Sup. Ct. Rep. 943. The supreme court does not put its decision upon that ground, but upon

319]the notion *that, during the joint lives, the husband was in substance the owner, the wife having a mere expectancy, and that the old saying was true, that community is a partnership which begins only at its end. We do not perceive how this statement of the wife's position can be reconciled with the old law of New Mexico embraced in §§ 2030, 2031 of the Compiled Laws 1897, referred to in the dissenting opinion of Abbott, A. J., that after payment of the common debts, the deduction of the survivor's separate property and his half of the acquest property, and subject to the payment of the debts of the decedent, the remainder of the acquest property and the separate estate of the decedent shall constitute the body of the estate for descent and distribution, and, in the absence of a will, shall descend, one fourth to the surviving husband, etc. For if the wife had a mere possibility, it would seem that whatever went to the husband from her so-called half would not descend from her, but merely would continue his. The statement also directly contradicts the conception of the community system expressed in Warburton v. White, 176 U. S. 484, 494, 44 L. ed. 555, 559, 20 Sup. Ct. Rep. 404, that the control was given to the husband, "not because he was the exclusive owner, but because by law he was created the agent of community." And notwithstanding the citation in Garrozi v. Dastas, 204 U. S. 64, 51 L. ed. 369, 27 Sup. Ct. Rep. 224, of some of the passages and *dicta* from authors and cases most relied upon by the court below, we think it plain that there was no intent in that decision to deny or qualify the expression quoted from Warburton v. White. See 204 U. S. 78. Los bienes que han marido y mujer que son de ambos por medio. Novisima Recopilación, Bk. 10, title 4, Law 4.

It is not necessary to go very deeply into the precise nature of the wife's interest during marriage. The discussion has fed the flame of juridical controversy for many years. The notion that the husband is the true owner is said to represent the tendency 320]of the French *customs. 2 Brissaud, Hist. du Droit Franç. 1699, n. 1. The notion may have been helped by the subjection of the woman to marital power (6 Laferrière, Hist. du Droit Franç. 365; Schmidt, Civil Law of Spain and Mexico, arts. 40, 51), and in this country by confusion between the practical effect of the husband's power and its legal ground, if not by mistranslation of ambiguous words like *dominio*. See United States v. Castillero, 2 Black, 17, 227, 17 L. ed. 360, 400. However this may be, it is very plain that the wife has a greater interest than the mere possibility of an expectant heir. For it is conceded by the court below and everywhere, we believe, that in one way or another she has a remedy for an alienation made in fraud of her by her husband. Novisima Recopilación, Bk. 10, title 4, Law 5; Schmidt, Civil Law of Spain and Mexico, art. 51; Garrozi v. Dastas, 204 U. S. 64, 78, 51 L. ed. 369, 378, 27 Sup. Ct. Rep. 224. We should require more than a reference to Randall v. Kreiger, 23 Wall. 137, 23 L. ed. 124, as to the power of the legislature over an inchoate right of dower, to make us believe that a law could put an end to her interest without compensation consistently with the Constitution of the United States. But whether it could or not, it has not tried to destroy it, but, on the contrary, to protect it. And as she was protected against fraud already, we can conceive no reason why the legislation could not make that protection more effectual by requiring her concurrence in her husband's deed of the land.

Judgment reversed.

Mr. Justice **McKenna**, dissenting:

I dissent from the opinion and judgment of the court for the reasons set forth in the opinion of the supreme court of New Mexico. See also Spreckels v. Spreckels, 116 Cal. 339, 36 L.R.A. 497, 58 Am. St. Rep. 170, 48 Pac. 228.

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*UNITED STATES, Plff. in Err.,[321
v.
JOHN J. O'BRIEN, Individually and as a Member of the Firm of Perkins & O'Brien; and Stephen Farrelly as Ancillary Receiver of the City Trust, Safe Deposit, & Surety Company of Philadelphia.

(See S. C. Reporter's ed. 321–328.)

Damages — contract for public work — excess of cost of completion.

The excess cost of completing a public work, recoverable by the United States under the contract in case of the failure of the contractor to "complete this contract as specified and agreed upon," cannot be recovered where there was time enough left to complete the work within the limit set by the contract when the government engineer gave the written notice of annulment for failure to prosecute the work "faithfully and diligently," provided for by another clause in the contract, under which was incurred only a forfeiture of reserved percentages and money due.

[For other cases, see Damages, VI. b, in Digest Sup. Ct. 1908.]

[No. 108.]

Argued March 17, 1911. Decided April 3, 1911.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which, on a second writ of error, affirmed a judgment of the Circuit Court for the Southern District of New York, dismissing the complaint in an action by the government to recover from the contractors for a public work the excess cost of completion after annulling the contract. Affirmed.

See same case below, 89 C. C. A. 664, 163 Fed. 1022.

The facts are stated in the opinion.

Solicitor General **Lehmann** argued the cause and Assistant Attorney General, Winfred T. Denison, filed a brief for plaintiff in error:

The finding by the engineer in charge that the contractors were not prosecuting the work diligently was a finding of a breach of the contract; for there was a covenant on the part of the contractors to prosecute the work with such diligence as should satisfy him.

United States v. Stone, Sand & Gravel Co. 100 C. C. A. 651, 177 Fed. 321.

Also the finding by the engineer in charge that the contractors were not going to complete the contract, and had become unable to complete it, was a finding of a breach, and it was not necessary for him to wait an additional eighteen months, until their authoritatively ascertained inability had occasioned excessive damage.

Hochster v. De La Tour, 2 El. & Bl. 678, 22 L. J. Q. B. N. S. 455, 17 Jur. 972, 1 Week. Rep. 469, 6 Eng. Rul. Cas. 576; Roehm v. Horst, 178 U. S. 1, 4 L. ed. 953, 20 Sup. Ct. Rep. 780; United States v. Behan, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81; Bank of Columbia v. Hagner, 1 Pet. 455, 467, 7 L. ed. 219, 224; El Paso Cattle Co. v. Stafford, 99 C. C. A. 515, 176 Fed. 47; Weber v. Grand Lodge, F. & A. M. 95 C. C. A. 20, 169 Fed. 533; Michigan Yacht & Power Co. v. Busch, 75 C. C. A. 109, 143 Fed. 929; McBath v. Jones Cotton Co. 79 C. C. A. 203, 149 Fed. 383; Edward Hines Lumber Co. v. Alley, 19 C. C. A. 599, 43 U. S. App. 169, 73 Fed. 603; Block v. Meridian, 95 C. C. A. 14, 169 Fed. 516; Marks v. Van Eeghen, 30 C. C. A. 208, 57 U. S. App. 149, 85 Fed. 853; Hancock v. New York L. Ins. Co. Fed. Cas. No. 6,011; Grau v. McVicker, 8 Biss. 13, Fed. Cas. No. 5,708; Ballou v. Billings, 136 Mass. 308; Lovell v. St. Louis Mut. L. Ins. Co. 111 U. S. 264, 28 L. ed. 423, 4 Sup. Ct. Rep. 390; Louisville, N. A. & C. R. Co. v. Pope, 26 C. C. A. 131, 53 U. S. App. 332, 80 Fed. 745; Dougherty v. Central Nat. Bank, 93 Pa. 227, 39 Am. Rep. 750; Diem v. Koblitz, 49 Ohio St. 41, 34 Am. St. Rep. 531, 29 N. E. 1124; Pratt v. S. Freeman & Sons Mfg. Co. 115 Wis. 648, 92 N. W. 368; Stanton v. New York & E. R. Co. 59 Conn. 272, 21 Am. St. Rep. 110, 22 Atl. 300; Lockport v. Shields, 87 Ill. App. 150; Robertson v. Davenport, 27 Ala. 574; Holt v. United Security L. Ins. & T. Co. 76 N. J. L. 585, 21 L.R.A.(N.S.) 691, 72 Atl. 301; Carr v. Hamilton, 129 U. S. 252, 32 L. ed. 669, 9 Sup. Ct. Rep. 295; Re Neff, 28 L.R.A.(N.S.) 349, 84 C. C. A. 561, 157 Fed. 57; Re Swift, 50 C. C. A. 264, 112 Fed. 315; Re Pettingill & Co. 137 Fed. 147; Ex parte Pollard, 2 Low. Dec. 411, Fed. Cas. No. 11,252; Re Inman, 171 Fed. 185; Lennox v. Murphy, 171 Mass. 373, 50 N. E. 644; Pardee v. Kanady, 100 N. Y. 121, 2 N. E. 885; New York Phonograph Co. v. Davega, 127 App. Div. 222, 111 N. Y. Supp. 363; Woolner v. Hill, 93 N. Y. 576; Chemical Nat. Bank v. World's Columbian Exposition, 170 Ill. 82, 48 N. E. 331; Lancaster County Nat. Bank v. Huver, 114 Pa. 216, 6 Atl. 141; Ætna Indemnity Co. v. Fuller Co. 111 Md. 321, 73 Atl. 738, 74 Atl. 369; Hoyle v. Scudder, 32 Mo. App. 372; Laclede Power Co. v. Stillwell, 97 Mo. App. 258, 71 S. W. 380; Kalkhoff v. Nelson, 60 Minn. 284, 62 N. W. 332; Rappleye v. Racine Seeder Co. 79 Iowa, 220, 7 L.R.A. 139, 44 N. W. 363; Bank Comrs. v. New Hampshire Trust Co. 69 N. H. 621, 44 Atl. 130; Stokes v. Baars, 18 Fla. 656; MacGregor v. Union L. Ins. Co. 57 C. C. A. 613, 121 Fed. 493; Camden v. Jarrett, 83 C. C. A. 492, 154 Fed. 788; Lowe v. Harwood, 139 Mass. 133, 29 N. E. 538; Hopkins v. Young, 11 Mass. 302; Canada v. Canada, 6 Cush. 15; Easton v. Jones, 193 Pa. 147, 44 Atl. 264; Bagley v. Cohen, 121 Cal. 604, 53 Pac. 1117; Wolf v. Marsh, 54 Cal. 228, 3 Mor. Min. Rep. 204; Murphy v. Dernberg, 84 App. Div. 101, 82 N. Y. Supp. 585; Crist v. Armour, 34 Barb. 378; Bolles v. Sachs, 37 Minn. 315, 33 N. W. 862; Smith v. Jordan, 13 Minn. 264, Gil. 246, 97 Am. Dec. 232; Lovering v. Lovering, 13 N. H. 513; Hunter v. Wenatchee Land Co. 50 Wash. 438, 97 Pac. 494; Palmer v. Clark, 52 Wash. 345, 100 Pac. 749; White v. Lumiere North American Co. 79 Vt. 206, 6 L.R.A.(N.S.) 807, 64 Atl. 1121; Smith v. Carter, 136 Mo. App. 529, 118 S. W. 527; Southern Texas Teleph. Co. v. Huntington, — Tex. Civ. App. —, 121 S. W. 242; Guthiel v. Gilmer, 27 Utah, 496, 76 Pac. 628; Teachenor v. Tibbals, 31 Utah, 10, 86 Pac. 483; Frost v. Knight, L. R. 7 Exch. 111, 41 L. J. Exch. N. S. 78, 26 L. T. N. S. 77, 20 Week. Rep. 471.

It makes no difference whether the repudiation is by words or by disability in fact, the failure to keep the contract in unimpaired and unimpeached efficiency is the

same, and the effect upon the power and right of the injured party to protect himself against the certain future failure is the same.

Robertson v. Davenport, 27 Ala. 574; Roehm v. Horst, 178 U. S. 1, 14 L. ed. 953, 20 Sup. Ct. Rep. 780; Hochster v. De La Tour, 2 El. & Bl. 678, 22 L. J. Q. B. N. S. 455, 17 Jur. 972, 1 Week. Rep. 469, 6 Eng. Rul. Cas. 576; Wald's Pollock, Contr. 3d ed. pp. 333, 354, 355; Johnstone v. Milling, L. R. 16 Q. B. Div. 460, 55 L. J. Q. B. N. S. 162, 54 L. T. N. S. 629, 34 Week. Rep. 238, 50 J. P. 694.

There was also a breach of the general remedial clause of the contract, because the contractors actually failed to complete the contract, and the "annulment," being valid, did not excuse this breach.

United States v. Perkins, 143 Fed. 688.

It is not reasonable to suppose that the parties intended that the reserved percentages should constitute liquidated damages.

Ex parte Pollard, 2 Low. Dec. 413, Fed. Cas. No. 11,252; Taylor v. The Marcella, 1 Woods, 302, Fed. Cas. No. 13,797; Davis v. Freeman, 10 Mich. 188; Heatwole v. Gorrell, 35 Kan. 692, 12 Pac. 135; Van Buren v. Digges, 11 How. 461, 477, 13 L. ed. 771, 777; Watts v. Camors, 115 U. S. 353, 360, 29 L. ed. 406, 408, 6 Sup. Ct. Rep. 91.

The use of the word "forfeited" indicates that the sum was not intended to be liquidated damages.

Taylor v. The Marcella, 1 Woods, 304, Fed. Cas. No. 13,797.

The retained percentages are not "liquidated damages," but penal security on account of the actual damages.

2 Comp. Dec. (1896) 579; 20 Ops. Atty. Gen. 511; Kennedy v. United States, 24 Ct. Cl. 122; Pigeon v. United States, 27 Ct. Cl. 167; Satterlee v. United States, 30 Ct. Cl. 31; United States v. Maloney, 4 App. D. C. 505; United States v. Stone, Sand & Gravel Co. 100 C. C. A. 651, 177 Fed. 326; Langdon v. Northfield, 42 Minn. 464, 44 N. W. 984; Jackson v. Cleveland, 19 Wis. 400; Dullaghan v. Fitch, 42 Wis. 679; Quinn v. United States, 99 U. S. 30, 25 L. ed. 269; Savannah & C. R. Co. v. Callahan, 56 Ga. 331; Tayloe v. Sandiford, 7 Wheat. 13, 5 L. ed. 384; Van Buren v. Digges, 11 How. 461, 477, 13 L. ed. 771, 777; Watts v. Camors, 115 U. S. 353, 360, 29 L. ed. 406, 408, 6 Sup. Ct. Rep. 91; Sun Printing & Pub. Asso. v. Moore, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240; United States v. Bethlehem Steel Co. 205 U. S. 105, 121, 51 L. ed. 731, 737, 27 Sup. Ct. Rep. 450; Martin v. Taylor, 1 Wash. C. C. 1, Fed. Cas. No. 9,166.

Messrs. **Frederic J. Swift** and **George A. King** argued the cause, and, with Mr. William R. Conklin, filed a brief for defendants in error:

In annulling the contract, the government put an end to it, as to the future, between the parties, and nothing can be recovered under the contract, as no special provision in regard to that recovery was made in the contract.

Hubbardston Lumber Co. v. Bates, 31 Mich. 168; Van Trott v. Wiese, 36 Wis. 448; Hayes v. Nashville, 26 C. C. A. 59, 47 U. S. App. 713, 80 Fed. 641.

The annulment of the contract does not render the contract void *ab initio*, but simply releases all parties as to the future.

Sparhawk v. United States, 67 C. C. A. 274, 134 Fed. 720; Philadelphia, W. & B. R. Co. v. Howard, 13 How. 340, 14 L. ed. 171.

A party who annuls a contract cannot recover damages or a penalty from the other party, unless they are referred to in the notice of annulment, or unless there is a special agreement to that effect in the contract.

McCreery v. Day, 119 N. Y. 5, 6 L.R.A. 503, 16 Am. St. Rep. 793, 23 N. E. 198; New York v. New York Refrigerating Constr. Co. 146 N. Y. 214, 40 N. E. 771; Pigeon v. United States, 27 Ct. Cl. 167.

Annulment is not an ascertainment of breach.

1 Hudson, Bldg. & Engineering Contracts, pp. 574, 575; Macassey & S. Civil Engineers, Architects & Contractors, pp. 248, 249; Wait, Engineering & A. Jur. § 720.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a suit brought by the United States to recover the extra expense incurred to complete some dredging in Rhode Island, by reason of the failure of the defendants Perkins and O'Brien diligently and faithfully to prosecute the work. The complaint was dismissed by the circuit court in accordance with the decision of the circuit court of appeals upon a previous trial (86 C. C. A. 539, 159 Fed. 671); *and the judg-[325 ment was affirmed by the circuit court of appeals (89 C. C. A. 664, 163 Fed. 1022).

Perkins and O'Brien made a contract with the United States to do the dredging required in improving Providence river and Narragansett bay between certain points, to begin work on or before March 1, 1899, and to complete it on or before July 1, 1902. One term of the contract was that if they should fail to begin on time or should "in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifica-

tions and requirements of the contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the chief of engineers, to annul this contract by giving notice in writing to that effect, . . . and, upon the giving of such notice, all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be, in his opinion, required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in § 3709 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 2484);" with a proviso that if the contractors should be prevented by violence of the elements from beginning or completing the work as agreed, such additional time might be allowed them as, in the judgment of the party of the first part, should be just.

Toward the end of the contract, four paragraphs further on than the last, was the further agreement: "In case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentage retained shall thereby be forfeited to the United States; and that the said Unit-326]ed *States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same."

The work was begun, but did not go on satisfactorily. On December 4, 1900, the major of engineers in charge wrote from Newport to the contractors and their surety, now represented by the other defendant, "that from present appearances it does not seem to be possible for the contractors to put on other dredges than the one now supposed to be at work," stating what had been done and what would have to be done before the time allowed expired, and that to do the work it would need three dredges upon it continuously. The letter proceeded to give the authorized warning that "unless the contractors have on work by January 1st, 1901, a sufficient plant to dredge at least 100,000 cubic yards per month, the contract will be annulled." On December 13 the contractors answered from New York, stating that they expected to make an arrangement to put on two more dredges within a few days. On December 29, 1900, the contractors telegraphed that heir representative would call upon the major in charge on Tuesday morning, *i. e.*, January 1. On December 31 he replied that the respresentative could accomplish nothing by coming, and on the same day wrote to the defendants, informing them that the contract was annulled. The work afterwards was finished by other parties, at much increased cost. There was no substantial ground in the evidence to attribute the government's course to anything but the fault of the contractors, which was very plain, and the only question is what liability they incurred.

*The sole material express promisc[327 of the contractors was to complete the work by July 1, 1902. If the work was done at that date, that promise was performed, no matter how irregularly or with what delays in the earlier months. Under its terms the United States was not concerned with the stages of performance, but only with the completed result. See Bacon v. Parker, 137 Mass. 309, 311. Its interest in the result, however, made it reasonable to reserve the right to employ someone else if, when time enough had gone by to show what was likely to happen, it saw that it probably would not get what it bargained for from the present hands. But it would be a very severe construction of the contract, a contract, too, framed by the United States, to read the reservation of a right to annul for want of a diligence not otherwise promised, as importing a promise to use such diligence as should satisfy the judgment of the engineer in charge. It is one thing to make the right to continue work under the contract depend upon his approval, another to make his dissatisfaction with progress conclusive of a breach. In this case it was admitted that there was time enough left to finish the work under the contract when the defendants were turned off. It would be a very harsh measure to pronounce the contract broken when, but for the prohibition of the United States, the defendants might have done the work in time. The right to terminate the employment of the defendants, coupled with a provision for monthly payments based upon the amount of material removed, and therefore, of course, giving little pay for little work, is the protection expressly stipulated by the United States.

Again, the later paragraph that we have quoted, giving the right to recover expense of completing the work in excess of the original price, gives that right only "in case of failure . . . to complete this contract as specified and agreed upon." On their face these words mean failure *to[328

complete by July 1, 1902; not failure to complete because turned off by the engineer in charge, a year and six months before that time arrived, when competent persons still might do the job. The earlier clause under which the so-called annulment took place provides for no such consequence, but only for a forfeiture of reserved percentages and money due. It is true that the expression of the right to proceed to provide for the completion of the contract and the reference to Rev. Stat. § 3709, hardly belong in that part of the contract unless the defendants are liable for the expense, but the contract does not show technical accuracy enough to give this consideration great weight. If the United States wants more, it must say so in plainer words.

If the proviso for annulment be not construed to import a promise on the defendants' part, we are of opinion that there is no ground to charge them with a breach of contract. There were suggestions on the government's part of anticipatory breach, etc., that do not seem to us to need discussion.

We may add one further observation, although it hardly is material, in the view that we take. The ill-chosen word "annul" in the contract, repeated in the notice to the contractors and in the complaint, cannot be taken literally in any of them. It means "refuse to perform further," not "rescind" or "avoid." Philadelphia, W. & B. R. Co. v. Howard, 13 How. 307, 340, 14 L. ed. 157, 171. For, if the contract were made naught by the government's election and notice, all rights under it would be at an end, whereas it provides in terms that rights shall arise upon annulment, which, but for this provision in the contract, the government would not have. The suit is upon the contract, but the United States asks more than, in our opinion, the contract gives.

Judgment affirmed.

329]*HILLS & COMPANY, Limited,
v.
JOSEPH HOOVER et al.

(See S. C. Reporter's ed. 329-338.)

Action — successive suits — copyright infringement.

1. The institution by the owner of a copyright in certain engravings of an action of replevin not prosecuted to judgment, to enforce the forfeiture of the infringing copies, prescribed by U. S. Rev. Stat. § 4965, U. S. Comp. Stat. 1901, p. 3414, precludes him from subsequently bringing and maintaining an action of assumpsit to recover the penalty provided for by that section, measured by the number of copies found in the infringer's possession, even where the state practice affords no form of action in which the double remedy may be enforced, since, under the broad powers conferred by § 716 (U. S. Comp. Stat. 1901, p. 580), the Federal court may so frame its process and writs as to give full relief in one action.

[For other cases, see Action or Suit, 51-59, in Digest Sup. Ct. 1908.]

Federal courts — practice — conformity act.

2. The conformity "as near as may be" to the state practice, enjoined upon the Federal courts by U. S. Rev. Stat. § 914, U. S. Comp. Stat. 1901, p. 684, does not prevent a Federal court, under the broad powers conferred by § 716 (U. S. Comp. Stat. 1901, p. 580), from framing its process and writs so as to give the full relief in one action by way of the forfeiture and penalties prescribed by § 4965 in case of the infringement of a copyright in engravings, although the state practice may afford no form of action in which this double remedy may be enforced.

[For other cases, see Courts, 1219-1229, in Digest Sup. Ct. 1908.]

[No. 101.]

Argued March 15 and 16, 1911. Decided April 3, 1911.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Third Circuit, presenting questions as to whether the owner of a copyright for engravings is restricted to a single suit to enforce the forfeiture and penalties prescribed by law in case of infringement. Answered in the affirmative.

The facts are stated in the opinion.

Messrs. **Hector T. Fenton** and **Benno Loewy** argued the cause and filed a brief for Hills & Company.

Mr. **William A. Carr** argued the cause and filed a brief for Hoover et al.

Mr. Justice **Day** delivered the opinion of the court:

This case comes here upon certificate from the circuit *court of appeals for[330 the third circuit. Hills & Company, Limited, a corporation of Great Britain, brought an action of assumpsit for its own use and that of the United States against Joseph and Henry L. Hoover, citizens of Pennsylvania, partners as Joseph Hoover & Son, to recover under § 4965 of the Revised

NOTE.—On conformity of Federal practice and procedure to practice of state courts—see notes to Re Secretary of Treasury, 11 L.R.A. 275; O'Connell v. Reed, 5 C. C. A. 594; and Nederland L. Ins. Co. v. Hall, 27 C. C. A. 392.

Statutes of the United States (U. S. Comp. Stat. 1901, p. 3414) for a forfeiture of money to the amount of $4,763, alleged to be due the plaintiff as the owner of the copyright of certain engravings, 4,763 of which were found in the defendant's possession, which, at the statutory sum of $1 each, make up the amount sued for.

In the circuit court a verdict for that amount was rendered for the plaintiff, subject to the reserved question whether there was any evidence to go to the jury in support of the plaintiff's claim. Upon this question the circuit court subsequently entered judgment in favor of the defendants, and the plaintiff took the case to the circuit court of appeals.

The certificate states the following facts:

"The plaintiff owned copyrights of certain engravings which the defendants wrongfully reproduced, sold some of the reproduced copies, and on December 10, 1902, still had a number thereof remaining in their possession when the plaintiff's agent went to the defendants' printing establishment with a deputy marshal who was serving a writ of replevin the plaintiff had had issued in the circuit court against the defendants for infringing copies. The agent there found in the possession of the defendants forty-seven hundred and sixty-three infringing copies. These the deputy marshall then and there took and delivered to the plaintiff's agent, who still retains them. Subsequently, on June 18, 1903, the plaintiff brought the present action of assumpsit against the defendant infringers to recover the $1 forfeit to the plaintiff or each of the forty-seven hun-[331]dred and sixty-three infringing *sheets of the copyrighted engravings which, on December 10, 1902, its agent had found in and taken from the defendants' possession. To this action the defendants appeared and pleaded nonassumpsit, and in it a verdict was had for the plaintiff, as above noted. The action of replevin was no further proceeded in."

The questions propounded by the circuit court of appeals under the act of March 3, 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488], are as follows:

"1. In a circuit court of the United States within the state of Pennsylvania is the owner of a copyright for engravings restricted to a single action to find and seize the copies alleged to infringe and likewise to recover the money penalty therefor?

"2. In a circuit court of the United States within the state of Pennsylvania does the institution by the owner of a copyright for engravings of an action of replevin for recovery of the copies alleged to infringe, not prosecuted to judgment, preclude such copyright owner from subsequently bringing and maintaining an action of assumpsit to recover the pecuniary penalty for the copies found and seized under the writ of replevin?"

As a question of this character must be answered in reference to the actual case (Columbus Watch Co. v. Robbins, 148 U. S. 266, 37 L. ed. 445, 13 Sup. Ct. Rep. 594), the second question must be answered in view of the facts stated, having in mind that the copies had been seized in the replevin suit and delivered to the plaintiff's agent.

An answer to these questions requires the construction of § 4965 of the Revised Statutes of the United States. That section declares that any person offending against its provisions "shall forfeit to the proprietor all the plates on which the same shall be copied and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale, . . . one half thereof to the *proprietor and the other[332 half to the use of the United States."

This section has been, in varying forms, a part of the copyright law of the United States for many years prior to the enactment, since this suit, of the present law of July, 1909, which has superseded former statutes upon the subject of copyright. It has been the subject of frequent and not always harmonious construction in the Federal courts. See Bolles v. Outing Co. 175 U. S. 262, 267, 44 L. ed. 156, 158, 20 Sup. Ct. Rep. 94.

It was before this court in the case of Thornton v. Schreiber, 124 U. S. 612, 31 L. ed. 577, 8 Sup. Ct. Rep. 618. In that case an action was brought by Schreiber against Thornton to recover the penalties for the unlawful reproduction of a certain copyrighted photograph. The infringing copies were found in the store of Sharpless & Sons in Philadelphia, where they were being used as labels on parcels of goods. Thornton was a manager in the employ of Sharpless & Sons, and had ordered 1,500 of the photographs, which were delivered to the firm, who paid for them. It was held that Thornton was not liable, as he had not the possession of the infringing prints within the meaning of the act, and that the proper parties defendant, against whom an action of replevin might have been sustained, was the firm of Sharpless & Sons, and not their agent. All that was necessary for the decision of the case was the holding that the prints were not found in the possession of Thornton within the

meaning of the act. In the course of the opinion Mr. Justice Miller said:

"Counsel for defendants in error, Schreiber & Sons, insist that the words 'found in his possession' are to be construed as referring to the finding of the jury; that the expression means simply that where the sheets are ascertained by the finding of the jury to have been at any time in the possession of the person who committed the wrongful act, such person shall forfeit $1 for each sheet so ascertained to have been 333]in his possession. We, however, *think that the word 'found' means that there must be a time before the cause of action accrues at which they are found in the possession of the defendant."

The question whether more than one suit could be maintained under § 4965, or whether it was necessary to find the infringing sheets by means of some action or process before beginning an action for the penalty, was not before the court in that case, and was in no way decided. The expression of Mr. Justice Miller, that the word "found" meant that there must be a time before the cause of action accrues at which the infringing matter is found in the possession of the defendant, has been differently interpreted in the courts of the United States.

In Falk v. Curtis Pub. Co. 46 C. C. A. 201, 107 Fed. 126, Thornton v. Schreiber was interpreted to mean that before the action for the penalty would lie there must be a finding of articles in the possession of the defendant by means of a proceeding instituted for the express purpose of seizure, and that consequently an action of assumpsit, brought prior to the seizure, as an independent proceeding, was premature, and could not be maintained.

In Bolles v. Outing Co. 46 L.R.A. 712, 23 C. C. A. 594, 45 U. S. App. 449, 77 Fed. 966, the case of Thornton v. Schreiber was held to mean only that the infringing articles must be found in the possession of the defendant before the penalty could be imposed, and that the section contemplated a single suit to enforce both remedies,—the money recovery and the forfeiture of the offending sheets, etc. That case was a suit by Bolles against the Outing Company, seeking to recover not only the penalty for one copy of Outing which was found in the defendant's possession, but also for all the copies which had been within the defendant's possession within any time two years previous to the commencement of the suit. The circuit court limited the recovery to $1 as penalty for the copy purchased by an agent of the plaintiff from the company, and the court 334]*refused to permit recovery for the copies printed and delivered to the Outing Company within two years of the commencement of the suit, but not found in the defendant's possession. The case came here, and the judgment of the circuit court of appeals was affirmed. Bolles v. Outing Co. 175 U. S. supra. In that case this court approved the judgment of the circuit court of appeals of the second circuit, and quoted with approval the following language from that court: "The remedy by condemnation and forfeiture is only appropriate in a case where the property can be seized upon process, and where, as here, the forfeiture declared is against property of the 'offender,' it is only appropriate when it can be seized in his hands." In the same case Mr. Justice Brown, speaking for this court, said:

"No remedy is provided by the act, although by § 4970 a bill in equity will lie for an injunction, but the provision for a forfeiture of the plates and of the copies seems to contemplate an action in the nature of replevin for their seizure, and, in addition to the confiscation of the copies, for a recovery of $1 for every copy so seized or found in the possession of the defendant."

With a difference of opinion, as we have stated, in two circuit courts of appeal as to the proper construction of the act, there came before this court two cases, American Tobacco Co. v. Werckmeister, 207 U. S. 284, 52 L. ed. 208, 28 Sup. Ct. Rep. 72, 12 A. & E. Ann. Cas. 595, and Werckmeister v. American Tobacco Co. 207 U. S. 375, 52 L. ed. 254, 28 Sup. Ct. Rep. 124. In the first of the cases Werckmeister, the owner of a copyright painting, recovered in an action in the nature of replevin 1,196 sheets containing a copy of the copyrighted picture belonging to him. In the second case the action was brought to recover $10 each as penalty for the sheets seized in the former suit. In that case the question was distinctly made whether, under § 4965 of the Revised Statutes, two actions could be brought, one for the seizure of the sheets forfeited under the act, *and another[335 for the penalty of $1 for every sheet found in the defendant's possession. Upon consideration, this court held that the statute contemplated but a single action, in which the offender should be brought into court, the plates and sheets seized and adjudicated to the owner of the copyright, and the penalty provided for by the statute recovered. It was held that only a single action was within the scope of the statute, and that to construe it so as to require two actions would be to extend it beyond its terms.

The second Werckmeister Case was decided while the case now before us was

pending in the circuit court of appeals, and shortly before argument in that court. The circuit court of appeals thereupon certified to this court the two questions, as hereinbefore stated. In the Werckmeister Case the matter was fully considered, and we find no occasion to depart from the construction which was given the statute in that case.

It is to be noted that both questions propounded by the circuit court of appeals relate to actions in the circuit courts of the United States within the state of Pennsylvania, and it is insisted by the counsel for Hills & Company that in the state of Pennsylvania there is no form of action in which the double remedy can be enforced, and that the effect of the decision in the Werckmeister Case should be limited to those states wherein the practice permits the remedies given to the copyright proprietor to be enforced in one action. This argument proceeds upon the theory that the state practice can alone be resorted to for remedies in the Federal courts under the copyright law of the United States.

Section 914, Revised Statutes (U. S. Comp. Stat. 1901, p. 684), provides: "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms [336] and modes *of proceedings existing at the time in like causes in the courts of record of the state within such circuit or district courts are held, any rule of any court to the contrary notwithstanding."

This section is intended to secure on the law side of the Federal courts the practice which prevails in like causes in courts of the states. Its requirement is that such proceeding shall conform "as near as may be" to that prevailing in the state courts "in like cases." This section was not intended to require the adoption of the state practice where it would be inconsistent with the terms or defeat the purposes of the legislation of Congress. Luxton v. North River Bridge Co. 147 U. S. 337, 338, 37 L. ed. 194, 195, 13 Sup. Ct. Rep. 356; Chappell v. United States, 160 U. S. 499, 512, 40 L. ed. 510, 514, 16 Sup. Ct. Rep. 397.

In fact, the language of the statute is itself an indication that the state practice cannot be at all times and under all circumstances complied with. It is enough if the Federal courts, in adjudicating the rights of parties, comply with the state practice "as near as may be." State statutes which defeat or encumber the administration of the law under Federal statutes are not required to be followed in the Federal courts. Mexican C. R. Co. v. Pinkney, 149 U. S. 207, 37 L. ed. 704, 13 Sup. Ct. Rep. 859.

It follows that where the state statute, or practice, is not adequate to afford the relief which Congress has provided in a given statute, resort must be had to the power of the Federal court to adapt its practice and issue its writs and administer its remedies so as to enforce the Federal law.

We think this power is not wanting in the present case. Section 716, Rev. Stat. (U. S. Comp. Stat. 1901, p. 580), confers broad powers upon the courts of the United States. That section provides:

"The Supreme Court and the circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by statute which may be necessary *for the exercise of their respec-[337 tive jurisdictions, and agreeable to the usages and principles of law."

At an early day it was held that under this section the courts of the United States are not restricted to the kind of processes used in the state courts, or bound to conform themselves thereto in all respects, but have the authority to alter the process in such manner as may be deemed expedient, and to so adapt it that its effect and operation may be effectual. Bank of United States v. Halstead, 10 Wheat. 51, 6 L. ed. 264.

There is no difficulty in issuing a writ in the nature of a writ of replevin in an action such as is authorized by § 4965, requiring the marshal to seize the alleged forfeited plates and copies, and asking in the same suit to recover the penalty for those found in the defendant's possession. The alleged infringing matter will be brought into court to abide its order and judgment, and at the same time, in the same action, a recovery may be had for the penalty awarded.

This was the view of the statute suggested in Bolles v. Outing Co. supra. It was also asserted in American Tobacco Co. v. Werckmeister, supra, affirmed in this court in Werckmeister v. American Tobacco Co. supra.

It is true that in the first Werckmeister Case the plaintiff recovered a judgment for the forfeiture of the infringing sheets, but the question made and decided in the second case involved the construction of the statute upon the question whether one or two actions was authorized; and it was held that the statute provided for one action, in which all the relief authorized by the statute could be obtained.

The copyright statutes of the United States afford all the relief to which a party

is entitled, and no action outside of those provided therein will lie. Globe Newspaper Co. v. Walker, 210 U. S. 356, 52 L. ed. 1096, 28 Sup. Ct. Rep. 726. It therefore follows that Hills & Company, having brought an 338]action for the recovery *of the infringing matter, and having conducted it so far as to have the goods seized and turned over to them, can have no other remedy under the statute which provides for all relief in a single action.

It is stated in the certificate that the replevin suit originally begun is still pending. Such being the fact, we do not wish to intimate, by anything herein decided, that the authority to amend pleadings and process in the Federal courts may not justify an amendment in that case so as to embrace the entire relief which could have been obtained in a single action under § 4965 of the Revised Statutes of the United States, as we have stated. That question will arise if an application shall be made to the circuit court of the United States in that view.

Holding that the remedy under the copyright statute embraces but one action, as was held in the Werckmeister Case, and that the local statutes of the state as to replevin or other remedies will not prevent the Federal courts from framing its process and writs so as to give full relief in one action, we answer both of the questions certified in the affirmative.

It is so ordered.

VICENTE GARCIA GAVIERES, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 338–345.)

Criminal law — former jeopardy — same offense.

The offenses of behaving in an indecent manner in a public place, open to public view, punishable under municipal ordinance, and of insulting a public officer by deed or word in his presence, contrary to P. I. Pen. Code, art. 257, are not identical, so that a conviction of the first will bar a prosecution for the other, although the acts and words of the accused set forth in both charges are the same.

[For other cases, see Criminal Law, 64–88, in Digest Sup. Ct. 1908.]

[No. 102.]

Submitted March 13, 1911. Decided April 3, 1911.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which affirmed a conviction in the Court of First Instance of the City of Manila of insulting a public officer by deed or word in his presence, although the accused had previously been convicted of behaving in an indecent manner in a public place, open to public view, the acts and words of the accused set forth in both charges being the same. Affirmed.

See same case below, 10 Philippine, 694.

The facts are stated in the opinion.

Mr. **Vicente Garcia Gavieres**, *in propria persona*, submitted the cause for plaintiff in error.

Assistant Attorney General **Harr** submitted the cause for defendant in error.

Mr. Justice **Day** delivered the opinion of the court:

This case presents the single question whether the plaintiff in error, by reason of the proceedings, hereinafter *stated,[341 has been twice in jeopardy for the same offense.

Gavieres, plaintiff in error, was charged, convicted, and sentenced in the court of first instance of the city of Manila, Philippine Islands, of a violation of article 257 of the Penal Code of the Philippine Islands, which provides:

"The penalty of arresto mayor shall also be imposed on those who outrage, insult, or threaten, by deed or word, public officials or agents of the authorities, in their presence, or in a writing addressed to them."

Gavieres was charged under this article with the crime of calumniating, outraging, and insulting a public official in the exercise of his office by word of mouth and in his presence. Upon conviction he was sentenced to four months of arresto mayor and to pay the cost of the prosecution. He had been previously convicted, because of the same words and conduct, under article 28, § 2 of the ordinance of the city of Manila, which provides:

"No person shall be drunk or intoxicated or behave in a drunken, boisterous, rude, or indecent manner in any public place open to public view; or be drunk or intoxicated or behave in a drunken, boisterous, rude, or indecent manner in any place or premises to the annoyance of another person."

Section 5 of the act of Congress of July 1, 1902 (32 Stat. at L. 691, chap. 1369), provides: "No person, for the same offense, shall be twice put in jeopardy of punishment."

NOTE.—On former jeopardy—see notes to Com. v. Fitzpatrick, 1 L.R.A. 451; Altenburg v. Com. 4 L.R.A. 543; Re Lange, 21 L. ed. U. S. 872; United States v. Perez, 6 L. ed. U. S. 165; and Silsby v. Foote, 14 L. ed. U. S. 394.

This statute was before this court in the case of Kepner v. United States, 195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. Rep. 797, 1 A. & E. Ann. Cas. 655, and it was there held that the protection against double jeopardy therein provided had, by means of this statute, been carried to the Philippine Islands in the sense and in the meaning which it had obtained under the Constitution and laws of the United States.

It is to be observed that the protection intended and specifically given is against 342]second jeopardy for the *same *offense. The question, therefore, is, Are the offenses charged, and of which a conviction has been had in the municipal court and in the court of first instance, identical? An examination of the ordinance shows that the gist of the offense under it was behaving in an indecent manner in a public place, open to public view. It was not necessary to charge or prove under the municipal ordinance any outrage, insult, or threat to a public official or agent of the authorities. The charge contained in the record shows that under the municipal ordinance the plaintiff in error was charged with wilfully and unlawfully, in a public street car and in the presence of numerous persons, including ladies, conducting himself in a reckless, indecent, and discourteous manner.

It is true that the acts and words of the accused set forth in both charges are the same; but in the second case it was charged, as was essential to conviction, that the misbehavior in deed and words was addressed to a public official. In this view we are of opinion that while the transaction charged is the same in each case, the offenses are different. This was the view taken in Morey v. Com. 108 Mass. 433, in which the supreme court of Massachusetts, speaking by Judge Gray, held:

"A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

343] *This case was cited with approval in Carter v. McClaughry, 183 U. S. 367, 395, 46 L. ed. 236, 251, 22 Sup. Ct. Rep. 181. In the Carter Case, speaking of the identity of offenses charged, this court said:

"The offenses charged under this article were not one and the same offense. This is apparent if the test of the identity of offenses, that the same evidence is required to sustain them, be applied. The first charge alleged 'a conspiracy to defraud,' and the second charge alleged 'causing false and fraudulent claims to be made,' which were separate and distinct offenses, one requiring certain evidence which the other did not. The fact that both charges related to and grew out of one transaction made no difference."

In Burton v. United States, 202 U. S. 344, 381, 50 L. ed. 1057, 1071, 26 Sup. Ct. Rep. 688, 6 A. & E. Ann. Cas. 362, Bishop's Criminal Law, vol. 1, § 1051, was quoted with approval to the effect, "Jeopardy is not the same when the two indictments are so diverse as to preclude the same evidence from sustaining both." In that case this court said, speaking of a plea of *autre fois acquit:* "It must appear that the offense charged, using the words of Chief Justice Shaw, 'was the same in law and in fact. The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, *however nearly they may be connected in fact.*'"

Applying these principles, it is apparent that evidence sufficient for conviction under the first charge would not have convicted under the second indictment. In the second case it was necessary to aver and prove the insult to a public official or agent of the authorities, in his presence or in a writing addressed to him. Without such charge and proof there could have been no conviction in the second case. The requirement of *insult to a public official* was lacking in the first offense. Upon the charge, under the ordinance, it was necessary to show that the offense was committed in a public place, open to public view; the insult to a public official need only be in his *presence[344 or addressed to him in writing. Each offense required proof of a fact which the other did not. Consequently a conviction of one would not bar a prosecution for the other.

A minority of the supreme court of the Philippine Islands was of opinion that there was double jeopardy in the case at bar upon the authority of the case of Grafton v. United States, 206 U. S. 333, 51 L. ed. 1084, 27 Sup. Ct. Rep. 749, 11 A. & E. Ann. Cas. 640. In that case the supreme court of the Philippine Islands held that a soldier of the United States Army might be prosecuted for homicide before a military court-martial and also before a civil court exercising authority in the islands. That judgment was

reversed and the conviction before the military court-martial held to bar a prosecution for the same homicide in the civil courts of the Philippine Islands. It appeared that Grafton had been acquitted of the unlawful homicide of a Filipino by a duly convened court-martial having jurisdiction of the offense. After acquittal he was charged in the court of first instance of the province of Iloilo with the crime of assassination in committing the same homicide. He was convicted, notwithstanding his plea of former jeopardy, of infraction of article 404 of the Penal Code, of the crime of homicide in killing the Filipino.

This court held that the court-martial had full jurisdiction to try the accused for the offense; that it derived its authority from the same governmental power as did the civil court in the Philippine Islands, and that if the conviction in the civil court were allowed to stand, the accused would be for the second time in jeopardy for the same homicide. Mr. Justice Harlan, delivering the opinion of the court, said:

"But passing by all other questions discussed by counsel, or which might arise on the record, and restricting our decision to the above question of double jeopardy, we adjudge that, consistently with the above act of 1902, and for the reasons stated, the 345]plaintiff in error, a soldier *in the Army, having been acquitted of the crime of homicide, alleged to have been committed by him in the Philippines, by a military court of competent jurisdiction, proceeding under the authority of the United States, could not be subsequently tried for the same offense in a civil court exercising authority in that territory."

In the case at bar the offense of insult to a public official, covered by the section of the Philippine Code, was not within the terms of the offense or prosecution under the ordinance. While it is true that the conduct of the accused was one and the same, two offenses resulted, each of which had an element not embraced in the other.

The judgment of the Supreme Court of the Philippine Islands is affirmed.

Affirmed.

Dissenting, Mr. Justice Harlan.

VERISIMO VASQUEZ VILAS, Plff. in Err. and Appt.,
v.
CITY OF MANILA. (No. 53.)

ESPERANZA OTERO TRIGAS et al., Plffs. in Err. and Appts.,
v.
CITY OF MANILA. (No. 54.)

RICARDO AGUADO, Appt.,
v.
CITY OF MANILA. (No. 207.)

(See S. C. Reporter's ed. 345-363.)

Appeal — from supreme court of Philippine Islands — Federal question.

1. Judgments of the supreme court of the Philippine Islands denying any liability of the present city of Manila upon municipal obligations incurred prior to the cession of the Philippine Islands to the United States by the treaty of December 10, 1898 (30 Stat. at L. 1754), are rendered in cases in which a treaty of the United States is involved, within the meaning of the act of July 1, 1902 (32 Stat. at L. 695, chap. 1369, U. S. Comp. Stat. Supp. 1909, p. 226), § 10, governing the appellate jurisdiction of the Federal Supreme Court, although no distinct claim under that treaty was made in the pleadings.

[For other cases, see Appeal and Error, III. d, 5, in Digest Sup. Ct. 1908.]

International law — cessions or conquests — dissolution of municipality.

2. A municipal corporation is not totally dissolved as a mere consequence of military occupation or teritorial cession.

[For other cases, see International Law, V., in Digest Sup. Ct. 1908.]

International law — result of cession — municipal property.

3. Public property belonging to the city of Manila as a municipal corporation cannot be regarded as having passed to the United States under the cession by Spain of the Philippine Islands for a cash consideration, under the treaty of Paris of December 10, 1898, of all "buildings, wharves, barracks, forts, structures, public highways, and other immovable property which, in conformity with law, belong to the public domain, and as such belong to the Crown of Spain,"—especially in view of the further stipulation protecting and safeguarding the property and property rights of municipal corporations precisely as were those of individuals.

[For other cases, see International Law, V., in Digest Sup. Ct. 1908.]

NOTE.—As to the effect of acquisition of territory by United States on laws and property rights therein—see note to Re Chavez, 80 C. C. A. 457.

On the establishment and regulation of municipal water supply—see note to State ex rel. Hallauer v. Gosnell, 61 L.R.A. 33.

As to the appellate jurisdiction of the Federal Supreme Court over supreme court of Philippine Islands—see note to Martinez v. International Bkg. Corp. ante, 438.

International law — result of cession — obligations of reincorporated municipality.

4. The present city of Manila, reincorporated by the Philippine Commission with substantially the same municipal powers, area, and inhabitants as the Spanish municipality of the same name, is liable upon municipal obligations incurred prior to the cession of the Philippine Islands by the treaty of Paris of December 10, 1898, to the United States.

[For other cases, see International Law, V., in Digest Sup. Ct. 1908.]

Trusts — liability of trust estate.

5. A claim under a contract to supply coal to a municipality for use in operating its waterworks system, apparently entered into upon the general credit of the city, does not constitute a charge upon the property and funds held in trust by the city to be devoted to the establishment and maintenance of such system.

[For other cases, see Trusts, 191–202, in Digest Sup. Ct. 1908.]

Trusts — individual liability of trustee.

6. A debt incurred for coal to be used in a municipal waterworks system is a municipal obligation, although the municipality holds property and funds in trust to be devoted to the establishment and maintenance of such system.

[For other cases, see Trusts, 138–140, in Digest Sup. Ct. 1908.]

[Nos. 53, 54, and 207.]

Argued February 24 and 27, 1911. Decided April 3, 1911.

IN ERROR to and APPEAL from the Supreme Court of the Philippine Islands to review decrees which affirmed decrees of the Court of First Instance of the City of Manila, sustaining demurrers to and dismissing complaints which seek to establish the liability of the city of Manila for obligations incurred prior to the cession of the Philippine Islands. Reversed with directions to overrule the demurrers. Also an APPEAL from the Supreme Court of the Philippine Islands to review a judgment which affirmed a judgment of the Court of First Instance in the City of Manila in favor of defendant in an action to enforce the liability of the city of Manila for a debt incurred for coal supplied for its waterworks system prior to the cession of the Philippine Islands to the United States. Reversed and remanded with directions to render judgment for plaintiff.

See same case below, 9 Philippine, 513.

The facts are stated in the opinion.

Messrs. **Frederic R. Coudert** and **Howard Thayer Kingsbury** argued the cause, and, with Messrs. Paul Fuller and Harry Weston Van Dyke, filed a brief for plaintiffs in error and appellants:

The judgment below wholly fails to take into account the dual character of municipal corporations.

South Carolina v. United States, 199 U. S. 437, 462, 50 L. ed. 261, 270, 26 Sup. Ct. Rep. 110, 4 A. & E. Ann. Cas. 737; Lloyd v. New York, 5 N. Y. 374, 55 Am. Dec. 347; Western Sav. Fund Soc. v. Philadelphia, 31 Pa. 175, 72 Am. Dec. 730.

A municipality is not a sovereignty.

Metropolitan R. Co. v. District of Columbia, 132 U. S. 1, 9, 33 L. ed. 231, 234, 10 Sup. Ct. Rep. 19.

After the cession of California the pueblo of San Francisco, which had existed as a municipal organization prior to the cession, continued to exist as such corporation in spite of the change of sovereignty; and such change of sovereignty left its property rights and obligations unimpaired.

Townsend v. Greeley, 5 Wall. 326, 18 L. ed. 547; Merryman v. Bourne, 9 Wall. 592, 19 L. ed. 683; More v. Steinbach, 127 U. S. 70, 32 L. ed. 51, 8 Sup. Ct. Rep. 1067; Los Angeles Farming & Mill. Co. v. Los Angeles, 217 U. S. 217, 54 L. ed. 736, 30 Sup. Ct. Rep. 452; Smith v. Morse, 2 Cal. 524; Cohas v. Raisin, 3 Cal. 443; Hart v. Burnett, 15 Cal. 530.

In like manner a contract made by city officials of New Orleans, appointed by the Federal military authorities during the military occupation of the city in the Civil War, was held binding upon the city after its restoration to the sovereign control of the state of Louisiana.

New Orleans v. New York Mail S. S. Co. 20 Wall. 387, 22 L. ed. 354.

The city of Manila, as at present constituted, is the successor of the city of Manila as existing under Spanish sovereignty, in respect to both its rights and obligations, and is therefore liable for the debts of the municipality which were outstanding at the time of the cession.

Mobile v. Watson, 116 U. S. 289, 29 L. ed. 620, 6 Sup. Ct. Rep. 398; Shapleigh v. San Angelo, 167 U. S. 646, 42 L. ed. 310, 17 Sup. Ct. Rep. 957; Broughton v. Pensacola, 93 U. S. 266, 23 L. ed. 896; Mt. Pleasant v. Beckwith, 100 U. S. 514, 25 L. ed. 699; Comanche County v. Lewis, 133 U. S. 198, 33 L. ed. 604, 10 Sup. Ct. Rep. 286; Van Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403; Girard v. Philadelphia, 7 Wall. 1, 19 L. ed. 53; Barnes v. District of Columbia, 91 U. S. 540, 23 L. ed. 440; New Orleans v. Clark (Jefferson City Gaslight Co. v. Clark) 95 U. S. 644, 24 L. ed. 521; Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197; New Orleans v. Morris, 105 U. S. 600, 26 L. ed. 1184; Amy v. Watertown, 130 U. S. 301, 32 L. ed. 946, 9 Sup. Ct. Rep. 530; Metropolitan R. Co. v. District of Columbia, 132 U. S. 1, 33 L. ed. 231,

10 Sup. Ct. Rep. 19; District of Columbia v. Woodbury, 136 U. S. 450, 34 L. ed. 472, 10 Sup. Ct. Rep. 990.

The juristic personality of municipal corporations, and their liability to suit, were recognized and established by the Roman law and the Spanish law, both ancient and modern.

Savigny, Jural Relations, translated by Rattigan, §§ 86, 87, 92, 93; 1 Alcubilla's Diccionario de la Administracion Espanola, pp. 839–863, 872, subtitle, "Ayuntamientos."

The plaintiffs are entitled to the remedies of judgment and execution for the enforcement of their claims.

Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190; Memphis v. United States, 97 U. S. 293, 24 L. ed. 920; Riggs v. Johnson County, 6 Wall. 193, 18 L. ed. 775; Knox County v. Aspinwall, 24 How. 376, 16 L. ed. 735.

The city of Manila holds the Carriedo fund as a trustee, and such fund is liable for obligations incurred in the administration of the Carriedo waterworks.

Vidal v. Philadelphia, 2 How. 127, 11 L. ed. 205; Girard v. Philadelphia, 7 Wall. 1, 19 L. ed. 53; United States v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597; Tippecanoe County v. Lucas, 93 U. S. 108, 115, 23 L. ed. 822, 824; Hunter v. Pittsburgh, 207 U. S. 161, 179, 52 L. ed. 151, 159, 28 Sup. Ct. Rep. 40; Philadelphia v. Fox, 64 Pa. 182; People ex rel. Le Roy v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 108; McDonogh v. Murdoch, 15 How. 367, 14 L. ed. 732; New v. Nicoll, 73 N. Y. 127, 29 Am. Rep. 111; Noyes v. Blakeman, 6 N. Y. 580; Van Slyke v. Bush, 123 N. Y. 47, 25 N. E. 196.

If, however, it should be thought by this court that the Aguado contract does not expressly bind the Carriedo fund, then the contract must be regarded as the individual obligation of the city, and the designation, in the pleadings of the city as trustee becomes simply *descriptio personæ*.

Taylor v. Davis (Taylor v. Mayo) 110 U. S. 330, 336, 28 L. ed. 163, 165, 4 Sup. Ct. Rep. 147.

To review a judgment of the Philippine supreme court, it is sufficient that any statute or treaty of the United States be "involved," and it is deemed to be "involved" where its construction or effect has been passed on by the court below, or has to be passed on by this court in reaching its decision.

Reavis v Fianza, 215 U. S. 16, 22, 54 L. ed. 72, 75, 30 Sup. Ct. Rep. 1.

Even for the review of state court judgments it is sufficient that the requisite "Federal question" be raised at any stage of the proceedings, in time for it to be actually considered and determined by the state court. This may be done as late as on a motion for reargument.

Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241.

The true test is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right. Everywhere in our decisions it has been held that we may review the judments of a state court when the determination or judgment of that court could not have been given without deciding upon a right or authority claimed to exist under the Constitution, laws, or treaties of the United States, and deciding against that right.

Murray v. Charleston, 96 U. S. 432, 442, 24 L. ed. 760, 761.

It is a general rule of international law that local obligations that "run with the land" are not affected by a change of sovereignty, however brought about; and that all local charges and guaranteed debts to which certain domains and their revenues are dedicated survive as charges upon the localities to which they relate, with their equities unimpaired.

Taylor, International Pub. Law, §§ 165, 168.

Plaintiffs' claims are "property" within the meaning of the treaty.

Soulard v. United States, 4 Pet. 511, 7 L. ed. 938; United States v. Reynes, 9 How. 127, 13 L. ed. 74.

Mr. **Paul Charlton** argued the cause, and, with Mr. Isaac Adams, filed a brief for defendant in error and appellee:

The question as to what constitutes "property," as that word was used in art. 8 of the treaty of Paris, has already received the conclusive determination of this court.

O'Reilly de Camara v. Brooke, 209 U. S. 45, 52 L. ed. 676, 28 Sup. Ct. Rep. 439.

While it is true that, under the present charter of the city of Manila, the city of Manila is authorized and directed to sue and defend actions in protection of the interests of the same, there is no provision for the satisfaction of amounts adjudged to be due by the decree of a court, except by appropriation for the payment thereof, which must originate in the Philippine Commission, and not in the municipal board of the city of Manila.

Hoey v. Baldwin, 1 Philippine, 551.

Mr. Justice **Lurton** delivered the opinion of the court:

The plaintiffs in error, who were plain-

tiffs below, are creditors of the city of Manila as it existed before the cession of the Philippine Islands to the United States by the treaty of Paris, December 10, 1898 [30 Stat. at L. 1754]. Upon the theory that the city, under its present charter from the government of the Philippine Islands, is the same juristic person and liable upon the obligations of the old city, these actions were brought against it. The supreme court of the Philippine Islands denied relief, holding that the present municipality is a totally different corporate entity, and in no way liable for the debts of the Spanish municipality.

352] *The fundamental question is whether, notwithstanding the cession of the Philippine Islands to the United States, followed by a reincorporation of the city, the present municipality is liable for the obligations of the city incurred prior to the cession to the United States.

We shall confine ourselves to the question whether the plaintiffs in error are entitled to judgments against the city upon their several claims. Whether there is a remedy adequate to the collection when reduced to judgment is not presented by the record. But whether there is or is not a remedy affords no reason why the plaintiffs in error may not reduce their claims to judgment. Mt. Pleasant v. Beckwith, 100 U. S. 514, 530, 25 L. ed. 699, 703. The city confessedly may be sued under its existing charter, and that implies at least a right to judgment if they establish their demands.

The city as now incorporated has succeeded to all of the property rights of the old city and to the right to enforce all of its causes of action. There is identity of purpose between the Spanish and American charters and substantial identity of municipal powers. The area and the inhabitants incorporated are substantially the same. But for the change of sovereignty which has occurred under the treaty of Paris, the question of the liability of the city under its new charter for the debts of the old city would seem to be of easy solution. The principal question would therefore seem to be the legal consequence of the cession referred to upon the property rights and civil obligations of the city incurred before the cession. And so the question was made to turn in the court below upon the consequence of a change in sovereignty and a reincorporation of the city by the substituted sovereignty.

This disposes of the question of the jurisdiction of this court, grounded upon the absence from the petition of the plaintiffs of any distinct claim under the treaty of Paris, since, under § 10 of the Philippine 353]organic act *of July 1, 1902 [32 Stat. at L. 695, chap. 1369, U. S. Comp. Stat. Supp. 1909, p. 226], this court is given jurisdiction to review any final decree or judgment of the supreme court of the Philippine Islands where any treaty of the United States "is involved." That treaty was necessarily "involved," since neither the court below nor this court can determine the continuity of the municipality nor the liability of the city as it now exists for the obligation of the old city, without considering the effect of the change of sovereignty resulting from that treaty. See Reavis v. Fianza, 215 U. S. 16, 22, 54 L. ed. 72, 75, 30 Sup. Ct. Rep. 1.

The historical continuity of a municipality embracing the inhabitants of the territory now occupied by the city of Manila is impressive. Before the conquest of the Philippine Islands by Spain, Manila existed. The Spaniards found on the spot now occupied a populous and fortified community of Moros. In 1571 they occupied what was then and is now known as Manila, and established it as a municipal corporation. In 1574 there was conferred upon it the title of "Illustrious and ever loyal city of Manila." From time to time there occurred amendments, and, on January 19, 1894, there was a reorganization of the city government under a royal decree of that date. Under that charter there was power to incur debts for municipal purposes and power to sue and be sued. The obligations here in suit were incurred under the charter referred to, and are obviously obligations strictly within the provision of the municipal power. To pay judgments upon such debts it was the duty of the ayuntamiento of Manila, which was the corporate name of the old city, to make provision in its budget.

The contention that the liability of the city upon such obligations was destroyed by a mere change of sovereignty is obviously one which is without a shadow of moral force, and, if true, must result from settled principles of rigid law. While the contracts from which the claims in suit resulted were in progress, war between the United *States and Spain ensued. On August[354 13, 1898, the city was occupied by the forces of this government, and its affairs conducted by military authority. On July 31, 1901, the present incorporating act was passed, and the city since that time has been an autonomous municipality. The charter in force is act 183 of the Philippine Commission, and now may be found as chapters 68 to 75 of the compiled acts of the Philippine Commission. The 1st section of the charter of 1901 reads as follows:

"The inhabitants of the city of Manila, residing within the territory described in § 2 of this act, are hereby constituted a mu-

nicipality, which shall be known as the city of Manila, and by that name shall have perpetual succession, and shall possess all the rights of property herein granted or heretofore enjoyed and possessed by the city of Manila as organized under Spanish sovereignty."

The boundaries described in § 2 include substantially the area and inhabitants which had theretofore constituted the old city.

By § 4 of the same act, the government of the city was invested in a municipal board.

Section 16 grants certain legislative powers to the board, and provides that it shall "take possession of all lands, buildings, offices, books, papers, records, moneys, credits, securities, assets, accounts, or other property or rights belonging to the former city of Manila, or pertaining to the business or interests thereof, and, subject to the provisions herein set forth, shall have control of all its property except the building known as the ayuntamiento, provision for the occupation and control of which is made in § 15 of this act; shall collect taxes and other revenues, and apply the same in accordance with appropriations, as hereinbefore provided, to the payment of the municipal expenses; shall supervise and control the discharge of official duties by subordinates; shall institute judicial proceedings 355]to recover property and *funds of the city wherever found, or otherwise to protect the interests of the city, and shall defend all suits against the city," etc.

Section 69 of the charter expressly preserved "all city ordinances and orders in force at the time of the passage of this act, and not inconsistent herewith," until modified or repealed by ordinances passed under this act.

Section 72 is the repealing clause, and provides for the repeal of "all acts, orders, and regulations" which are inconsistent with the provisions of the act.

The charter contains no reference to the obligations or contracts of the old city.

If we understand the argument against the liability here asserted, it proceeds mainly upon the theory that inasmuch as the predecessor of the present city, the ayuntamiento of Manila, was a corporate entity created by the Spanish government, when the sovereignty of Spain in the islands was terminated by the treaty of cession, if not by the capitulation of August 13, 1898, the municipality *ipso facto* disappeared for all purposes. This conclusion is reached upon the supposed analogy to the doctrine of principal and agent, the death of the principal ending the agency. So complete is the supposed death and annihilation of a municipal entity by extinction of sovereignty of the creating state that it was said in one of the opinions below that all of the public property of Manila passed to the United States, "for a consideration, which was paid," and that the United States was therefore justified in creating an absolutely new municipality, and endowing it with all of the assets of the defunct city, free from any obligation to the creditors of that city. And so the matter was dismissed in the Trigas Case by the court of first instance, by the suggestion that "the plaintiff may have a claim against the Crown of Spain, which has received from the United States payment for that done by the plaintiff."

*We are unable to agree with the[356 argument. It loses sight of the dual character of municipal corporations. They exercise powers which are governmental and powers which are of a private or business character. In the one character a municipal corporation is a governmental subdivision, and for that purpose exercises by delegation a part of the sovereignty of the state. In the other character it is a mere legal entity or juristic person. In the latter character it stands for the community in the administration of local affairs wholly beyond the sphere of the public purposes for which its governmental powers are conferred.

The distinction is observed in South Carolina v. United States, 199 U. S. 437, 461, 50 L. ed. 261, 269, 26 Sup. Ct. Rep. 110, 4 A. & E. Ann. Cas. 737, where Lloyd v. New York, 5 N. Y. 369, 374, 55 Am. Dec. 347, and Western Sav. Fund Soc. v. Philadelphia, 31 Pa. 175, 72 Am. Dec. 730, are cited and approved. In Lloyd v. New York, supra, it is said:

"The corporation of the city of New York possesses two kinds of powers: one governmental and public, and to the extent they are held and exercised, is clothed with sovereignty; the other private, and to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes, the latter for private purposes. While in the exercise of the former, the corporation is a municipal government; and while in the exercise of the latter, is a corporate legal individual."

See also Dill. Mun. Corp. 4th ed. 66; Petersburg v. Applegarth, 28 Gratt. 321, 343, 26 Am. Rep. 357, and Oliver v. Worcester, 102 Mass. 489, 3 Am. Rep. 485.

In view of the dual character of municipal corporations there is no public reason for presuming their total dissolution as a mere consequence of military occupation or territorial cession. The suspension of such governmental functions as are obviously incompatible with the new political relations thus brought about may be presumed. *But no such implication may[357 be reasonably indulged beyond that result.

Such a conclusion is in harmony with the

settled principles of public law as declared by this and other courts and expounded by the text-books upon the laws of war and international law. Taylor, International Pub. Law, § 578.

That there is a total abrogation of the former political relations of the inhabitants of the ceded region is obvious. That all laws theretofore in force which are in conflict with the political character, constitution, or institutions of the substituted sovereign, lose their force, is also plain. Alvarez y Sanchez v. United States, 216 U. S. 167, 54 L. ed. 432, 30 Sup. Ct. Rep. 367. But it is equally settled in the same public law that that great body of municipal law which regulates private and domestic rights continues in force until abrogated or changed by the new ruler. In Chicago, R. I. & P. R. Co. v. McGlinn, 114 U. S. 542, 546, 29 L. ed. 270, 271, 5 Sup. Ct. Rep. 1005, it was said:

"It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession, public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the 358]*press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use, and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general, that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed."

The above language was quoted with approval in Downes v. Bidwell, 182 U. S. 244, 298, 45 L. ed. 1088, 1110, 21 Sup. Ct. Rep. 770.

That the United States might, by virtue of its situation under a treaty ceding full title, have utterly extinguished every municipality which it found in existence in the Philippine Islands, may be conceded. That it did so, in view of the practice of nations to the contrary, is not to be presumed, and can only be established by cogent evidence.

That during military occupation the affairs of the city were in a large part administered by officials put in place by military order did not operate to dissolve the corporation, or relieve it from liability upon obligations incurred before the occupation, nor those created for municipal purposes by the administrators of its affairs while its old officials were displaced. New Orleans v. New York Mail S. S. Co. 20 Wall. 387, 394, 22 L. ed. 354, 358. During that occupation and military administration the business of the city was carried on as usual. Taxes were assessed and taxes collected and expended for local purposes, and many of the officials carrying on the government were those found in office when the city was occupied. The continuity of the corporate city was not inconsistent with military occupation or the constitution or institutions of the occupying power. This *is made[359 evident by the occurrences at the time of capitulation. Thus, the articles of capitulation concluded in these words: "This city, its inhabitants, . . . and its private property of all descriptions, are placed under the special safeguard of the faith and honor of the American Army." This was quoted in President McKinley's instructions of April 7, 1900, to the Philippine Commission, and touching this he said: "I believe that this pledge has been faithfully kept." And the commission was directed to labor for the full performance of this obligation. This instruction was in line with and in fulfilment of the 8th article of the treaty of Paris of December 10, 1898. Under the 3d article of that treaty the archipelago known as the Philippine Islands was ceded to the United States, the latter agreeing to pay to Spain the sum of $20,000,000. Under the first paragraph of the 8th article, Spain relinquished to the United States "all the buildings, wharves, barracks, forts, structures, public highways, and other immovable property which, in conformity with law, belong to the public domain, and as such belong to the Crown of Spain." It is under this clause, in connection with the clause agreeing to pay to Spain $20,000,000 for the cession of the Philippine group, that the contention that all of the public rights of the city of Manila were acquired by the United States, which

country was therefore justified, as absolute owner, in granting the property rights so acquired to what is called the "absolutely new corporation" created thereafter. But the qualifying words touching property rights relinquished by Spain limit the relinquishment to "property which, in conformity with law, belonging to the public domain, and *as such belong to the Crown of Spain.*" It did not affect property which did not, in "conformity with law, belong to the Crown of Spain." That it was not intended to apply to property which, "in conformity with law," belonged to the city of
360]Manila as a municipal corporation, *is clear. This is demonstrated by the second paragraph of the same article, which reads: "And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments . . . having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals." Thus, the property and property rights of municipal corporations were protected and safeguarded precisely as were the property and property rights of individuals.

That the cession did not operate as an extinction or dissolution of corporations is herein recognized, for the stipulation against impairment of their property rights has this plain significance.

The conclusion we reach, that the legal entity survived both the military occupation and the cession which followed, finds support in the cases which hold that the Pueblos of San Francisco and Los Angeles, which existed as municipal organizations prior to the cession of California by Mexico, continued to exist with their community and property rights intact. Cohas v. Raisin, 3 Cal. 443; Hart v. Burnett, 15 Cal. 530; Townsend v. Greeley, 5 Wall. 326, 18 L. ed. 547; Merryman v. Bourne, 9 Wall. 592, 602, 19 L. ed. 683, 686; Moore v. Steinbach, 127 U. S. 70, 32 L. ed. 51, 8 Sup. Ct. Rep. 1067; Los Angeles Farming & Mill. Co. v. Los Angeles, 217 U. S. 217, 54 L. ed. 736, 30 Sup. Ct. Rep. 452.

Were corporate identity and corporate liability extinguished as a necessary legal result of the new charter granted in 1901 by the Philippine Commission? The inhabitants of the old city are the incorporators of the new. There is substantially identity of area. There are some changes in the form of government and some changes in corporate powers and methods of administration. The new corporation is endowed with all of the property and *property[361 rights of the old. It has the same power to sue and be sued which the former corporation had. There is not the slightest suggestion that the new corporation shall not succeed to the contracts and obligations of the old corporation. Laying out of view any question of the constitutional guaranty against impairment of the obligation of contracts, there is, in the absence of express legislative declaration of a contrary purpose, no reason for supposing that the reincorporation of an old municipality is intended to permit an escape from the obligations of the old, to whose property and rights it has succeeded. The juristic identity of the corporation has been in no wise affected, and, in law, the present city is, in every legal sense, the successor of the old. As such it is entitled to the property and property rights of the predecessor corporation, and is, in law, subject to all of its liabilities. Broughton v. Pensacola 93 U. S. 266, 23 L. ed. 896; Mt. Pleasant v. Beckwith, 100 U. S. 520, 25 L. ed. 699; Mobile v. Watson, 116 U. S. 289, 29 L. ed. 620, 6 Sup. Ct. Rep. 398; Shapleigh v. San Angelo, 167 U. S. 646, 655, 42 L. ed. 310, 313, 17 Sup. Ct. Rep. 957; O'Connor v. Memphis, 6 Lea, 730; Colchester v. Seaber, 3 Burr. 1866, 1870, in which case, when a municipality became disabled to act and obtained a new charter, in an action upon an obligation of the old corporation, there was judgment for the creditor, Lord Mansfield saying:

"Many corporations, for want of legal magistrates, have lost their activity, and obtained new charters. Maidstone, Radnor, Carmarthen, and many more are in the same case with Colchester. And yet it has never been disputed but that the new charters revive and give activity to the old corporation; except, perhaps, in that case in Levinz, where the corporation had a new name; and even there the court made no doubt. Where the question has arisen upon any remarkable metamorphosis, it has always been determined 'that they remain the same as to debts and rights.'"

Morris v. State, 62 Tex. 728, 730.

*In Shapleigh v. San Angelo, supra,[362 this court said in a similar case:

"The state's plenary power over its municipal corporations to change their organization, to modify their method of internal government, or to abolish them altogether, is not restricted by contracts entered into by the municipality with its creditors or with private parties. An absolute repeal of a municipal charter is therefor effectual so far as it abolishes the old corporate organization; but when the same or substantially the same inhabitants are erected into a new corporation, whether with ex-

tended or restricted territorial limits, such new corporation is treated as in law the successor of the old one, entitled to its property rights, and subject to its liabilities."

The cases of Trigas and Vilas went off upon demurrers, and no question of remedy arises here.

The appeal of Aguado is from a decree upon a final hearing denying him all relief.

That all three of the plaintiffs in error are entitled to proceed to judgment when they shall establish their several claims is obvious from what we have said. But in the Aguado Case it is sought to establish his claim as a charge against certain property and funds held by the city as trustee, known as the Carriedo fund. In 1734 one Don Francisco Carriedo y Perodo bequeathed to the city a fund for the establishment of waterworks, to be kept as a separate fund and devoted to the erection and maintenance of the works.. This fund was loyally kept and greatly increased, and was enlarged by a special tax upon meat, devoted to that purpose. The works were finally completed in 1878, and have been since operated by the city, the income and special tax going to maintenance. Certain securities belonging to the fund are now held by the city, the income being applied to the operation of the works. Aguado took a contract to supply coal for the use of the 363]*Carriedo works, and made a deposit to guarantee the contract. When the city was occupied by the American Army it was indebted to him for coal so supplied, as well as for the deposit so made. That the coal was bought for and used in the operation of the Carriedo works is not denied. But there is no evidence that the credit was given to the Carriedo fund so held in trust under the will of Carriedo. The contract was made with the ayuntamiento of Manila, just as all other contracts for city supplies or works were made. The contract not having been made with special reference to the liability of the fund held in trust by the city, but apparently upon the general credit of the city, we are not disposed to reverse the judgment of the court below, holding that the claim of Aguado did not constitute a charge upon the Carriedo fund.

Aguado is, nevertheless, entitled to a judgment. The designation of the city in the petition as trustee may be regarded as descriptive. The debt having been incurred by the city, it must be regarded as a city liability. Taylor v. Davis (Taylor v. Mayo), 110 U. S. 330, 336, 28 L. ed. 163, 165, 4 Sup. Ct. Rep. 147.

Our conclusion is that the decree in the Aguado Case must be reversed and the case remanded, with direction to render judgment and such other relief as may seem in conformity with law. The judgments in the Trigas and Vilas Cases will be reversed and the cases remanded, with direction to overrule the respective demurrers, and for such other action as may be consistent with law, and consistent with this opinion.

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*WESTERN UNION TELEGRAPH COMPANY, Plff. in Err., [364

v.

LAWRENCE J. CROVO and Walter C. Crenshaw, Partners, Trading as Crovo & Crenshaw.

(See S. C. Reporter's ed. 364-372.)

Error to state court — when writ may run to inferior tribunal.

1. The judgment of the trial court is that of the highest court of the state for the purpose of a writ of error from the Federal Supreme Court, where the highest state tribunal has denied a writ of error to the trial court.

[For other cases, see Appeal and Error, 1160-1164, in Digest Sup. Ct. 1908.]

Commerce — state regulation — interstate telegram.

2. A state statute under which a penalty is incurred by a telegraph company which negligently fails to transmit within the state as promptly as practicable a message received at an office in the state, for transmission to a person in another state, is a valid exercise of the power of the state, in the absence of any legislation by Congress on the subject.

[For other cases, see Commerce, 368-375, in Digest Sup. Ct. 1908.]

[Nos. 81 and 87.]

Argued March 6 and 7, 1911. Decided April 3, 1911.

IN ERROR to the Law and Equity Court of the City of Richmond, State of Virginia, and the Supreme Court of Appeals of that state, to review a judgment of the

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NOTE.—On practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal —see note to Wedding v. Meyler, 66 L.R.A. 833.

As to when writ of error may run to inferior state court—see note to Kentucky v. Powers, 50 L. ed. U. S. 633.

On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

On the power of states to control or impose burdens upon interstate telegraph and telephone companies—see note to Postal Teleg. Cable Co. v. Baltimore, 24 L.R.A. 161.

former court, imposing a penalty upon a telegraph company for its negligent failure to transmit promptly within the state an interstate telegram. Affirmed.

The facts are stated in the opinion.

Mr. **Francis Raymond Stark** argued the cause, and, with Messrs. Henry D. Estabrook, Rush Taggart, and George H. Fearons, filed a brief for plaintiff in error.

Mr. **J. Kent Rawley** argued the cause and filed a brief for defendants in error.

Mr. Justice **Lurton** delivered the opinion of the court:

Action to recover statutory penalty for the negligent failure to promptly transmit a prepaid message accepted at the Richmond office of the telegraph company, addressed

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On police regulation of electric companies —see State ex rel. Laclede Gaslight Co. v. Murphy, 31 L. R. A. 807.

On the right of a state to limit liability on interstate telegrams—see note to Western U. Teleg. Co. v. Commercial Mill Co. — L.R.A.(N.S.) —

Validity of state statutes imposing penalty for default or mistake in transmission or delivery of interstate telegrams.

A statutory penalty for delay in the delivery of a telegram is not an interference with interstate commerce as applied to messages from points outside the state directed to some point within the state. Western U. Teleg. Co. v. Tyler, 90 Va. 297, 4 Inters. Com. Rep. 481, 44 Am. St. Rep. 910, 18 S. C. 280; Western U. Teleg. Co. v. Bright, 90 Va. 778, 20 S. E. 146; Western U. Teleg. Co. v. James, 90 Ga. 254, 16 S. E. 83; Western U. Teleg. Co. v. Bates, 93 Ga. 352, 20 S. E. 637.

The doctrine of these cases was affirmed in Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934, affirming 90 Ga. 254, 16 S. E. 83, where the court held that the Georgia statute was valid,—at least until Congress should legislate upon the subject. The court said: "The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in nowise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not. No tax is laid upon any interstate message, nor is there any regulation of a nature calculated to at all embarrass, obstruct, or impede the company in the full and fair performance of its duty as an interstate sender of messages. We see no reason to fear any weakening of the protection of the constitutional provision as to commerce among the several states by holding that, in regard to such a message as the one in question, although it comes from a place without the state, it is yet under the jurisdiction of the state where it is to be delivered (after its arrival therein at the place of delivery),—at least so far as legislation of the state tends to enforce the performance of duty owed by the company under the general law. So long as Congress is silent upon the subject, we think it is within the power of the state government to enact legislation of the nature of this Georgia statute. It is not a case where the silence of Congress is equivalent to an express enactment. As has been said, this statute levies no tax and seeks no revenue from the company by reason of these interstate messages."

An Indiana statute providing penalties for default or mistake in transmission of telegraph messages has been construed to be inapplicable to messages sent into the state from other states, on the ground that the contracts were made outside the state. Rogers v. Western U. Teleg. Co. 122 Ind. 395, 17 Am. St. Rep. 373, 24 N. E. 157; Western U. Teleg. Co. v. Reed, 96 Ind. 195; Carnahan v. Western U. Teleg. Co. 89 Ind. 526, 46 Am. Rep. 175.

Prior to the decision in Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126, the Indiana courts had upheld, as applied to messages sent out of the state, a statute giving penalties for default in delivery, on the theory that such statute did no more than require the telegraph company to perform, under a penalty, the duty imposed upon it by the common law. Western U. Teleg. Co. v. Hamilton, 50 Ind. 181; Western U. Teleg. Co. v. Lindley, 62 Ind. 371; Western U. Teleg. Co. v. Pendleton, 95 Ind. 12, 48 Am. Rep. 692; Western U. Teleg. Co. v. Ferris, 103 Ind. 91, 2 N. E. 240.

But when the question came before the Federal Supreme Court, that court held that such statute could not be applied to a message sent out of the state, without violating the commerce clause of the Federal Constitution. Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126, reversing 95 Ind. 12, 48 Am. Rep. 692.

That part of the Virginia statute which penalizes the failure to transmit a telegraph message faithfully and impartially was upheld in Western U. Teleg. Co. v. Powell, 94 Va. 268, 26 S. E. 828, and Postal Teleg. Cable Co. v. Umstadter, 103 Va. 743, 50 S. E. 259, 2 A. & E. Ann. Cas. 511, as against an objection founded on the commerce clause of the Federal Constitution.

to a business correspondent at Brockton, New York. The declaration averred that the negligence occurred in the office at Richmond.

There was issue joined and a jury. The defendant demurred to the evidence. This was overruled because the court was of opinion that from the facts and circumstances the jury might find that the negligence in transmission occurred in the sending office at Richmond. There was a verdict and judgment for the plaintiff.

A writ of error was denied by the supreme court of appeals, under local practice, because the court thought "the judgment was plainly right."

The plaintiff in error has sued out two writs of error: one to the law and equity court of the city of Richmond, the trial court, and another to the supreme court of appeals of Virginia. Inasmuch as the latter court denied a writ of error, the judgment of the law and equity court was the highest court of the state to which the case could be carried, and a writ will therefore lie to that court if a Federal question is properly saved.

The statute which it is claimed operates [367] as a regulation *of interstate commerce, and under which the action was brought, is set out in the margin.†

It makes it the duty of every telegraph company doing business in the state to receive and transmit prepaid messages "faithfully, impartially, with substantial accuracy, as promptly as practicable." But the standard of duty under the statute is precisely that imposed at common law upon such a common carrier. The imposition of a penalty for the purpose of enforcing the statute was plainly within the legislative power of the state, if the act was otherwise valid. Ling Su Fan v. United States, 218 U. S. 306, 54 L. ed. 1049, 30 L.R.A.(N.S.) 1176, 31 Sup. Ct. Rep. 21.

But it is said the act requires that messages shall be transmitted in the order received, though preference *may* be given to business of the United States, the state, and the public press, and that this is a regulation which may conflict with a different rule prescribed by other states, *and may constitute a hindrance and [368] impediment to interstate commerce.

It is not clear that such result may follow if the act be regarded as applying only to despatches received within the state, although destined to persons beyond the state. The act, unlike the Indiana statute involved in the Pendleton Case, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126, neither regulates delivery in nor out of the state, and prescribes no preference in transmission. The company is permitted to give certain preferences named, but is not required to do so.

But we are not called upon to consider whether that particular requirement, one separable from all the others, is valid or not. The single ground of action stated in the plaintiff's declaration was that his prepaid message had not been transmitted "as promptly as practicable," and that this was due to negligence within the state.

The duty of transmitting without unreasonable delay was, as already stated, the clear common-law duty of the company, —a duty to which the statute adds only the imposition of a penalty for default. The issue of fact in the state court was whether the delay, however caused, occurred within the limits of the state. Stated more definitely, it was whether the fault was that of the Richmond office, which accepted the message, or that of the New York office, where it is said the message must be relaid over another wire to reach either Brockton or Brooklyn in the state of New York. The indisputable fact was that a message addressed to Brockton, New York, was sent to Brooklyn, New York. Somebody somewhere made a blunder, by which there occurred delay in the proper transmission of the message. Now, if that mistake was made at Richmond, the negligence occurred within the limits of the state. If it was correctly sent to the relay point,

†"It shall be the duty of every telegraph company doing business in this state to receive and transmit despatches from and for other telegraph or telephone companies or lines, and from and for any person, upon the payment of the usual charges therefor, if such payment is demanded; to transmit the same faithfully, impartially, with substantial accuracy, as promptly as practicable, and in the order of delivery to the said company. For every failure to transmit a despatch faithfully, impartially, with substantial accuracy, and for every failure to transmit a despatch as promptly as practicable, or in the order of its delivery to the company, the company shall forfeit the sum of $100 to the person sending or offering to send such despatch, or to the person to whom it was addressed: Provided, however, that not more than one recovery shall be had on one despatch, and the recovery by one party entitled thereto shall be a bar to the recovery of the other party. But nothing herein shall prevent any such company from giving preference to despatches on official business from or to officers of the United States or the state of Virginia, or from making arrangements with proprietors or publishers of newspapers for the transmission to them for publication of intelligence of general and public interest out of its regular order."

and the mistake occurred in relaying, the negligence occurred beyond the limits of
369]the state, and the failure to *transmit "as promptly as practicable" did not occur within the state limits.

This issue of fact has been found against the plaintiff in error. Nine hours after the message was accepted, the plaintiff received a written notice in these words:

The Western Union Telegraph Company,
(Incorporated.)
Richmond, Va. Sept. 25, 1907.

M. Crovo & Crenshaw:

Your despatch dated to-day to S. P. Morse & Sons, Brooklyn, New York, is undelivered.

Reason: Unable to locate party. Give better address.

A. C. Steventon,
Per C.,
Manager, Richmond, Va., office.

The manager of the company's office at Richmond testified that the notice above set out, "sent to the plaintiff in the usual and ordinary course of business, meant that the message was sent from Richmond, Virginia, to Brooklyn, New York, and not to Brockton, New York."

The only question for decision is whether a statute of the state of Virginia which imposes a penalty for the failure to transmit a despatch received at an office of the company in the state, for transmission to a person in another state, is a valid exercise of the power of the state, the delay occurring in the state.

That companies engaged in the telegraph business, whose lines extend from one state to another, are engaged in interstate commerce, and that messages passing from one state to another constitute such commerce, is indisputable. Such companies and such messages come, therefore, under the regulating power of Congress. It follows, then, that if this statute as applied in the state court is to be construed as a regulation of commerce between the states, it is in ex-
*absence of congressional legislation,[371
ern U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406, 416, 54 L. ed. 1088, 1091, — L.R.A.(N.S.) —, 31 Sup. Ct. Rep. 59.

In the Pendleton Case, a statute of Indiana which imposed a penalty for the failure to deliver by messenger a despatch sent by the sender in Indiana to a person addressed at a station in Iowa, was held an attempt to regulate the method of delivery outside of the state, and therefore an interference with and regulation of interstate commerce.

In the James Case, a statute of Georgia which imposed a penalty for the failure to diligently deliver to the person addressed in Georgia an interstate message was upheld as a valid exercise of state power, in the absence of legislation upon the subject by Congress. In that case the court, by Mr. Justice Peckham, distinguished the Pendleton Case, saying:

"Nor is the statute open to the same objections that were regarded as fatal in the Pendleton Case, supra. No attempt is here made to enforce the provisions of the state statute beyond the limits of the state, and no other state could, by legislative enactment, affect in any degree the duty of the company in relation to the delivery of messages within the limits of the state of Georgia. No confusion, therefore, could be expected in carrying out within the limits of that state the provisions of the statute. It is true it provides a penalty for a violation of its terms, and permits a recovery of the amount thereof, irrespective of the question whether any actual damages have been sustained by the individual who brings the suit; but that is only a matter in aid of the performance of the general duty owed by the company. It is not a regulation of commerce, but a provision which only incidentally affects it. We do not mean to be understood as holding that any state law on this subject would be valid, even in the
371]*absence of congressional legislation, if the penalty provided were so grossly excessive that the necessary operation of such legislation would be to impede interstate commerce. Our decision in this case would form no precedent for holding valid such legislation. It might then be urged that legislation of that character was not in aid of commerce, but was of a nature well calculated to harrass and to impede it. While the penalty in the present statute is quite ample for a mere neglect to deliver in some cases, we cannot say that it is so unreasonable as to be outside of and beyond the jurisdiction of the state to enact.

"While it is vitally important that commerce between the states should be unembarrassed by vexatious state regulations regarding it, yet, on the other hand, there are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty, within the limits of the state, upon the part of those who are engaged in interstate commerce. We think the statute in question is one of that class, and in the absence of any legislation by Congress, the statute is a valid exercise of the power of the state over the subject."

In Western U. Teleg. Co. v. Commercial Mill. Co. supra, a statute of Michigan which prohibited contractual limitation of the common-law liability due to the negligence of the company in transmission or delivery was upheld as applied to a message received at the company's office in Michigan for transmission to a person in another state. Distinguishing the Pendleton Case, Mr. Justice McKenna, for this court, said:

"But there is a manifest difference between the statute of Indiana and the statute of Michigan, and of their purposes and effects. The former imposed affirmative duties and regulated the performance of the business of the telegraph company. It besides 372]ignored the requirements or *regulations of another state, made its laws paramount to the laws of another state, gave an action for damages against the permission of such laws for acts done within their jurisdiction. Such a statute was plainly a regulation of interstate commerce, and exhibited in a conspicuous degree the evils of such interference by a state, and the necessity of one uniform plan of regulation. The statute of Michigan has no such objectionable qualities. It imposes no additional duty. It gives sanction only to an inherent duty. It declares that in the performance of a service public in its nature, that it is a policy of the state that there shall be no contract against negligence. The prohibition of the statute, therefore, entails no burden. It permits no release from that duty in the public service which men in their intercourse must observe,—the duty of observing the degree of care and vigilance which the circumstances justly demand, to avoid injury to another."

The requirement of the Virginia statute as here applied is a valid exercise of the power of the state, in the absence of legislation by Congress. It is neither a regulation of, nor a hindrance to, interstate commerce, but is in aid of that commerce.

The case is clearly governed by Western U. Teleg. Co. v. James and Western U. Teleg. Co. v. Commercial Mill. Co., both above cited.

Judgment affirmed.

373]*DR. MILES MEDICAL COMPANY, Petitioner,

v.

JOHN D. PARK & SONS COMPANY.

(See S. C. Reporter's ed. 373-413.)

Monopoly — manufactured products — secret formula.

1. A restraint of trade which would be unlawful as to other manufactured articles cannot be justified because the article in question is a proprietary medicine made under a secret formula.

[For other cases, see Monopoly, II. b, in Digest Sup. Ct. 1908.]

Monopoly — contract to control price.

2. Contracts between a manufacturer and all dealers whom he permits to sell his products, comprising most of the dealers in similar articles throughout the country, which fix the price for all sales, whether at wholesale or retail, operate as a restraint of trade, unlawful both at common law and, as to interstate commerce, under the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), even though such products may be proprietary medicines made under secret formulæ.

[For other cases, see Monopoly, II. b, in Digest Sup. Ct. 1908.]

[No. 72.]

Argued January 4 and 5, 1911. Decided April 3, 1911.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which affirmed a decree of the Circuit Court for the Eastern District of Kentucky, dismissing on demurrer a bill to restrain the defendant from inducing by corruption and fraud agents of the plaintiff and purchasers from it to break their contracts not to sell its goods below a certain price. Affirmed.

See same case below, 90 C. C. A. 579, 164 Fed. 803.

Statement by Mr. Justice Hughes:

This is a writ of certiorari to review a judgment of the circuit court of appeals for the sixth circuit which affirmed a judgment of the circuit court, dismissing, on demurrer, the bill of complaint for want of equity. 90 C. C. A. 579, 164 Fed. 803.

The complainant, Dr. Miles Medical Company, an Indiana corporation, is engaged in the manufacture and sale of proprietary medicines, prepared by means of secret methods and formulas, and identified by distinctive packages, labels, and trademarks. It has established an extensive trade

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Note.—On validity of contract provisions seeking to control price at which an article shall be resold—see note to Grogan v. Chaffee, 27 L.R.A.(N.S.) 395.

On rights of manufacturer not protected by patent or copyright, with respect to interference by third parties with selling system by which he seeks to control retail price—see note to John D. Park & Sons Co. v. Hartman, 12 L.R.A.(N.S.) 135.

On illegal trusts under modern anti-trust laws—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

throughout the United States and in certain foreign countries. It has been its practice to sell its medicines to jobbers and wholesale druggists, who in turn sell to retail druggists for sale to the consumer. In the case of each remedy, it has fixed not only the price of its own sales to jobbers and wholesale dealers, but also the wholesale and retail prices. The bill alleged that most of its sales were made through retail druggists, and that the demand for its reme-
375]dies largely depended upon their *good will and commendation, and their ability to realize a fair profit; that certain retail establishments, particularly those known as department stores, had inaugurated a "cut-rate" or "cut-price" system which had caused "much confusion, trouble, and damage" to the complainant's business, and "injuriously affected the reputation" and "depleted the sales" of its remedies; that this injury resulted "from the fact that the majority of retail druggists as a rule cannot, or believe that they cannot, realize sufficient profits" by the sale of the medicines "at the cut-prices announced by the cut-rate and department stores," and therefore are "unwilling to, and do not keep" the medicines "in stock," or, "if kept in stock, do not urge or favor sales thereof, but endeavor to foist off some similar remedy or substitute, and from the fact that in the public mind an article advertised or announced at 'cut' or 'reduced' price from the established price suffers loss of reputation and becomes of inferior value and demand."

It was further alleged that for the purpose of protecting "its trade sales and business" and of conserving "its good will and reputation," the complainant had established a method "of governing, regulating, and controlling the sale and marketing" of its remedies, which is thus described in the bill:

"Contracts in writing were required to be executed by all jobbers and wholesale druggists to whom your orator sold its aforesaid remedies, medicines, and cures, of the following tenor and effect:

"Consignment Contract—Wholesale.

"The Dr. Miles Medical Company.

"This agreement made by and between The Dr. Miles Medical Company, a corporation, of Elkhart, Indiana, hereafter referred to as the proprietor, and —— ——— hereinafter referred to as the consignee, witnesseth:

"That the said proprietor hereby appoints
376]said consignee *one of its wholesale distributing agents, and agrees to consign to such consignee for sale for the account of said proprietor such goods of its manufacture as the proprietor may deem necessary, the title thereto and property therein to be and remain in the proprietor absolutely until sold under and in accordance with the provisions hereof, and all unsold goods to be immediately returned to said proprietor on demand and the cancelation of this agreement. Said goods to be invoiced to consignee at the following prices:

"Medicines of which the retail price is $1, $8 per dozen.

"Medicines (if any) of which the retail price is 50 cents, $4 per dozen.

"Medicines of which the retail price is 25 cents, $2 per dozen.

"Freight on all orders, the invoice price of which amounts to $100 or more, to be prepaid by the proprietor; otherwise, freight to be paid by consignee.

"Said consignee agrees to confine the sale of all goods and products of the said proprietor strictly to, and to sell only to, the designated retail agents of said proprietor as specified in lists of such retail agents furnished by said proprietor and alterable at the will of said proprietor, and to faithfully and promptly account and pay to the proprietor the proceeds of all sales, after deducting as full compensation for all services, charges, and disbursements a commission of 10 per cent of the invoice value, and a further commission of 5 per cent on the net amount of each consignment, after deducting the said 10 per cent commission on all advances on account remitted within ten days from date of any consignment, it being agreed between the parties hereto that such advances shall in no manner affect the title to such goods, which title shall remain in the proprietor as if no such advances had been made; provided that such advances *shall be repaid to said consignee[377 should the said proprietor terminate this agreement and the return of any unsold goods on which advances have been made. Said consignee guarantees the payment for all goods sold under this agreement, and agrees to render a full account and remit the net proceeds on the first day of each month of and for the sales of the month preceding. Failure to make such accounting and remittance within ten days from the first of each month shall render the whole account payable and subject to draft, but the proceeds of such draft shall not affect the title of any unsold goods, which shall remain in the proprietor until actually sold, as herein provided.

"It is further agreed that the consignee shall furnish the proprietor from time to time upon demand full statements of the stock of goods of the proprietor on hand on any date specified, and that a failure to furnish such statements within ten days from date of such demand shall be a suf-

ficient cause for the cancelation of this agreement, and a demand for the return of the consigned goods.

"It is further agreed that the proprietor will cause each retail package of its goods to be identified by a number, and said consignee hereby agrees to furnish the said proprietor full reports upon proper cards or blanks furnished by said proprietor of the disposition of each dozen or fraction of such goods by means of the identifying numbers, specifying the names and addresses of the retail agents to whom such goods have been delivered and the dates of such delivery, and to send such reports to said proprietor at least semimonthly, and at any other time on the request of said proprietor.

"It is understood and agreed between the parties hereto that the commissions herein specified shall not be considered as earned by said consignee upon any goods of said proprietor which shall have been delivered to dealers not authorized agents of said pro-[378]prietor, as per list of *such agents, or upon any goods whose disposition by said consignee shall not have been properly reported as herein provided, or sold at prices less than the prices authorized, and that said consignee shall not credit any such commissions when making remittances on consignment account provided notice has been given by said proprietor that such commissions are unearned; and that if such unearned commissions have been deducted by said consignee in making advance payments or monthly remittances on account, they shall be charged back to said consignee and credited and paid to said proprietor. It is understood that violation or nonobservance of any provision hereof by the consignee shall make this agreement terminable and all unsold goods returnable at the option of the proprietor.

"It is agreed that the goods of said proprietor shall be sold by said consignee only to the said retail or wholesale agents of said proprietor, as per list furnished, at not less than the following prices, to wit:

"Medicines of which the retail price is $1, $8 per dozen.

"Medicines (if any) of which the retail price is 50 cents, $4 per dozen.

"Medicines of which the retail price is 25 cents, $2 per dozen.

"Provided, that said consignee may allow a cash discount not exceeding 1 per cent, if paid within ten days from date of invoice, and that when sales at one time and at one invoice amount to $15 or more, the said consignee may allow 3 per cent trade discount, and if said purchase amounts to $50 or more, 5 per cent trade discount, all without cost to the proprietor, and if such $50 quantity shall be shipped direct to the retail purchaser from the laboratory of said proprietor, on the order from said wholesale distributing agent, freight will be prepaid by the proprietor, but not otherwise.

*"This contract will take effect when[379 the original, duly signed by the consignee, has been received and accepted by The Dr. Miles Medical Company, at Elkhart, Indiana.

"Done under our hands —— —, A. D. 1907.

"Fill in date on above line.

"The Dr. Miles Medical Company.

"—— ——, wholesale dealer.

"Sign your name on above line.

"Original. Return in inclosed envelop."

"And written contracts were required with all retailers of your orator's said proprietary remedies, medicines, and cures, as follows:

"Retail Agency Contract.

"The Dr. Miles Medical Company.

"This agreement between The Dr. Miles Medical Company of Elkhart, Indiana, and —— ——, of —— ——,

"Retailer's name on above line. Town. State.

"hereinafter referred to as retail agent, witnesseth:

"Appointed Agent.

"The said Dr. Miles Medical Company hereby appoints said retail dealer as one of the retail distributing agents of its proprietary medicines, and agrees that said retail agent may purchase the proprietary medicines manufactured by said Dr. Miles Medical Company (each retail package of which the said company will cause to be identified by a number) at the following prices, to wit:

"Wholesale Prices.

"Medicines of which the retail price is $1, $8 per dozen.

"Medicines of which the retail price is 50 cents, $4 per dozen.

"Medicines of which the retail price is 25 cents, $2 per dozen.

"Quantity Discount.

"Provided that when purchases at one time and on one invoice amount to $15 (or more), wholesale distributing *agents[380 are authorized to allow 3 per cent trade discount; if such purchase amounts to $50 (or more) 5 per cent trade discount will be allowed; and if such $50 quantity be shipped direct to the purchaser from the laboratory of said Dr. Miles Medical Company for the account of such wholesale agent, freight will be prepaid, but not otherwise.

"Full Price.

"In consideration whereof said retail agent agrees in no case to sell or furnish

the said proprietary medicines to any person, firm, or corporation whatsoever, at less than the full retail price as printed on the packages, without reduction for quantity; and said retail agent further agrees not to sell the said proprietary medicines at any price to wholesale or retail dealers not accredited agents of the Dr. Miles Medical Company.

"Violation.

"It is further agreed between the parties hereto that the giving of any article of value, or the making of any concession by means of trading stamps, cash register coupons, or otherwise, for the purpose of reducing the price above agreed upon, shall be considered a violation of this agreement, and further it is agreed between the parties hereto that the Dr. Miles Medical Company will sustain damage in the sum of twenty-five dollars ($25) for each violation of any provision of this agreement, it being otherwise impossible to fix the measure of damage.

"This contract will take effect when a duplicate thereof, duly signed by the retail agent, has been received and approved by The Dr. Miles Company, at its office at Elkhart, Indiana.

"Done under our hands ——— —, A. D. 1907.

"Fill in date on above line.

"The Dr. Miles Medical Company.

"———— ————, retail dealer.

"Sign your name on above line in ink.

381] *"To Retail Dealer:

"Paste printed label, giving name and address, that your name may be correctly listed.

"Duplicate. Keep for reference."

As an aid to the maintenance of the prices thus fixed, the company devised a system for tracing and identifying, through serial numbers and cards, each wholesale and retail package of its products.

It was alleged that all wholesale and retail druggists, "and all dealers in proprietary medicines," had been given full opportunity, without discrimination, to sign contracts in the form stated, and that such contracts were in force between the complainant "and over four hundred jobbers and wholesalers and twenty-five thousand retail dealers in proprietary medicines in the United States."

The defendant is a Kentucky corporation conducting a wholesale drug business. The bill alleged that the defendant had formerly dealt with the complainant, and had full knowledge of all the facts relating to the trade in its medicines; that it had been requested, and refused, to enter into the wholesale contract required by the complainant; that in the city of Cincinnati, Ohio, where the defendant conducted a wholesale drug store, there were a large number of wholesale and retail druggists who had made contracts of the sort described, with the complainant, and kept its medicines on sale pursuant to the agreed terms and conditions. It was charged that the defendant, "in combination and conspiracy with a number of wholesale and retail dealers in drugs and proprietary medicines, who have not entered into said wholesale and retail contracts" required by the complainant's system, and solely for the purpose of selling the remedies to dealers "to be advertised, sold, and marketed at cut rates," and "to thus attract and secure custom and patronage for other merchandise, and not for the purpose of making or receiving a direct money profit" from the *sales of the remedies, had[382 unlawfully and fraudulently procured them from the complainant's "wholesale and retail agents" by means "of false and fraudulent representations and statements, and by surreptitious and dishonest methods, and by persuading and inducing, directly and indirectly," a violation of their contracts.

It is further charged that the defendant, having procured the remedies in this manner, had advertised and sold them at less than the jobbing and retail prices established by the complainant; and that, for the purpose of concealing the source of supply, the identifying serial numbers, which had been stamped upon the labels and cartons, had been obliterated by the defendant or by those acting in collusion with the defendant, and the labels and cartons had been mutilated, thus rendering the list of ailments and directions for use illegible, and that the remedies in this condition were sold both to the wholesale and retail dealers, and ultimately to buyers for use at cut rates.

The bill prayed for an injunction restraining the defendant from inducing or attempting to induce any party to any of the said "wholesale or retail agency contracts" to "violate or break the same, or to sell or deliver to the defendant, or to any person for it," the complainant's remedies; from procuring or attempting to procure in any way any of these remedies from wholesale or retail dealers who had executed the contracts; from advertising, selling, or offering for sale the remedies obtained by any of the described means at less "than the established retail price thereof," or to dealers who had not entered into contract with the complainant; from in any way obliterating, mutilating, removing, or covering up the labels and cartons upon the bottles containing the remedies, and from making sales without such labels and cartons,

and the letter press and numerals thereon, being intact. There was also a prayer for an accounting.

383] *The defendant demurred to the bill generally for want of equity, and also specially to that portion of the bill which related to the mutilation and destruction of the identifying numbers and labels.

The circuit court sustained the demurrers and dismissed the bill, and its judgment was affirmed by the circuit court of appeals.

Mr. **Frank F. Reed** argued the cause, and, with Mr. Edward S. Rogers, filed a brief for petitioner:

The wholesale contracts are agency contracts, and not contracts of sale.

Milburn Mfg. Co. v. Peak, 89 Tex. 209, 34 S. W. 102; Wilcox & G. Sewing Mach. Co. v. Ewing, 141 U. S. 627, 35 L. ed. 882, 12 Sup. Ct. Rep. 94; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; Metropolitan Nat. Bank v. Benedict Co. 20 C. C. A. 377, 36 U. S. App. 604, 74 Fed. 182; Atlas Glass Co. v. Ball Bros. Glass Mfg. Co. 87 Fed. 418; Re Galt, 56 C. C. A. 470, 120 Fed. 64; Re Flanders, 67 C. C. A. 484, 134 Fed. 560; Briggs v. Foster, 70 C. C. A. 349, 137 Fed. 773; Re Fabian, 151 Fed. 949; Re McGehee, 166 Fed. 928; Franklin v. Stoughton Wagon Co. 94 C. C. A. 269, 168 Fed. 857; Corbitt Buggy Co. v. Ricaud, 95 C. C. A. 279, 169 Fed. 935; Walter A. Wood Mowing & Reaping Mach. Co. v. Vanstory, 96 C. C. A. 331, 171 Fed. 375; Butler Bros. Shoe Co. v. United States Rubber Co. 84 C. C. A. 167, 156 Fed. 1; M'Cullough v. Porter, 4 Watts & S. 177, 39 Am. Dec. 68; Keystone Watch Case Co. v. Fourth Street Nat. Bank, 194 Pa. 535, 45 Atl. 328; Cannon Coal Co. v. Taggart, 1 Colo. App. 60, 27 Pac. 238; First Nat. Bank v. Schween, 127 Ill. 573, 11 Am. St. Rep. 174, 20 N. E. 681; Hunter v. Gordon, 33 Ill. App. 464; Lenz v. Harrison, 148 Ill. 598, 36 N. E. 567; Bayliss v. Davis, 47 Iowa, 340; Norton v. Melick, 97 Iowa, 564, 66 N. W. 780; Eldridge v. Benson, 7 Cush. 483; Hatch v. McBrien, 83 Mich. 159, 47 N. W. 214; Olney v. Van Heusen, 3 Thomp. & C. 313; Elwell v. Coon, — N. J. Eq. —, 46 Atl. 580; Lambeth Rope Co. v. Brigham, 170 Mass. 518, 49 N. E. 1022; Monitor Mfg. Co. v. Jones, 96 Wis. 619, 72 N. W. 44; Williams Mower & Reaper Co. v. Raynor, 38 Wis. 119; Burton v. Goodspeed, 69 Ill. 237; Walker v. Butterick, 105 Mass. 237; National Cordage Co. v. Sims, 44 Neb. 148, 62 N. W. 514; Sturm v. Boker, 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. Rep. 99; Balderston v. National Rubber Co. 18 R. I. 338, 49 Am. St. Rep. 772, 27 Atl. 507; Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co. 38 W. Va. 158, 22 L.R.A. 850, 45 Am. St. Rep. 846, 18 S. E. 482; National Bank v. Goodyear, 90 Ga. 711, 16 S. E. 962; Moline Plow Co. v. Rodgers, 53 Kan. 743, 42 Am. St. Rep. 317, 37 Pac. 111; Fleet v. Hertz, 201 Ill. 594, 94 Am. St. Rep. 192, 66 N. E. 858; Re Columbus Buggy Co. 74 C. C. A. 611, 143 Fed. 859; Re Smith & N. Piano Co. 79 C. C. A. 53, 149 Fed. 111.

There is no restraint of trade in agency contracts, whatever restrictions may be imposed upon the agent.

Rice v. Brook, 20 Fed. 611; Weed v. Adams, 37 Conn. 380; Barksdale v. Brown, 1 Nott & M'C. 519, 9 Am. Dec. 720; Scott v. Rogers, 4 Abb. App. Dic. 159; Feild v. Farrington, 10 Wall. 141, 149, 19 L. ed. 923, 924; Brown v. M'Gran, 14 Pet. 479, 10 L. ed. 550; Cotton v. Hiller, 52 Miss. 13; Union Hardware Co. v. Plume & A. Mfg. Co. 58 Conn. 219, 20 Atl. 455; Welch v. Phelps & B. Wind Mill Co. 89 Tex. 653, 36 S. W. 71; Weiboldt v. Standard Fashion Co. 80 Ill. App. 67; Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co. 75 S. C. 378, 9 L.R.A.(N.S.) 501, 55 S. E. 973, 9 A. & E. Ann. Cas. 902; Keith v. Herschberg Optical Co. 48 Ark. 138, 2 S. W. 777; Roller v. Ott, 14 Kan. 609; Newell v. Meyendorff, 9 Mont. 254, 8 L.R.A. 440, 18 Am. St. Rep. 738, 23 Pac. 333; Payne v. Western & A. R. Co. 13 Lea, 507, 49 Am. Rep. 666; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 461; Arkansas Brokerage Co. v. Dunn & P. Co. — L.R.A.(N.S.) —, 97 C. C. A. 454, 173 Fed. 899; Robison v. Texas Pine Land Asso. — Tex. Civ. App. —, 40 S. W. 843; Hunt v. Simonds, 19 Mo. 586; Butterick Pub. Co. v. Rose, 141 Wis. 533, 124 N. W. 647; Butterick Pub. Co. v. Fisher, 203 Mass. 122, 133 Am. St. Rep. 283, 89 N. E. 189.

Neither the common-law doctrine of restraint of trade, nor the statutory enactment on the subject, has any application to contracts or transactions between principal and agent.

Welch v. Phelps & B. Wind Mill Co. 89 Tex. 653, 36 S. W. 71; Weiboldt v. Standard Fashion Co. 80 Ill. App. 67; Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co. 75 S. C. 378, 9 L.R.A. (N.S.) 501, 55 S. E. 973, 9 A. & E. Ann. Cas. 902; Butterick Pub. Co. v. Fisher, 203 Mass. 122, 133 Am. St. Rep. 283, 89 N. E. 189.

The right to refuse sales exists in every manufacturer.

Payne v. Western & A. R. Co. 13 Lea, 507, 49 Am. Rep. 666; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; Cleveland, C. C. & St. L. R. Co. v. Jenkins, 174 Ill. 398, 62 L.R.A.

922, 66 Am. St. Rep. 296, 51 N. E. 811; American Live Stock Commission Co. v. Chicago Live Stock Exch. 143 Ill. 210, 18 L.R.A. 190, 36 Am. St. Rep. 385, 32 N. E. 274; Robison v. Texas Pine Land Asso. — Tex. Civ. App. —, 40 S. W. 843; Tanenbaum v. New York F. Ins. Exch. 33 Misc. 134, 68 N. Y. Supp. 342; Collins v. American News Co. 34 Misc. 260, 69 N. Y. Supp. 638; Hunt v. Simonds, 19 Mo. 586; Schulten v. Bavarian Brewing Co. 96 Ky. 224, 28 S. W. 505; Baker v. Metropolitan L. Ins. Co. 23 Ky. L. Rep. 1174, 55 L.R.A. 271, 64 S. W. 913; Baker v. Sun L. Ins. Co. 23 Ky. L. Rep. 1178, 64 S. W. 967; McCune v. Norwich City Gas Co. 30 Conn. 524, 79 Am. Dec. 278; New York, C. & St. L. R. Co. v. Schaffer, 65 Ohio St. 414, 62 L.R.A. 931, 87 Am. St. Rep. 628, 62 N. E. 1036; Brewster v. C. Miller's Sons Co. 101 Ky. 368, 38 L.R.A. 505, 41 S. W. 303; Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; Matthews v. Associated Press, 136 N. Y. 333, 32 Am. St. Rep. 741, 32 N. E. 981; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91; People v. Klaw, 55 Misc. 72, 106 N. Y. Supp. 347; Union Pacific Coal Co. v. United States, 97 C. C. A. 578, 173 Fed. 737; Payne v. Western & A. R. Co. 13 Lea, 507, 49 Am. Rep. 666.

Contracts giving the exclusive right to sell the product of a maker in a certain territory are valid.

Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co. 75 S. C. 378, 9 L.R.A.(N.S.) 501, 55 S. E. 973, 9 A. & E. Ann. Cas. 902; Keith v. Herschberg Optical Co. 48 Ark. 138, 2 S. W. 777; Roller v. Ott, 14 Kan. 609; Newell v. Meyendorff, 9 Mont. 254, 8 L.R.A. 440, 18 Am. St. Rep. 738, 23 Pac. 333; Welch v. Phelps & B. Wind Mill Co. 89 Tex. 653, 36 S. W. 71; Olmstead v. Distilling & Cattle-Feeding Co. 77 Fed. 265; Re Greene, 52 Fed. 104; Ferris v. American Brewing Co. 155 Ind. 539, 52 L.R.A. 305, 58 N. E. 701; Woods v. Hart, 50 Neb. 497, 70 N. W. 53; Ward v. Hogan, 11 Abb. N. C. 478; Palmer v. Stebbins, 3 Pick. 188, 15 Am. Dec. 204; Anheuser-Busch Brewing Asso. v. Houck, — Tex. Civ. App. —, 27 S. W. 692; Fuqua v. Pabst Brewing Co. — Tex. Civ. App. —, 36 S. W. 479; Houck v. Wright, 77 Miss. 476, 27 So. 616; Vandeweghe v. American Brewing Co. — Tex. Civ. App. —, 61 S. W. 526; Gates v. Hooper, 90 Tex. 563, 39 S. W. 1079; Norton v. W. H. Thomas & Sons Co. 99 Tex. 578, 91 S. W. 780; Clark v. Cyclone Woven Wire Fence Co. 22 Tex. Civ. App. 41, 54 S. W. 392; Ewing v. Wilcox & G. Sewing Mach. Co. 9 W. N. C. 272; Standard Fashion Co. v. Ostrom, 16 App. Div. 220, 44 N. Y. Supp. 666.

Contracts for exclusive dealing in articles are valid.

Dunlap's Cable News Co. v. Stone, 27 Abb. N. C. 28, 15 N. Y. Supp. 2; Matthews v. Associated Press, 61 Hun, 199, 15 N. Y. Supp. 887, 136 N. Y. 333, 32 Am. St. Rep. 741, 32 N. E. 981; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; Brown v. Rounsavell, 78 Ill. 589; Clark v. Crosby, 37 Vt. 188; Central Shade Roller Co. v. Cushman, 143 Mass. 353, 9 N. E. 629; Blauner v. Williams Co. 36 Misc. 173, 73 N. Y. Supp. 165; Butteriek Pub. Co. v. Fisher, 203 Mass. 122, 133 Am. St. Rep. 283, 89 N. E. 189; Forest Photographic Co. v. Hutchinson Grocery Co. — Tex. Civ. App. —, 108 S. W. 768.

Contracts restricting the distribution or use of property are legal.

Phillips v. Iola Portland Cement Co. 61 C. C. A. 19, 125 Fed. 593; Meyer v. Estes, 164 Mass. 457, 32 L.R.A. 283, 41 N. E. 683; Crystal Ice Mfg. Co. v. San Antonio Brewing Asso. 8 Tex. Civ. App. 1, 27 S. W. 210; Bancroft v. Union Embossing Co. 72 N. H. 402, 64 L.R.A. 298, 57 Atl. 97; Twomey v. People's Ice Co. 66 Cal. 233, 5 Pac. 158; Schawlm v. Holmes, 49 Cal. 665; Hodge v. Sloan, 107 N. Y. 244, 1 Am. St. Rep. 816, 17 N. E. 335; Kellogg v. Larkin, 3 Chand. (Wis.) 133, 56 Am. Dec. 164; Lanyon v. Garden City Sand Co. 223 Ill. 616, 9 L.R.A.(N.S.) 446, 79 N. E. 313, 7 A. & E. Ann. Cas. 50; Leslie v. Lorillard, 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 363.

Contracts for the entire output of a plant are valid.

Carter-Crume Co. v. Peurrung, 30 C. C. A. 174, 58 U. S. App. 388, 86 Fed. 439; Heimbuecher v. Goff, 119 Ill. App. 373; Over v. Byram Foundry Co. 37 Ind. App. 452, 117 Am. St. Rep. 327, 77 N. E. 302; Van Marter v. Babcock, 23 Barb. 633; Hadden v. Dimick, 31 How. Pr. 196.

Restrictions on prices are valid.

Clark v. Frank, 17 Mo. App. 602; Com. v. Grinstead, 111 Ky. 203, 56 L.R.A. 709, 63 S. W. 427; Elliman v. Carrington, [1901] 2 Ch. 275, 84 L. T. N. S. 858, 70 L. J. Ch. N. S. 577, 49 Week. Rep. 532; Walsh v. Dwight, 40 App. Div. 513, 58 N. Y. Sup p. 91; Rackemann v. Riverbank Improv. Co. 167 Mass. 1, 57 Am. St. Rep. 427, 44 N. E. 990; Weiboldt v. Standard Fashion Co. 80 Ill. App. 67.

Absolute dominion over the monopoly in inventions, discoveries, and writings is the foundation of the patent and copyright laws, and has been declared in a series of cases.

Press Pub. Co. v. Monroe, 51 L.R.A. 353, 19 C. C. A. 429, 38 U. S. App. 410, 73 Fed. 196; Holmes v. Hurst, 174 U. S. 82, 43 L. ed. 904, 19 Sup. Ct. Rep. 606; Millar v. Taylor, 4 Burr. 2303; Jefferys v. Boosey, 4 H. L. Cas. 920, 3 C. L. R. 625, 24 L. J. Exch. N. S. 81, 1 Jur. N. S. 615; Queensbury v. Shebbeare, 2 Eden, 329; Prince Albert v. Strange, 1 MacN. & G. 25, 18 L. J. Ch. N. S. 120, 1 Hall & Tw. 1, 13 Jur. 109; Bartlette v. Crittenden, 4 McLean, 300, Fed. Cas. No. 1,082; Abernethy v. Hutchinson, 3 L. J. Ch. 209, 1 Hall & Tw. 28; Donaldson v. Beckett, 2 Bro. P. C. 129; Pope v. Curl, 2 Atk. 342; Caird v. Sime, L. R. 12 App. Cas. 326, 57 L. J. P. C. N. S. 2, 57 L. T. N. S. 634, 36 Week. Rep. 199; Palmer v. De Witt, 47 N. Y. 532, 7 Am. Rep. 480; Tompkins v. Halleck, 133 Mass. 32, 43 Am. Rep. 480.

The method herein set out to control the sale and prices of his own product by a manufacturer is valid and lawful, when the article is made and sold under letters patent or copyright.

(1) Patent cases: E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; National Phonograph Co. v. Edison-Bell Consol. Phonograph Co. [1908] 1 Ch. 335, 98 L. T. N. S. 291, 77 L. J. Ch. N. S. 218, 24 Times L. R. 201; United States Consol. Seeded Raisin Co. v. Griffin & S. Co. 61 C. C. A. 334, 126 Fed. 364; Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co. 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288; Edison Phonograph Co. v. Kaufmann, 105 Fed. 960; Edison Phonograph Co. v. Pike, 116 Fed. 863; Cortelyou v. Lowe, 49 C. C. A. 671, 111 Fed. 1005; Dickerson v. Matheson, 6 C. C. A. 466, 14 U. S. App. 569, 57 Fed. 524; Bonsack Mach. Co. v. Smith, 70 Fed. 383; Bowling v. Taylor, 40 Fed. 404; Dickerson v. Tinling, 28 C. C. A. 139, 55 U. S. App. 217, 84 Fed. 192; Butterick Pub. Co. v. Rose, 141 Wis. 533, 124 N. W. 647; Central Shade Roller Co. v. Cushman, 143 Mass. 353, 9 N. E. 629; Gloucester Isinglass & Glue Co. v. Russia Cement Co. 154 Mass. 92, 12 L.R.A. 563, 26 Am. St. Rep. 214, 27 N. E. 1005; Good v. Daland, 121 N. Y. 1, 24 N. E. 15; Morse Twist Drill & Mach. Co. v. Morse, 103 Mass. 73, 4 Am. Rep. 513; Cortelyou v. Charles Eneu Johnson & Co. 138 Fed. 110; Bancroft v. Union Embossing Co. 72 N. H. 402, 64 L.R.A. 298, 57 Atl. 97; Hulse v. Bonsack Mach. Co. 13 C. C. A. 180, 25 U. S. App. 239, 65 Fed. 864; Victor Talking Mach. Co. v. The Fair, 61 C. C. A. 58, 123 Fed. 424; National Phonograph Co. v. Schlegel, 64 C. C. A. 594, 128 Fed. 733; Whitson v. Columbia Phonograph Co. 18 App. D. C. 565; Rubber Tire Wheel Co. v. Milwaukee Rubber Works, 142 Fed. 531, 83 C. C. A. 336, 154 Fed. 358; Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co. 83 C. C. A. 343, 154 Fed. 365. (2) Copyright cases: Straus v. American Publishers' Asso. 177 N. Y. 473, 64 L.R.A. 701, 101 Am. St. Rep. 819, 69 N. E. 1107; Murphy v. Christian Press Asso. Pub. Co. 38 App. Div. 426, 56 N. Y. Supp. 597; Authors' & Newspapers Asso. v. O'Gorman Co. 147 Fed. 616; Straus v. American Publishers' Asso. 127 App. Div. 935, 111 N. Y. Supp. 830, 194 N. Y. 538, 87 N. E. 1127.

An invention or discovery conserved as a trade secret is a property right, and its monopoly will be preserved by injunction.

Powell v. Birmingham Vinegar Brewery Co. 13 Rep. Pat. Cas. 235 [1896] 2 Ch. 69, 14 Rep. Pat. Cas. 728 [1897] A. C. 710, 76 L. T. N. S. 792, 66 L. J. Ch. Div. N. S. 763; Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664; Stewart v. Hook, 118 Ga. 445, 63 L.R.A. 255, 45 S. E. 369; Tabor v. Hoffman, 118 N. Y. 30, 16 Am. St. Rep. 740, 23 N. E. 12; Eastman Co. v. Reichenbach, 47 N. Y. S. R. 435, 20 N. Y. Supp. 110; Simmons Hardware Co. v. Waibel, 1 S. D. 488, 11 L.R.A. 267, 36 Am. St. Rep. 755, 47 N. W. 814; National Tube Co. v. Eastern Tube Co. 13–23 Ohio C. C. 471; Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637; Board of Trade v. Cella Commission Co. 76 C. C. A. 28, 145 Fed. 28; Stone v. Goss, 65 N. J. Eq. 756, 63 L.R.A. 344, 103 Am. St. Rep. 794, 55 Atl. 736; O. & W. Thum Co. v. Tloczynski, 114 Mich. 149, 38 L.R.A. 200, 68 Am. St. Rep. 469, 72 N. W. 140; Westervelt v. National Paper & Supply Co. 154 Ind. 673, 57 N. E. 552; Salomon v. Hertz, 40 N. J. Eq. 400, 2 Atl. 379; Grand Rapids Wood Finishing Co. v. Hatt, 152 Mich. 132, 115 N. W. 714; Philadelphia Extracting Co. v. Keystone Extracting Co. 176 Fed. 830; Sanitas Nat. Food Co. v. Cemer, 134 Mich. 370, 96 N. W. 454; Vulcan Detinning Co. v. American Can Co. 67 N. J. Eq. 243, 58 Atl. 290; Taylor Iron & Steel Co. v. Nichols, 70 N. J. Eq. 541, 61 Atl. 946, 73 N. J. Eq. 684, 24 L.R.A.(N.S.) 933, 133 Am. St. Rep. 753, 69 Atl. 186; National Gum & Mica Co. v. Braendly, 27 App. Div. 219, 51 N. Y. Supp. 93; G. F. Harvey Co. v. National Drug Co. 75 App. Div. 103, 77 N. Y. Supp. 674; Pressed Steel Car Co. v. Standard Steel Car Co. 210 Pa. 464, 60 Atl. 4; Eastern Extracting Co. v. Greater New York Extracting Co. 126 App. Div. 928, 110 N. Y. Supp. 738; Union Switch & Signal Co. v. Sperry, 169 Fed. 926; H. B. Wiggins Sons' Co. v. Cott-A-Lap Co. 169 Fed. 150.

Under the admitted averments of the bill of complaint, petitioner could now apply for and obtain letters patent on each remedy.

Ransom v. New York, 1 Fisher, Pat. Cas. 267, Fed. Cas. No. 11,573; Boyd v. Cherry, 50 Fed. 279; Matheson v. Campbell, 69 Fed. 597; Goodyear v. Day, Fed. Cas. No. 5,566; Tabor v. Hoffman, 41 Hun, 5, 118 N. Y. 30, 16 Am. St. Rep. 740, 23 N. E. 12.

Trade secrets and trade-secret products are put, as to contracts and control, precisely, so far as the monopoly is concerned, upon the same basis as articles made under or covered by letters patent.

Harrison v. Glucose Sugar Ref. Co. 58 L.R.A. 915, 53 C. C. A. 484, 116 Fed. 304; Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co. 177 Mo. 559, 76 S. W. 1008; Tode v. Gross, 127 N. Y. 480, 13 L.R.A. 652, 24 Am. St. Rep. 475, 28 N. E. 469; Board of Trade v. Cella Commission Co. 76 C. C. A. 28, 145 Fed. 30; Clark v. Frank, 17 Mo. App. 602; Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637; Re Park, 138 Fed. 421; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. 142 Fed. 531, 83 C. C. A. 336, 154 Fed. 358; New York Cotton Exch. v. Hunt, 144 Fed. 519, affirmed in 205 U. S. 322, 51 L. ed. 821, 27 Sup. Ct. Rep. 529.

Plans similar to that of petitioner have been repeatedly recognized and protected by the Federal courts, in carefully considered opinions, upon the ground of direct analogy between the rights and monopolies of patented and trade-secret articles. In these sustained plans, however, the contracts with the wholesale dealers were contracts of sale passing title.

Dr. Miles Medical Co. v. Goldthwaite, 133 Fed. 794; Re Park, 138 Fed. 421; Dr. Miles Medical Co. v. Jaynes Drug Co. 149 Fed. 838; Hartman v. John D. Park & Sons Co. 145 Fed. 358; Dr. Miles Medical Co. v. Platt, 142 Fed. 606; John D. Park & Sons Co. v. Bruen, 139 Fed. 698; Wells & R. Co. v. Abraham, 146 Fed. 190; Loder v. Jayne, 142 Fed. 1010, 7 L.R.A.(N.S.) 984, 78 C. C. A. 653, 149 Fed. 21, 9 A. & E. Ann. Cas. 294.

Adjudications upon contracts and methods similar in form and indentical in legal principles and result are to the same effect and based largely upon the same reasoning.

Fowle v. Park, 131 U. S. 88, 97, 33 L. ed. 67, 74, 9 Sup. Ct. Rep. 658; National Teleg. News Co. v. Western U. Teleg. Co. 60 L.R.A. 805, 56 C. C. A. 198, 119 Fed. 294; Board of Trade v. Christie Grain & Stock Co. 121 Fed. 608, 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637; Garst v. Harris, 177 Mass. 72, 58 N. E. 174; Garst v. Charles, 187 Mass. 144, 72 N. E. 839; John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136; Bancroft v. Union Embossing Co. 72 N. H. 402, 64 L.R.A. 298, 57 Atl. 97; Elliman v. Carrington [1901] 2 Ch. 275, 84 L. T. N. S. 858, 70 L. J. Ch. N. S. 577, 49 Week. Rep. 532; Hartman v. John D. Park & Sons Co. 145 Fed. 358.

Contracts having to do with patented or proprietary articles, and fixing prices and regulating distribution, are not affected by the act of Congress of July 2, 1890.

E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; Board of Trade v. Christie Grain & Stock Co. 121 Fed. 608, 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637; Phillips v. Iola Portland Cement Co. 61 C. C. A. 19, 125 Fed. 593; Bancroft v. Union Embossing Co. 72 N. H. 402, 64 L.R.A. 298, 57 Atl. 97; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; A. Booth & Co. v. Davis, 127 Fed. 875, 65 C. C. A. 269, 131 Fed. 31; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784; Walsh v. Dwight, 40 App. Div. 513, 58 N. Y. Supp. 91; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. 142 Fed. 531, 83 C. C. A. 336, 154 Fed. 358; Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co. 83 C. C. A. 343, 154 Fed. 365.

But aside from all questions of monopoly or protection by trademarks, trade secrets, letters patent, or copyright, courts have ruled that a manufacturer may, in the sale of his own product, impose upon his vendee reasonable conditions as to prices and persons on resale, as long as the arrangement is confined solely to his own product, and does not concern the product of another.

National Phonograph Co. v. Edison-Bell Consol. Phonograph Co. [1908] 1 Ch. 335, 98 L. T. N. S. 291, 77 L. J. Ch. N. S. 218, 24 Times L. R. 201; Com. v. Grinstead, 111 Ky. 203, 56 L.R.A. 709, 63 S. W. 427; Garst v. Harris, 177 Mass. 72, 58 N. E. 174; Garst v. Charles, 187 Mass.

144, 72 N. E. 839; Elliman v. Carrington [1901] 2 Ch. 275, 84 L. T. N. S. 858, 70 L. J. Ch. N. S. 577, 49 Week. Rep. 532; Grogan v. Chaffee, 156 Cal. 611, 27 L.R.A.(N.S.) 395, 105 Pac. 745; Walsh v. Dwight. 40 App. Div. 513, 58 N. Y. Supp. 91; Rackemann v. Riverbank Improv. Co. 167 Mass. 1, 57 Am. St. Rep. 427, 44 N. E. 990.

Other decisions in principle sustain the theories of these adjudications, and permit conditions and restrictions to be imposed in connection with the sale or use of property.

Brown v. Rounsavell, 78 Ill. 589; Clark v. Crosby, 37 Vt. 188; Central Shade Roller Co. v. Cushman, 143 Mass. 353, 9 N. E. 629; Blauner v. Williams Co. 36 Misc. 173, 73 N. Y. Supp. 165; Phillips v. Iola Portland Cement Co. 61 C. C. A. 19, 125 Fed. 593; Meyer v. Estes, 164 Mass. 457, 32 L.R.A. 283, 41 N. E. 683; Crystal Ice Mfg. Co. v. San Antonio Brewing Co. 8 Tex. Civ. App. 1, 27 S. W. 210; Bancroft v. Union Embossing Co. 72 N. H. 402, 64 L.R.A. 298, 57 Atl. 97; Twomey v. People's Ice Co. 66 Cal. 233, 5 Pac. 158; Schawlm v. Holmes, 49 Cal. 665; Hodge v. Sloan, 107 N. Y. 244, 1 Am. St. Rep. 816, 17 N. E. 335; Kellogg v. Larkin, 3 Chand. (Wis.) 133, 56 Am. Dec. 164; Lanyon v. Garden City Sand Co. 223 Ill. 616, 9 L.R.A.(N.S.) 446, 79 N. E. 313, 7 A. & E. Ann. Cas. 50; Leslie v. Lorillard, 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 363; Carter-Crume Co. v. Peurrung. 30 C. C. A. 174, 58 U. S. App. 388, 86 Fed. 439; Heimbuecher v. Goff, 119 Ill. App. 373; Over v. Byram Foundry Co. 37 Ind. App. 452, 117 Am. St. Rep. 327, 77 N. E. 302; Van Marter v. Babcock, 23 Barb. 633; Hadden v. Dimick, 31 How. Pr. 196.

The owner of letters patent or copyright, and the owner of a trade-secret process or unknown-formula article, have precisely the same right, and that is the right of exclusiveness in making, using, and selling and permitting or preventing manufacture, use, or sale by others, and each can concede the same rights in permitting manufacture, use or sale.

Bobbs-Merrill Co. v. Straus, 15 L.R.A (N.S.) 766, 77 C. C. A. 607, 147 Fed. 15; Continental Paper Bag Co. v. Eastern Paper Bag Co. 210 U. S. 405, 52 L. ed. 1122, 28 Sup. Ct. Rep. 748.

There can be no distinction in principle between property right in undisclosed discoveries and the same when patented.

Press Pub. Co. v. Monroe, 51 L.R.A. 353, 19 C. C. A. 429, 38 U. S. App. 410, 73 Fed. 196; Holmes v. Hurst, 174 U. S. 82, 43 L. ed. 904, 19 Sup. Ct. Rep. 606; Millar v. Taylor, 4 Burr. 2303; Jefferys v. Boosey, 4 H. L. Cas. 920, 3 C. L. R. 625, 24 L. J. Exch. N. S. 81, 1 Jur. N. S. 615; Queensbury v. Shebbeare, 2 Eden, 329.

Mr. Alton B. Parker argued the cause, and with Mr. William J. Shroder, filed a brief for respondent:

The patent and copyright laws of the United States grant new rights that do not exist at common law, and which can be acquired only by compliance with the conditions of these laws.

Wheaton v. Peters, 8 Pet. 591, 657, 8 L. ed. 1055, 1079; Wilson v. Rousseau. 4 How. 646, 674, 11 L. ed. 1141, 1153; Werckmeister v. American Lithographic Co. 68 L.R.A. 591, 69 C. C. A. 553, 134 Fed. 321; Re Brosnahan, 4 McCrary, 1, 18 Fed. 65, 4 Am. Crim. Rep. 16; Palmer v. De Witt, 47 N. Y. 536, 7 Am. Rep. 480; Press Pub. Co. v. Monroe, 51 L.R.A. 353, 19 C. C. A. 429, 38 U. S. App. 410, 73 Fed. 196; Henry Bill Pub. Co. v. Smythe, 27 Fed. 914; Kipling v. Fenno, 106 Fed. 692; Hartman v. John D. Park & Sons Co. 145 Fed. 361; Gayler v. Wilder, 10 How. 477, 13 L. ed. 504; 2 Parsons, Contr. 7th ed. pp. 303, 331; Latta v. Shawk, 1 Bond, 259, Fed Cas. No. 8,116; American Hide & Leather Splitting & Dressing Mach. Co. v. American Tool & Mach. Co. Holmes, 503, Fed. Cas. No. 302; Dudley v. Mayhew, 3 N. Y. 9.

The new right created and conferred by the patent and copyright laws of the United States is the right to maintain an exclusive monopoly in the articles produced under such statutory rights.

Grant v. Raymond, 6 Pet. 218, 241, 242, 8 L. ed. 376, 384, 385; Wheaton v. Peters, 8 Pet. 591, 663, 664, 8 L. ed. 1055, 1081, 1082; Wilson v. Rousseau, 4 How. 646, 674, 11 L. ed. 1141, 1153; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; Goodyear v. Central R. Co. 2 Wall. Jr. 356, Fed. Cas. No. 5,563; Carr v. Rice, 1 Fisher, Pat. Cas. 198, Fed. Cas. No. 2,440; Columbia Wire Co. v. Freeman Wire Co. 71 Fed. 306; Bloomer v. McQuewan, 14 How. 539, 549, 14 L. ed. 532, 537; Bloomer v. Millinger, 1 Wall. 340, 351, 17 L. ed. 581, 584; Bonsack Mach. Co. v. Smith, 70 Fed. 386; Mitchell v. Hawley, 16 Wall. 544, 21 L. ed. 322.

The right of creating a monopoly in the subsequent trade in the articles manufactured, and of controlling the prices at which the vendees of the patentee must resell, rests selely upon the exclusive right given by the patent laws.

Bloomer v. McQuewan, 14 How. 539, 549, 14 L. ed. 532, 537; Chaffee v. Boston Belting Co. 22 How. 217, 223, 16 L. ed.

240, 242; Bloomer v. Millinger, 1 Wall. 340, 351, 17 L. ed. 581, 584; Mitchell v. Hawley, 16 Wall. 544, 548, 21 L. ed. 322, 323; Wilder v. Kent, 15 Fed. 217; Holliday v. Matheson, 23 Blatchf. 239, 24 Fed. 185; Dickerson v. Matheson, 50 Fed. 73, 6 C. C. A. 466, 14 U. S. App. 569, 57 Fed. 524; Boesch v. Graff, 133 U. S. 697, 33 L. ed. 787, 10 Sup. Ct. Rep. 378; Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co. 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288; Dickerson v. Tinling, 28 C. C. A. 139, 55 U. S. App. 217, 84 Fed. 192; Edison Phonograph Co. v. Kaufmann, 105 Fed. 960; Edison Phonograph Co. v. Pike, 116 Fed. 863; Rupp & W. Co. v. Elliott, 65 C. C. A. 544, 131 Fed. 730; Victor Talking Mach. Co. v. The Fair, 61 C. C. A. 58, 123 Fed. 424; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; Murphy v. Christian Press Asso. Pub. Co. 38 App. Div. 426, 56 N. Y. Supp. 507; John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136; Straus v. American Publishers' Asso. 177 N. Y. 473, 64 L.R.A. 701, 101 Am. St. Rep. 819, 69 N. E. 1107.

Ownership of trademark, name, or label does not bear with it a special right to maintain any exclusive control over the article to which it is attached, which would be unlawful, either at common law or under the statutes, in the absence of ownership of such trademark, name, or label.

Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; Sperry & H. Co. v. Mechanics' Clothing Co. 128 Fed. 800; Chadwick v. Covell, 151 Mass. 190, 6 L.R.A. 839, 21 Am. St. Rep. 442, 23 N. E. 1068; Johnson v. Rutan, 122 Fed. 998; Scriven v. North, 124 Fed. 894, 897; Independent Baking Powder Co. v. Boorman, 130 Fed. 726; Flagg Mfg. Co. v. Holway, 178 Mass. 83, 59 N. E. 667; Dover Stamping Co. v. Fellows, 163 Mass. 191, 28 L.R.A. 448, 47 Am. St. Rep. 448, 40 N. E. 105; People v. Cannon, 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759.

Several recent cases uphold the right to distribute news and information under restrictive conditions. The right so sustained will be found to be the same right which an author had at common law to distribute his work for private use before publication, and to impose conditions absolutely restricting the same to such use. The right to so distribute news and information is subject to the same limitations, and is likewise absolutely lost by publication.

Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co. 84 Hun, 12, 32 N. Y. Supp. 41; F. W. Dodge Co. v. Construction Information Co. 183 Mass. 62, 60 L.R.A. 810, 97 Am. St. Rep. 412, 66 N. E. 204; Kiernan v. Manhattan Quotation Teleg. Co. 50 How. Pr. 194; Gold & Stock Teleg. Co. v. Todd, 17 Hun, 548; National Teleg. News Co. v. Western U. Teleg. Co. 60 L.R.A. 805, 56 C. C. A. 198, 119 Fed. 294; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 51 L.R.A. 151, 81 Am. St. Rep. 368, 60 S. W. 91; Dunlap's Cable News Co. v. Stone, 27 Abb. N. C. 28, 15 N. Y. Supp. 2; Matthews v. Associated Press, 61 Hun, 199, 15 N. Y. Supp. 887; Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637.

The owner of a trade secret has no peculiar rights entitling such contracts as he may make to any exemption from the application thereto of the ordinary principles of common law.

United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; Jarvis v. Peck, 10 Paige, 118; Hard v. Seeley, 47 Barb. 428; Alcock v. Giberton, 5 Duer, 76; Tode v. Gross, 127 N. Y. 480, 13 L.R.A. 652, 24 Am. St. Rep. 475, 28 N. E. 469; C. F. Simmons Medicine Co. v. Simmons, 81 Fed. 163; Fowle v. Park, 131 U. S. 88, 33 L. ed. 67, 9 Sup. Ct. Rep. 658; Magnolia Metal Co. v. Price, 65 App. Div. 276, 72 N. Y. Supp. 792; Anchor Electric Co. v. Hawkes, 171 Mass. 101, 41 L.R.A. 189, 68 Am. St. Rep. 403, 50 N. E. 509; Harrison v. Glucose Sugar Ref. Co. 58 L.R.A. 915, 53 C. C. A. 484, 116 Fed. 304; S. Jarvis Adams Co. v. Knapp, 58 C. C. A. 1, 121 Fed. 34; Thibodeau v. Hildreth, 63 L.R.A. 480, 60 C. C. A. 78, 124 Fed. 892; Gamewell Fire Alarm Teleg. Co. v. Crane, 160 Mass. 50, 22 L.R.A. 673, 39 Am. St. Rep. 458, 35 N. E. 98; Mallinckrodt Chemical Works v. Nemnich, 83 Mo. App. 6, affirmed in 169 Mo. 388, 69 S. W. 355.

The utmost extent to which any special protection is given owners of trade secrets is against one who acquires it by breach of contract or trust. The protection is the same as that given at common law to the owners of unpublished concepts and undisclosed inventions.

Tabor v. Hoffman, 118 N. Y. 30, 16 Am. St. Rep. 740, 23 N. E. 12; Stewart v. Hook, 118 Ga. 445, 63 L.R.A. 255, 45 S. E. 369; Chadwick v. Covell, 151 Mass. 190, 6 L.R.A. 839, 21 Am. St. Rep. 442, 23 N. E. 1068; Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664; Chain Belt Co. v. Von Spreckelsen, 117 Wis. 106, 94 N. W. 78; Westervelt v. National Paper & Supply Co. 154 Ind. 673, 57 N. E. 552; Vulcan Detinning Co. v. American Can Co. 67 N. J. Eq. 243, 58 Atl. 290; Central Transp. Co. v. Pullman's

Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; Vickery v. Welch, 19 Pick. 523.

The contract between the petitioner and wholesale drug dealers and jobbers is one of sale.

Ex parte White, L. R. 6 Ch. 397, 24 L. T. N. S. 45, 19 Week. Rep. 488, affirmed in Towle v. White, 29 L. T. N. S. 78, 21 Week. Rep. 465; Nutter v. Wheeler, 2 Low. Dec. 346, Fed Cas. No. 10,384; Peoria Mfg. Co. v. Lyons, 153 Ill. 427, 38 N. E. 661; Howell v. Boudar, 95 Va. 815, 30 S. E. 1007; Conn v. Chambers, 123 App. Div. 298, 107 N. Y. Supp. 976, affirmed in 195 N. Y. 538, 88 N. E. 1117; Yoder v. Haworth, 57 Neb. 150, 73 Am. St. Rep. 496, 77 N. W. 377; Mack v. Drummond Tobacco Co. 48 Neb. 397, 58 Am. St. Rep. 691, 67 N. W. 174; Ætna Powder Co. v. Hildebrand, 137 Ind. 462, 45 Am. St. Rep. 194, 37 N. E. 136; Gindre v. Kean, 7 Misc. 582, 28 N. Y. Supp. 7; Arbuckle Bros. v. Kirkpatrick, 98 Tenn. 221, 36 L.R.A. 285, 60 Am. St. Rep. 854, 39 S. W. 3; Arbuckle Bros. v. Gates, 95 Va. 802, 30 S. E. 496; Williams v. Drummond Tobacco Co. 17 Tex. Civ. App. 635, 44 S. W. 185; Snelling v. Arbuckle Bros. 104 Ga. 362, 30 S. E. 863; Norwegian Plow Co. v. Clark, 102 Iowa, 31, 70 N. W. 808; De Kruif v. Flieman, 130 Mich. 12, 89 N. W. 558.

Although every act and every part of appellant's system, taken by itself, were lawful, still if the object and effect of the system as a whole were unlawful, it would be unenforceable.

Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276; Aikens v. Wisconsin, 195 U. S. 194, 206, 49 L. ed. 154, 160, 25 Sup. Ct. Rep. 3.

The petitioner has no peculiar, special, or exclusive right in the articles manufactured by it, warranting it to carry out, with reference to their sale, a plan or scheme which would otherwise be invalid and illegal.

Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co. 155 N. Y. 241, 41 L.R.A. 846, 63 Am. St. Rep. 666, 49 N. E. 872; Larrowe-Loisette v. O'Loughlin, 88 Fed. 896.

To attempt to carry out such a scheme as the petitioner is here seeking to do would be unlawful on the part of anyone who has not a right to the benefit of the patent and copyright laws.

Straus v. American Publishers' Asso. 177 N. Y. 473, 64 L.R.A. 701, 101 Am. St. Rep. 819, 69 N. E. 1107; Gamewell Fire Alarm Teleg. Co. v. Crane, 160 Mass. 50, 22 L.R.A 673, 39 Am. St. Rep. 458, 35 N. E. 98; Vulcan Powder Co. v. Hercules Powder Co. 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581; Tecktonius v. Scott, 110 Wis. 441, 86 N. W. 672; Pasteur Vaccine Co. v. Burkey, 22 Tex. Civ. App. 232, 54 S. W. 804; Fox Solid Pressed Steel Co. v. Schoen, 77 Fed. 29.

An examination of the cases in which a partial restraint of trade has been sustained as reasonable will show that they all rest upon the express statement or upon the assumption that the restraints are partial only, and the interests of the public not injuriously affected.

United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 281; Dolph v. Troy Laundry Machinery Co. 28 Fed. 553; Re Greene, 52 Fed. 104; United States v. Nelson, 52 Fed. 646; Dueber Watch Case Mfg. Co. v. E. Howard Watch & Clock Co. 55 Fed. 851; Olmstead v. Distilling & Cattle-Feeding Co. 77 Fed. 265; Phillips v. Iola Portland Cement Co. 61 C. C. A. 19, 125 Fed. 593; Knapp v. S. Jarvis Adams Co. 70 C. C. A. 536, 135 Fed. 1008; Grogan v. Chaffee, 156 Cal. 611, 27 L.R.A.(N.S.) 395, 105 Pac. 745; Walsh v. Dwight, 40 App. Div. 513, 58 N. Y. Supp. 91; Garst v. Harris, 177 Mass. 72, 58 N. E. 174; Garst v. Charles, 187 Mass. 144, 72 N. E. 839; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; Com. v. Strauss, 188 Mass. 229, 74 N. E. 308.

The system established and maintained by the petitioner controls the entire trade in the articles manufactured by it, and is necessarily a general restraint of the trade in the articles in question, and is therefore illegal.

Oliver v. Gilmore, 52 Fed. 562; United States v. Jellico Mountain Coal & Coke Co. 12 L.R.A. 753, 3 Inters. Com. Rep. 626, 46 Fed. 432; United States v. Coal Dealers' Asso. 85 Fed. 252; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 610; United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271, affirmed in 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Cravens v. Carter-Crume Co. 34 C. C. A. 479, 92 Fed. 479; Montague v. Lowry, 63 L.R.A. 58, 52 C. C. A. 621, 115 Fed. 27; Gibbs v. McNeeley, 60 L.R.A. 152, 55 C. C. A. 70, 118 Fed. 120; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Getz, Bros. & Co. v. Federal Salt Co. 147 Cal. 115, 109 Am. St. Rep. 114, 81 Pac. 416; Hunt v. Riverside Co-op. Club, 140 Mich. 538, 112 Am. St. Rep. 420, 104 N. W. 40; Owen v. Byram Foundry Co. 37 Ind. App. 452, 117 Am. St. Rep. 327, 77 N. E. 302; Clancey v. Onondago Fine Salt Mfg. Co. 62 Barb. 395;

De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co. 16 Daly, 529, 14 N. Y. Supp. 277; People v. Duke, 19 Misc. 292, 44 N. Y. Supp. 336; Tuscaloosa Ice Mfg. Co. v. Williams, 127 Ala. 110, 50 L.R.A. 175, 85 Am. St. Rep. 125, 28 So. 669; Finck v. Schneider Granite Co. 187 Mo. 244, 106 Am. St. Rep. 452, 86 S. W. 213; Charleston Natural Gas Co. v. Kanawha Natural Gas, Light & Fuel Co. 58 W. Va. 22, 112 Am. St. Rep. 936, 50 S. E. 876, 6 A. & E. Ann. Cas. 154; Lowry v. Tile, Mantel & Grate Asso. 106 Fed. 38; Ellis v. Inman, P. & Co. 65 C. C. A. 488, 131 Fed. 182; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Cummings v. Union Blue Stone Co. 164 N. Y. 404, 52 L.R.A. 262, 79 Am. St Rep. 655, 58 N. E. 525; Cohen v. Berlin & J. Envelope Co. 166 N. Y. 292, 59 N. E. 906; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; Distilling & Cattle-Feeding Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188; State ex rel. Watson v. Standard Oil Co. 49 Ohio St. 137, 15 L.R.A. 145, 34 Am. St. Rep. 541, 30 N. E. 279; People v. North River Sugar Ref. Co. 54 Hun, 354, 5 L.R.A. 386, 7 N. Y. Supp. 406, affirmed in 123 N. Y. 587, 9 L.R.A. 33, 18 Am. St. Rep. 843, 24 N. E. 834; Bishop v. American Preservers' Co. 157 Ill. 284, 48 Am. St. Rep. 317, 41 N. E. 765; Harding v. American Glucose Co. 182 Ill. 551, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577; Chicago, W. & V. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770; Texas Standard Oil Co. v. Adoue, 83 Tex. 650, 15 L.R.A. 598, 29 Am. St. Rep. 690, 19 S. W. 274; State ex rel. Crow v. Armour Packing Co. 173 Mo. 356, 61 L.R.A. 464, 96 Am. St. Rep. 515, 73 S. W. 645; Santa Clara Valley Mill & Lumber Co. v. Hayes, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391; Pacific Factor Co. v. Adler, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36; Cleland v. Anderson, 66 Neb. 252, 5 L.R.A.(N.S.) 136, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 105 N. W. 1092; Brown v. Jacobs Pharmacy Co. 115 Ga. 429, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553.

The restraint which the petitioner is attempting to maintain is, even if partial, unreasonable, and therefore unlawful.

John D. Park & Sons Co. v. Hartman, 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 41.

The petitioner alleges that its goods are sold by it to the wholesale and jobbing druggists throughout nearly all of the states of the United States. This is clearly interstate commerce.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

The effect of the Sherman anti-trust act is to make illegal any contract or agreement in restraint of trade, whether reasonable or not.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; Loewe v. Lawlor, 208 U. S. 274, 293, 52 L. ed. 488, 496, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815.

Mr. Justice **Hughes**, after making the above statement, delivered the opinion of the court:

The complainant, a manufacturer of proprietary medicines which are prepared in accordance with secret formulas, presents by its bill a system, carefully devised, by which it seeks to maintain certain prices fixed by it for all the sales of its products, both at wholesale and retail. Its purpose is to establish minimum prices at which sales shall be made by its vendees and by all subsequent purchasers who traffic in its remedies. Its plan is thus to govern directly the entire trade in the medicines it manufactures, embracing interstate commerce as well as commerce within the state respectively. To accomplish this result it has adopted two forms of restrictive agreements limiting trade in the articles to those who become parties to one or the other. The one sort of contract, known as "Consignment Contract—Wholesale," has been made with over four hundred jobbers and wholesale dealers, and the other, described as "Retail Agency Contract," with twenty-five thousand retail dealers in the United States.

The defendant is a wholesale drug concern which has refused to enter into the required contract, and is charged with procuring medicines for sale at "cut prices" by inducing those who have made the contracts to violate the restrictions. The complainant invokes the established doctrine that an actionable wrong is committed by one who maliciously interferes with a contract between two parties, and induces one of them to break that contract, to the injury of the other, and that, in the absence of an adequate *remedy at law, equitable re-[395 lief will be granted. Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; Bitterman v. Louisville & N. R. Co. 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. Rep. 91, 12 A. & E. Ann. Cas. 693.

The principal question is as to the validity of the restrictive agreements.

Preliminarily there are opposing contentions as to the construction of the agree-

ments, or, at least, of that made with jobbers and wholesale dealers. The complainant insists that the "consignment contract" contemplates a true consignment for sale for account of the complainant, and that those who make sales under it are the complainant's agents, and not its vendees. The court below did not so construe the agreement, and considered it an effort "to disguise the wholesale dealers in the mask of agency, upon the theory that in that character one link in the system for the suppression of the 'cut rate' business might be regarded as valid," and that under this agreement "the jobber must be regarded as the general owner, and engaged in selling for himself, and not as a mere agent of another." 90 C. C. A. 581, 164 Fed. p. 805.

There are certain allegations in the bill which do not accord with the complainant's argument. Thus, it is alleged that it "has been and is the uniform custom" of the complainant "to sell said medicines, remedies, and cures to jobbers and wholesale druggists, who in turn sell and dispose of the same to retail druggists for sale and distribution to the ultimate purchaser or consumer." And in setting forth the form of the agreement in question it is alleged that it was "required to be executed by all jobbers and wholesale druggists to whom your orator sold its aforesaid remedies, medicines, and cures." It is further stated that, as a means of maintaining "said list of prices," cards bearing serial identifying numbers are placed in each package of remedies "sold to jobbers and wholesale druggists." But it is also alleged in the bill 396]that under the provisions *of the contract the title to the medicines remained in the complainant "until actual sale in good faith to retail dealers, as therein provided."

Turning to the agreement itself, we find that it purports to appoint the party with whom it is made one of the complainant's "wholesale distributing agents," and it is agreed that the complainant, as proprietor, shall consign to the agent "for sale for the account of said proprietor" such goods as it may deem necessary, "the title thereto to remain in the proprietor absolutely until sold under and in accordance with the provisions hereof, and all unsold goods to be immediately returned to said proprietor on demand and the cancelation of this agreement." The goods are to be invoiced to the consignee at stated prices, which are the same as the minimum prices at which the consignee is allowed to sell. It is also agreed that the consignee shall "faithfully and promptly account and pay to the proprietor the proceeds of all sales, after deducting as full compensation . . . a commission of 10 per cent of the invoice value, and a further commission of 5 per cent on the net amount of each consignment after deducting the said 10 per cent commission on all advances on account remitted within ten days from the date of any consignment," such advances, however, not to affect the title to the goods, and to be repaid should the agreement be terminated and unsold goods, on which advances had been made, be returned. The consignee guarantees payment for all goods sold, and promises "to render a full account and remit the net proceeds on the first day of each month of and for the sales of the month preceding."

The consignee agrees "to sell only to the designated retail agents of said proprietor, as specified in lists of such retail agents furnished by said proprietor, and alterable at the will of said proprietor." A further provision permits sales "only to the said retail or wholesale agents *of[397 said proprietor, as per list furnished." No time is fixed for the duration of the agreement.

It is urged that the additional commission of 5 per cent is to induce, through the guise of "advances," payment for the goods before sales are made, and that unsold goods are to be returned only on the complainant's demand and the cancelation of the agreement. But the consignee is not bound to make these "advances," and it is distinctly provided that he shall not acquire title by making them. It is also said that the consignee may sell at prices higher than those listed, but he is bound by the agreement to account for "the proceeds of all sales," less the stipulated commissions. Nor is the provision as to the time for accounting and remittance of net proceeds to be regarded as inconsistent with agency, in the absence of a showing that, in the actual transactions and accounts, the consignee was treated as selling on his own behalf and paying as purchaser.

If, however, we consider the "consignment contract" as one which in legal effect provides for consignments of goods to be sold by an agent for his principal's account, and that the tenor of the agreement, as set forth, must be taken to override the inconsistent general allegations to which we have referred, this alone would not be sufficient to support the bill.

The bill charges that the defendant has unlawfully and fraudulently procured the proprietary medicines from the complainant's "wholesale and retail agents" in violation of their contracts. But it does not allege that the goods procured by the defendant from "wholesale agents" were goods consigned to the latter for sale. The description "wholesale agent" refers to those who

have signed the "consignment contract." This contract, however, permits one "wholesale agent" to sell to another "wholesale agent." For all that appears, the goods procured by the defendant may have been pur-
398]chased by the defendant's *vendors from other wholesale agents. The bill avers that prior to the introduction of the described system, the defendant, a wholesale house, had dealt in the remedies, and had purchased them from the complainant and from "wholesale druggists and jobbers." There is nothing in the bill which is inconsistent with such an actual course of dealing, permitted by the agreement itself, with respect to the wholesale dealers who have signed it. But the goods which one wholesale agent purchased from another wholesale agent would not be held for sale as consigned goods belonging to the complainant, and to be accounted for as such; and their sale by the wholesale dealer, who had acquired title, would be made for his own account, and not for that of the complainant. The allegations of the bill and the plain purpose of the system of contracts do not permit the conclusion that it was intended that wholesale dealers purchasing goods in this way should be free to sell to anyone at any price. Evidently it was not contemplated that the restrictions of the system should be escaped in such a simple manner. But if the restrictions of the "consignment contract" as to prices and vendees are to be deemed to apply to the sale of goods which one wholesale dealer has purchased from another, it is evident that the validity of the restrictions in this aspect must be supported on some other ground than that such sale is made by the wholesale dealer as the agent of the complainant. The case presented by the bill cannot properly be regarded as one for inducing breach of trust by an agent.

The other form of contract adopted by the complainant, while described as a "retail agency contract," is clearly an agreement looking to sale, and not to agency. The so-called "retail agents" are not agents at all, either of the complainant or of its consignees, but are contemplated purchasers who buy to sell again; that is, retail dealers. It is agreed that they may purchase
399]the medicines manufactured *by the complainant at stated prices. There follows this stipulation:

"In consideration whereof said retail agent agrees in no case to sell or furnish the said proprietary medicines to any person, firm, or corporation whatsoever at less than the full retail price as printed on the packages, without reduction for quantity; and said retail agent further agrees not to sell the said proprietary medicines at any price to wholesale or retail dealers not accredited agents of the Dr. Miles Medical Company."

It will be noticed that the "retail agents" are not forbidden to sell either to wholesale or retail dealers if these are "accredited agents" of the complainant, that is, if the dealers have signed either of the two contracts the complainant requires. But the restriction is intended to apply whether the retail dealers have bought the goods from those who held under consignment or from other dealers, wholesale or retail, who had purchased them. And in which way the "retail agents" who supplied the medicines to the defendant had bought them is not shown.

The bill asserts complainant's "right to maintain and preserve the aforesaid system and method of contracts and sales adopted and established by it." It is, as we have seen, a system of interlocking restrictions by which the complainant seeks to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or subpurchasers, and thus to fix the amount which the consumer shall pay, eliminating all competition. The essential features of such a system are thus described by Mr. Justice Lurton (then circuit judge), in the opinion of the circuit court of appeals in the case of John D. Park & Sons Co. v. Hartman, 12 L.R.A. (N.S.) on page 147, 82 C. C. A. 158, 153 Fed. 24: "The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell *below a minimum price dictated by[400
complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to anyone who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers, and the retailers, to maintain prices and stifle competition, has been brought about."

That these agreements restrain trade is obvious. That, having been made, as the bill alleges, with "most of the jobbers and wholesale druggists and a majority of the retail druggists of the country," and having

for their purpose the control of the entire trade, they relate directly to interstate as well as intrastate trade, and operate to restrain trade or commerce among the several states, is also clear. Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; E. Bement & Sons v. National Harrow Co. 186 U. S. 92, 46 L. ed. 1069, 22 Sup. Ct. Rep. 747; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

But it is insisted that the restrictions are not invalid either at common law or under the act of Congress of July 2, 1890, chap. 647, 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200, upon the following grounds, which may be taken to embrace the fundamental contentions for the complainant: (1) That the restrictions are valid because they relate to proprietary medicines manufactured under a secret process; and (2) that, apart from this, a manufacturer is entitled to control the prices on all sales of his own products.

First. The first inquiry is whether there is [401] any distinction, *with respect to such restrictions as are here presented, between the case of an article manufactured by the owner of a secret process and that of one produced under ordinary conditions. The complainant urges an analogy to right secured by letters patent. E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747. In the case cited, there were licenses for the manufacture and sale of articles covered by letters patent, with stipulations as to the prices at which the licensee should sell. The court said, referring to the act of July 2, 1890 (p. 92): "But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers."

But whatever rights the patentee may enjoy are derived from statutory grant under the authority conferred by the Constitution. This grant is based upon public considerations. The purpose of the patent law is to stimulate invention by protecting inventors for a fixed time in the advantages that may be derived from exclusive manufacture, use, and sale. As was said by Chief Justice Marshall in Grant v. Raymond, 6 Pet. pp. 241–243, 8 L. ed. 384, 385: "It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. . . . The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time the public faith is pledged. . . . The great object and intention of the act is to secure to the public the advantages to be derived from the discoveries of individuals, and the means it employs are the compensation *made to those individuals for [402] the time and labor devoted to these discoveries, by the exclusive right to make, use, and sell the things discovered for a limited time."

The complainant has no statutory grant. So far as appears, there are no letters patent relating to the remedies in question. The complainant has not seen fit to make the disclosure required by the statute, and thus to secure the privileges it confers. Its case lies outside the policies of the patent law, and the extent of the right which that law secures is not here involved or determined.

The complainant relies upon the ownership of its secret process and its rights are to be determined accordingly. Anyone may use it who fairly, by analysis and experiment, discovers it. But the complainant is entitled to be protected against invasion of its rights in the process by fraud or by breach of trust or contract. Tabor v. Hoffman, 118 N. Y. 36, 16 Am. St. Rep. 740, 23 N. E. 12; Chadwick v. Covell, 151 Mass. 190, 6 L.R.A. 839, 21 Am. St. Rep. 442, 23 N. E. 1068. The secret process may be the subject of confidential communication and of sale or license to use with restrictions as to territory and prices. Fowle v. Park, 131 U. S. 88, 33 L. ed. 67, 9 Sup. Ct. Rep. 658. A similar principle obtains with respect to the confidential communication of quotations collected by a board of trade. Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637.

Here, however, the question concerns not the process of manufacture, but the manufactured product,—an article of commerce. The complainant has not communicated its process in trust, or under contract, or executed a license for the use of the process with restrictions as to the manufacturer and sale by the licensee to whom the communication is made. The complainant has retained its secret, which apparently it believes to be undiscoverable. Whether its remedies are sold or unsold, whether the restrictions as to future sales are valid or invalid, the complainant's secret remains in-

tact. That the complainant may rightfully 403]object *to attempts to discover it by fraudulent means, or to a breach of trust or contract relating to the process, does not require the conclusion that it is entitled to establish restrictions with respect to future sales by those who purchase its manufactured product. It is said that the remedies "embody" the secret. It would be more correct to say that they are manufactured according to the secret process, and do not constitute a communication of it. It is also urged that, as the process is secret, no one else can manufacture the article. But this argument rests on monopoly of production, and not on the secrecy of the process or the particular fact that may confer that monopoly. It implies that if, for any reason, monopoly of production exists, it carries with it the right to control the entire trade of the produced article, and to prevent any competition that otherwise might arise between wholesale and retail dealers. The principle would not be limited to secret processes, but would extend to goods manufactured by anyone who secured control of the source of supply of a necessary raw material or ingredient. But, because there is monopoly of production, it certainly cannot be said that there is no public interest in maintaining freedom of trade with respect to future sales after the article has been placed on the market and the producer has parted with his title. Moreover, every manufacturer, before sale, controls the articles he makes. With respect to these, he has the rights of ownership, and his dominion does not depend upon whether the process of manufacture is known or unknown, or upon any special advantage he may possess by reason of location, materials, or efficiency. The fact that the market may not be supplied with the particular article unless he produces it is a practical consequence which does not enlarge his right of property in what he does produce.

If a manufacturer, in the absence of statutory privilege, has the control over the 404]sales of the manufactured article *for which the complainant here contends, it is not because the process of manufacture is kept secret. In this respect, the maker of so-called proprietary medicines, unpatented, stands on no different footing from that of other manufacturers. The fact that the article is represented to be curative in its properties does not justify a restriction of trade which would be unlawful as to compositions designed for other purposes.

Second. We come, then, to the second question,—whether the complainant, irrespective of the secrecy of its process, is entitled to maintain the restrictions by virtue of the fact that they relate to products of its own manufacture.

The basis of the argument appears to be that, as the manufacturer may make and sell, or not, as he chooses, he may affix conditions as to the use of the article or as to the prices at which purchasers may dispose of it. The propriety of the restraint is sought to be derived from the liberty of the producer.

But because a manufacturer is not bound to make or sell, it does not follow in case of sales actually made he may impose upon purchasers every sort of restriction. Thus, a general restraint upon alienation is ordinarily invalid. "The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void. 'If a man,' says Lord Coke, in 2 Coke on Littleton, § 360, 'be possessed . . . of a horse or of any other chattel, real or personal, and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because the whole interest and property is out of him, so as he hath *no possibil-[405 ity of a reverter; and it is against the trade and traffic and bargaining and contracting between man and man.'" John D. Park & Sons Co. v. Hartman, 12 L.R.A. (N.S.) 146, 82 C. C. A. 158, 153 Fed. 24. See also Gray, Restraints on Alienation of Property, §§ 27, 28.

Nor can the manufacturer by rule and notice, in the absence of contract or statutory right, even though the restriction be known to purchasers, fix prices for future sales. It has been held by this court that no such privilege exists under the copyright statutes, although the owner of the copyright has the sole right to vend copies of the copyrighted production. Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722. There the court said (p. 351): "The owner of the copyright in this case did sell copies of the book in quantities and at a price satisfactory to it. It has exercised the right to vend. What the complainant contends for embraces not only the right to sell the copies, but to qualify the title of a future purchaser by the reservation of the right to have the remedies of the statute against an infringer because of the printed notice of its purpose so to do unless the purchaser sells at a price fixed in the

notice. To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment." It will hardly be contended, with respect to such a matter, that the manufacturer of an article of commerce not protected by any statutory grant is in any better case. See Taddy & Co. v. Sterious & Co. [1904] 1 Ch. 354; McGruther v. Pitcher [1904] 2 Ch. 306; Garst v. Hall & L. Co. 179 Mass. 588, 55 L.R.A. 631, 61 N. E. 219. Whatever right the manufacturer may have to project his control beyond his own sales must depend not upon an inherent power incident to production and original ownership, but upon agreement.

406] *With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy. As was said by this court in Gibbs v. Consolidated Gas. Co. 130 U. S. 409, 32 L. ed. 984, 9 Sup. Ct. Rep. 553: "The decision in Mitchel v. Reynolds, 1 P. Wms. 181, s. c. 1 Smith, Lead. Cas. 7th Eng. ed. 407; 8th Am. ed. 756, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things and a state of society different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable. Rousillon v. Rousillon, L. R. 14 Ch. Div. 351; Leather Cloth Co. v. Lorsont, L. R. 9 Eq. 345."

"The true view at the present time," said Lord Macnaghten in Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. [1894] A. C. p. 565, 6 Eng. Rul. Cas. 413, "I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special *circumstances of a par-[407 ticular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable,—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public."

The present case is not analogous to that of a sale of good will, or of an interest in a business, or of the grant of a right to use a process of manufacture. The complainant has not parted with any interest in its business or instrumentalities of production. It has conferred no right by virtue of which purchasers of its products may compete with it. It retains complete control over the business in which it is engaged, manufacturing what it pleases and fixing such prices for its own sales as it may desire. Nor are we dealing with a single transaction, conceivably unrelated to the public interest. The agreements are designed to maintain prices after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them.

The bill asserts the importance of a standard retail price, and alleges generally that confusion and damage have resulted from sales at less than the prices fixed. But the advantage of established retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them, and not to the complainant. It is through the inability of the favored dealers to realize these profits, on account of the described competition, that the complainant works out its alleged injury. If there be an advantage to the manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they *sell.[408 As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus

obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system.

But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer. People v. Sheldon, 139 N. Y. 251, 23 L.R.A. 221, 36 Am. St. Rep. 690, 34 N. E. 785; Judd v. Harrington, 139 N. Y. 105, 34 N. E. 790; People v. Milk Exch. 145 N. Y. 267, 27 L.R.A. 437, 45 Am. St. Rep. 609, 39 N. E. 1062; United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271, on appeal 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Chapin v. Brown Bros. 83 Iowa, 156, 12 L.R.A. 428, 32 Am. St. Rep. 297, 48 N. W. 1074; Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; W. H. Hill Co. v. Gray & Worcester, 163 Mich. 12, 30 L.R.A.(N.S.) 327, 127 N. W. 803.

The complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purposes. No distinction can properly be made by reason of the particular character of the commodity in question. It is not entitled to special privilege or immunity. It is an article of commerce, and the rules concerning the freedom of trade must be held to apply to it. Nor does the fact that the margin of freedom is reduced by the control of production make the protection of what remains, in such a case, a negligible matter. And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by several manufacturers or by one, 409]*or whether they were previously owned by one or by many. The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.

The questions involved were carefully considered and the decisions reviewed by Judge Lurton in delivering the opinion of the circuit court of appeals in John D. Park & Sons Co. v. Hartman, supra, and, in following that case, it was concluded below that the restrictions sought to be enforced by the bill were invalid both at common law and under the act of Congress of July 2, 1890. We think that the court was right.

The allegations of the bill as to the labels and cartons used by the complainant are evidently incidental to the main charge as to the procurement of violation of the restrictions as to prices and vendees contained in the agreement; and failing as to this, no case is made for relief with respect to the trademarks, which are not shown to have been infringed.

Judgment affirmed.

Mr. Justice **Lurton** took no part in the consideration and decision of this case.

Mr. Justice **Holmes**, dissenting:

This is a bill to restrain the defendant from inducing, by corruption and fraud, agents of the plaintiff and purchasers from it to break their contracts not to sell its goods below a certain price. There are two contracts concerned. The first is that of the jobber or wholesale agent to whom the plaintiff consigns its goods; and I will say a few words about that, although it is not this branch of the case that induces me to speak. That they are agents, and not buyers, I understand to be conceded, and I do not see how it *can be denied. We have[410 nothing before us but the form and the alleged effect of the written instrument, and they both are express that the title to the goods is to remain in the plaintiff until actual sale as permitted by the contract. So far as this contract limits the authority of the agents as agents, I do not understand its validity to be disputed. But it is construed also to permit the purchase of medicine by consignees from other consignees, and to make the specification of prices applicable to goods so purchased as well as to goods consigned. Hence, when the bill alleges that the defendant has obtained medicine from these agents by inducing them to break their contracts, the allegation does not require proof of breach of trust by an agent, but would be satisfied by proving a breach of promise in respect of goods that the consignee had bought and owned. This reasoning would have been conclusive in the days of Saunders if the construction of the contract is right, as I suppose that it is. But the contract as to goods purchased is at least in the background and obscure; it is not the main undertaking that the instrument is intended to express. I should have thought that the bill ought to be read as charging the defendant with inducing breach of the ordinary duty of consignees as such (Swift & Co. v. United States, 196 U. S. 375, 395, 49 L. ed. 518, 523, 25 Sup. Ct. Rep. 276), and therefore as entitling the plaintiff to relief (Angle v. Chicago, St.

P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240).

The second contract is that of the retail agents, so called, being really the first purchasers, fixing the price below which they will not sell to the public. There is no attempt to attach a contract or condition to the goods, as in Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. Rep. 722, or in any way to restrict dealings with them after they leave the hands of the retail men. The sale to the retailers is made by the plaintiff, and the only question is whether the law forbids a purchaser to contract with his vendor that he will not 411]sell *below a certain price. This is the important question in this case. I suppose that in the case of a single object, such as a painting or a statue, the right of the artist to make such a stipulation hardly would be denied. In other words, I suppose that the reason why the contract is held bad is that it is part of a scheme embracing other similar contracts, each of which applies to a number of similar things, with the object of fixing a general market price. This reason seems to me inadequate in the case before the court. In the first place, by a slight change in the form of the contract the plaintiff can accomplish the result in a way that would be beyond successful attack. if it should make the retail dealers also agents in law as well as in name, and retain the title until the goods left their hands, I cannot conceive that even the present enthusiasm for regulating the prices to be charged by other people would deny that the owner was acting within his rights. It seems to me that this consideration by itself ought to give us pause.

But I go farther. There is no statute covering the case; there is no body of precedent that, by ineluctable logic, requires the conclusion to which the court has come. The conclusion is reached by extending a certain conception of public policy to a new sphere. On such matters we are in perilous country. I think that at least it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear. What, then, is the ground upon which we interfere in the present case? Of course, it is not the interest of the producer. No one, I judge, cares for that. It hardly can be the interest of subordinate vendors, as there seems to be no particular reason for preferring them to the originator and first vendor of the product. Perhaps it may be assumed to be the interest of the consumers and the public. On that point I confess that I am in a minor-412]ity as to larger issues than *are concerned here. I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution) as fixing a fair price. What really fixes that is the competition of conflicting desires. We, none of us, can have as much as we want of all the things that we want. Therefore, we have to choose. As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. Of course, I am speaking of things that we can get along without. There may be necessaries that sooner or later must be dealt with like short rations in a shipwreck, but they are not Dr. Miles's medicines. With regard to things like the latter, it seems to me that the point of most profitable returns marks the equilibrium of social desires, and determines the fair price in the only sense in which I can find meaning in those words. The Dr. Miles Medical Company knows better than we do what will enable it to do the best business. We must assume its retail price to be reasonable, for it is so alleged and the case is here on demurrer; so I see nothing to warrant my assuming that the public will not be served best by the company being allowed to carry out its plan. I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own, and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get.

The conduct of the defendant falls within a general prohibition of the law. It is fraudulent, and has no merits of its own to recommend it to the favor of the court. An injunction against a defendant's dealing in nontransferable round-trip reduced-rate tickets has been granted to a railroad company upon the general principles of the law protecting contracts, and the demoralization of rates has *been referred as a spe-[413 cial circumstance in addition to the general grounds. Bitterman v. Louisville & N. R. Co. 207 U. S. 205, 222–224, 52 L. ed. 171, 182, 183, 28 Sup. Ct. Rep. 91, 12 A. & E. Ann. Cas. 693. The general and special considerations equally apply here, and we ought not to disregard them, unless the evil effect of the contract is very plain. The analogy relied upon to establish that evil effect is that of combinations in restraint of trade. I believe that we have some superstitions on that head, as I have said; but those combinations are entered into with intent to exclude others from a business naturally open to them, and we unhappily have become familiar with the

methods by which they are carried out. I venture to say that there is no likeness between them and this case (Jayne v. Loder, 7 L.R.A.(N.S.) 984, 78 C. C. A. 653, 149 Fed. 21, 27, 9 A. & E. Ann. Cas. 294), and I think that my view prevails in England (Elliman, Sons & Co. v. Carrington & Son [1901] 2 Ch. 275). See Garst v. Harris, 177 Mass. 72, 58 N. E. 174. Garst v. Charles, 187 Mass. 144, 72 N. E. 839. I think also that the importance of the question and the popularity of what I deem mistaken notions makes it my duty to express my view in this dissent.

CHICAGO, BURLINGTON, & QUINCY RAILWAY COMPANY, Petitioner,
v.
ERASTUS W. WILLARD, Administrator of the Estate of Harold R. Wellman, Deceased.

(See S. C. Reporter's ed. 413–427.)

Appeal — questions reviewable — jurisdiction below.

1. An appellate Federal court can and should consider on its own motion the question of the jurisdiction of a Federal circuit court to which a cause has been removed from the state court, as presenting a separable controversy, although the plaintiff withdrew and did not renew his motion to remand to the state court, but went to trial in the Federal court without objection.

[For other cases, see Appeal and Error, 3994–4012, 4541–4549, in Digest Sup. Ct. 1908.]

Removal of causes — separable controversy — joint action.

2. A case in which plaintiff has elected, in conformity with the settled law of the state, to sue jointly in tort a nonresident lessee railway company, exclusively operating, controlling, and managing the road, and its resident corporate lessor, upon a cause of action arising in the state, out of the negligent operation of the road, cannot be removed to a Federal circuit court as presenting a separable controversy between the plaintiff and the lessee, although the lessor may have been joined for the purpose of excluding the Federal jurisdiction.

[For other cases, see Removal of Causes, 138–158, in Digest Sup. Ct. 1908.]

Removal of causes — separable controversy — fraudulent joinder.

3. Fraudulent joinder of a resident with a nonresident defendant, for the purpose of defeating the removal of the cause to a Federal court, cannot be established, where, by the settled law of the state in which the action was brought, and in which the cause of action arose, both defendants were jointly liable to suit.

[For other cases, see Removal of Causes, 138–158, in Digest Sup. Ct. 1908.]

[No. 105.]

Submitted March 17, 1911. Decided April 10, 1911.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which reversed a judgment of the Circuit Court for the Northern District of Illinois, Eastern Division, in favor of defendants in an action in tort which had been removed to that court from a state court, and remanded the cause with directions to remand to the state court. Affirmed.

See same case below, 91 C. C. A. 215, 165 Fed. 181.

The facts are stated in the opinion.

Messrs. **Albert J. Hopkins** and **Chester M. Dawes** submitted the cause for petitioner:

It is the duty of the plaintiff, upon the removal of a case by a defendant, to controvert or take issue with the allegations of the petition; and if he fails so to do, the cause stands removed, and the jurisdiction of the circuit court attaches.

Atlanta, K. & N. R. Co. v. Southern R. Co. 82 C. C. A. 256, 153 Fed. 122, 11 A. & E. Ann. Cas. 766; Kelly v. Chicago & A. R. Co. 122 Fed. 286; Ross v. Erie R. Co. 120 Fed. 704; Durkee v. Illinois C. R. Co. 81 Fed. 2; Dishon v. Cincinnati, N. O. & T. P. R. Co. 66 C. C. A. 345, 133 Fed. 475; Kentucky v. Powers, 201 U. S. 1, 34, 50 L. ed. 633, 648, 26 Sup. Ct. Rep. 387, 5 A. & E. Ann. Cas. 692; Dow v. Bradstreet Co. 46 Fed. 824; Weaver v. Northern P. R. Co. 125 Fed. 155; Pittsburgh, C. & St. L. R. Co. v. Ramsey, 22 Wall. 322, 22 L. ed. 823; Davies v. Lathrop, 21 Blatchf. 164, 13 Fed. 565; Carrington v. Florida R. Co. 9 Blatchf. 467, Fed. Cas. No. 2,447; Edgerton v. Gilpin, 3 Woods, 277, Fed. Cas. No. 4,280; Baggs v. Martin, 179 U. S. 206, 45 L. ed. 155, 21 Sup. Ct. Rep. 109; Re Moore, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706, 14 A. & E. Ann. Cas. 1164.

NOTE.—As to removal of causes in cases of separable controversy—see notes to Miller v. Clifford, 5 L.R.A.(N.S.) 50; Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co. 35 C. C. A. 153; Pollitz v. Wabash R. Co. 100 C. C. A. 4; Sloane v. Anderson, 29 L. ed. U. S. 899; Merchants Cotton Press & Storage Co. v. Insurance Co. of N. A. 38 L. ed. U. S. 195; Butler v. National Home for Disabled Volunteer Soldiers, 36 L. ed. U. S. 346; and Torrence v. Shedd, 36 L. ed. U. S. 528.

On fraudulent joinder of parties to prevent removal of cause to Federal court—see notes to Boatmen's Bank v. Fritzlen, 22 L.R.A.(N.S.) 1235, and Offner v. Chicago & E. R. Co. 78 C. C. A. 362.

Messrs. **Arthur J. Eddy** and **Emil C. Wetten** submitted the cause for respondent. Messrs. Coll McNaughton and Patrick C. Haley were on the brief:

Under the law of the state of Illinois, the lessor railroad company is jointly liable with the lessee railroad company for the wrongful acts of the latter.

Peoria & R. I. R. Co. v. Lane, 83 Ill. 448; Balsley v. St. Louis, A. & T. H. R. Co. 119 Ill. 68, 59 Am. Rep. 784, 8 N. E. 859; Pennsylvania Co. v. Ellett, 132 Ill. 654, 24 N. E. 559; Chicago & G. T. R. Co. v. Hart, 209 Ill. 414, 66 L.R.A. 75, 70 N. E. 654.

In every pleading by which the existence of fraud is put in issue, the facts constituting fraud must be distinctly and directly averred. General allegations and mere conclusions of law are insufficient.

Stearns v. Page, 7 How. 819–829, 12 L. ed. 928–932; Wood v. Carpenter, 101 U. S. 135, 25 L. ed. 807.

Where the pleadings do not on their face show a separable controversy, its existence must be averred in the petition for removal by the statement of the facts from which the conclusion arises.

Anderson v. Bowers, 40 Fed. 708.

An allegation that what was done was "colorable" or "fraudulent" is a conclusion of law, which a demurrer does not admit.

Fogg v. Blair, 139 U. S. 118, 35 L. ed. 104, 11 Sup. Ct. Rep. 476.

An action of tort which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separable controversy which will authorize its removal by some of the defendants to the Federal circuit court, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one.

Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147; Powers v. Chesapeake & O. R. Co. 169 U. S. 97, 42 L. ed. 674, 18 Sup. Ct. Rep. 264; Louisville & N. R. Co. v. Wangelin, 132 U. S. 601, 33 L. ed. 475, 10 Sup. Ct. Rep. 203; Plymouth Consol. Gold Min. Co. v. Amador & S. Canal Co. 118 U. S. 264, 30 L. ed. 232, 6 Sup. Ct. Rep. 1034; Pirie v. Tvedt, 115 U. S. 43, 29 L. ed. 332, 5 Sup. Ct. Rep. 1034, 1161; Sloane v. Anderson, 117 U. S. 275, 29 L. ed. 899, 6 Sup. Ct. Rep. 730; Little v. Giles, 118 U. S. 596, 30 L. ed. 269, 7 Sup. Ct. Rep. 32; Torrence v. Shedd, 144 U. S. 530, 36 L. ed. 531, 12 Sup. Ct. Rep. 726; Connell v. Smiley, 156 U. S. 340, 39 L. ed. 444, 15 Sup. Ct. Rep. 353; Hyde v. Ruble, 104 U. S. 407, 26 L. ed. 823; Ayres v. Wiswall 112 U. S. 192, 28 L. ed. 695, 5 Sup. Ct. Rep. 90; Warax v. Cincinnati, N. O. & T. P. R. Co. 72 Fed. 640; Illinois C. R. Co. v. Le Blanc, 74 Miss. 626, 21 So. 748.

A defendant has no right to say that an action shall be separate, which a plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way.

Pirie v. Tvedt, 115 U. S. 43, 29 L. ed. 332, 5 Sup. Ct. Rep. 1034, 1161; Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147.

The question whether there is a separable controversy warranting a removal must be determined by the state of the pleadings and the record of the case at the time of the application for removal.

Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147; Wilson v. Oswego Twp. 151 U. S. 65, 38 L. ed. 74, 14 Sup. Ct. Rep. 259; Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A. 151 U. S. 384, 38 L. ed. 204, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; Louisville & N. R. Co. v. Wangelin, 132 U. S. 601, 33 L. ed. 475, 10 Sup. Ct. Rep. 203.

In determining whether there is a separable controversy, the cause of action is, for all the purposes of the suit, whatever the plaintiff declares it to be in its pleadings; and the allegations of the plaintiff must be accepted as true.

Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147; Torrence v. Shedd, 144 U. S. 530, 36 L. ed. 531, 12 Sup. Ct. Rep. 726; Louisville & N. R. Co. v. Ide, 114 U. S. 52, 29 L. ed. 63, 5 Sup. Ct. Rep. 735; Little v. Giles, 118 U. S. 601, 30 L. ed. 271, 7 Sup. Ct. Rep. 32; Plymouth Consol. Gold Min. Co. v. Amador & S. Canal Co. 118 U. S. 270, 30 L. ed. 233, 6 Sup. Ct. Rep. 1034; Deere v. Chicago, M. & St. P. R. Co. 85 Fed. 881; Warax v. Cincinnati, N. O. & T. P. R. Co. 72 Fed. 640; Offner v. Chicago & E. R. Co. 78 C. C. A. 359, 148 Fed. 201.

Mr. Patrick C. Haley also filed a separate brief for respondent.

Mr. Justice **Harlan** delivered the opinion of the court:

This suit originated in one of the courts of Illinois. It is a *joint* action against two railroad corporations,—the Chicago, Burlington, & Quincy Railway Company of

Iowa, and the Chicago, Burlington, & Quincy Railroad Company of Illinois,—to recover 417]damages alleged to have *been caused by the negligence, carelessness, and improper conduct of the defendants by their agents and servants, whereby one Harold R. Wellman, the intestate of the plaintiff, was killed. The particular railroad from the operation of which the injuries in question arose is located wholly in Illinois, and the plaintiff, Willard, is a citizen of that state. The case involves a question, to be presently mentioned, of the jurisdiction of the circuit court. It also involves a question as to the power and duty of an appellate Federal court, where it appears, *from the record*, that a subordinate court has disposed of a case of which it could not properly take cognizance, but in respect to which the parties are silent.

The facts are: The defendant, the Iowa corporation, filed its petition for the removal of this cause to the circuit court of the United States. It appears that in November, 1901, the Chicago, Burglington, & Quincy Railroad Company of Illinois leased, for a period of ninety-nine years from September 30th, 1901, to the Chicago, Burlington, & Quincy Railway Company of Iowa, its line of railway, and the rights, privileges, franchises, rights of way, yards, stations, tracks, and all appliances thereunto belonging, including in the lease that part of the road in Illinois described in the declaration; that the lessor company also assigned to the lessee company all other real and personal property not above mentioned, and all the rights, privileges, immunities, and franchises of the lessor company, except its franchise to be a corporation; that after December 21st, 1901, as well as on the day of the alleged injury and death of Wellman, the Iowa company operated and was then operating, controlling, and managing the railway lines of the Illinois company. At the time of the injuries complained of, neither the Illinois company nor any of its servants controlled, used, or operated the railroad engine or cars with which the deceased came into contact and was killed, but that the management, cus-418]tody, *control, and operation of the leased road and property was with the Iowa corporation exclusively; and that there was, it is alleged, a separable controversy between the Iowa company and the plaintiff, citizen of Illinois, which entitled that corporation to have the cause transferred for trial into the Federal court. It was further alleged that as the plaintiff was a citizen of Illinois, the two corporations were *fraudulently and improperly joined* as codefendants *for the purpose of defeating the removal of the case to the Federal court.*

The state court made an order recognizing the right of the Iowa corporation to have the cause removed to the Federal court. Subsequently, in the circuit court of the United States, the plaintiff moved to remand the case to the state court; but a few days thereafter he was given leave to withdraw that motion and to amend his declaration. He did not renew the motion to remand, but was given leave to amend his declaration, under which privilege he made extended amendments. But we do not perceive that those amendments affect the conclusion which, in our judgment, must be reached in the determination of the cause. The case remained throughout as a *joint* action against two companies, one of which was a corporation of the state of which the plaintiff was a citizen. What would have been the effect of any amendment made by the plaintiff, in the circuit court, eliminating or dismissing the lessor company, the Illinois corporation, altogether as a party defendant, thus leaving the case as presenting issues between citizens of different states only, we have no occasion now to determine. A trial was had in the circuit court, between the plaintiff and the two corporations, without objection as to the jurisdiction of that court, and at the conclusion of the evidence the jury, by direction of the court, returned a verdict for the defendants, and a judgment was accordingly rendered for them. The case went to the circuit court of appeals, where that *court, being of[419 opinion that the record disclosed a want of jurisdiction in the circuit court of the United States, the judgment was reversed, with directions to remand to the state court. That action was taken by the circuit court of appeals upon its own inspection of the record, and without any suggestion by either party as to a want of jurisdiction in the circuit court. The case is now here upon certiorari.

Had the circuit court jurisdiction of this case? As the plaintiff withdrew and did not renew his motion to remand to the state court, but went to trial in the Federal court without objection, was the circuit court of appeals, or is this court, precluded from considering the question of jurisdiction? These questions can have but one answer. It is firmly established by many decisions that in every case pending in an appellate Federal court of the United States, the inquiry must always be whether, under the Constitution and laws of the United States, that court or the court of original jurisdiction could take cognizance of the case. The leading authority on the subject is Mansfield, C. & L. M. R. Co. v.

Swan, 111 U. S. 379, 382, 28 L. ed. 462, 463, 4 Sup. Ct. Rep. 510, where the cases are fully reviewed. In that case the question of jurisdiction was raised in this court by the party at whose instance the subordinate Federal court exercised jurisdiction. But that fact was held not to be decisive; for, said Mr. Justice Matthews, speaking for the court, "on every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." This rule was said to be inflexible and without exception, and has been uniformly sustained by this court. In Ayers v. Watson, 113 U. S. 594, 598, 28 L. ed. 1093, 1094, 5 Sup. Ct. Rep. 641, Mr. Justice Bradley, speaking for the court, and referring to the 2d section (the 420]removal section) of *the act of 1875 [18 Stat. at L. 470, chap. 137, U. S. Comp Stat. 1901, p. 509], said: "In the nature of things, the 2d section is jurisdictional, and the 3d is but modal and formal. The conditions of the 2d section are indispensable, and must be shown by the record; the directions of the 3d, though obligatory, may, to a certain extent, be waived. Diverse state citizenship of the parties, or some other jurisdictional fact prescribed by the 2d section, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed. Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510." In Cameron v. Hodges, 127 U. S. 322, 326, 32 L. ed. 132, 134, 8 Sup. Ct. Rep. 1154, it was held to be an express requirement of the statute that the circuit court shall remand a case to the court from which it was removed whenever it appears that it is not one of which the Federal court can properly take cognizance. In Martin v. Baltimore & O. R. Co. (Gerling v. Baltimore & O. R. Co.) 151 U. S. 673, 689, 38 L. ed. 311, 317, 14 Sup. Ct. Rep. 533, after referring to the judiciary act of 1875, Mr. Justice Gray, speaking for the court, said: "Diverse state citizenship of the parties, or some other jurisdictional fact prescribed by the 2d section, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed." In Minnesota v. Northern Securities Co. 194 U. S. 48, 62, 63, 48 L. ed. 870, 877, 878, 24 Sup. Ct. Rep. 598, in which both parties insisted upon the jurisdiction of the circuit court, the said court: "Consent of [the] parties can never confer jurisdiction upon a Federal court. If the record does not affirmatively show jurisdiction in the circuit court, we must, upon our own motion, so declare, and make such order as will prevent that court from exercising an authority not conferred upon it by statute." In Thomas v. Ohio State University, 195 U. S. 207, 211, 49 L. ed. 160, 164, 25 Sup. Ct. Rep. 24: "It is equally well established that when jurisdiction depends upon diverse citizenship, the absence of sufficient averments or of facts in the record showing such required diversity of citizenship *is fatal, and can-[421 not be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived." In Kentucky v. Powers, 201 U. S. 1, 35, 50 L. ed. 633, 648, 26 Sup. Ct. Rep. 387, 5 A. & E. Ann. Cas. 692, it was said that this court "must see to it that they [the subordinate courts of the United States] do not usurp authority given to them by acts of Congress,"—citing Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 382, 28 L. ed. 462, 463, 4 Sup. Ct. Rep. 510. In Perez v. Fernandez, 202 U. S. 80, 100, 50 L. ed. 942, 949, 26 Sup. Ct. Rep. 561, which came to this court from the district court of the United States for the district of Porto Rico, this court, upon the authority of the Swan and other cases cited, held that "where the jurisdiction fails, the objection can be raised in this court; if not by the parties, then by the court itself." There are many other authorities to the same effect, but we cite a few of the additional cases: King Iron Bridge & Mfg. Co. v. Otoe County, 120 U. S. 225, 30 L. ed. 623, 7 Sup. Ct. Rep. 552; Continental L. Ins. Co. v. Rhoads, 119 U. S. 237, 30 L. ed. 380, 7 Sup. Ct. Rep. 193; Peper v. Fordyce, 119 U. S. 469, 30 L. ed. 435, 7 Sup. Ct. Rep. 287; Blacklock v. Small, 127 U. S. 96, 103, 105, 32 L. ed. 70, 73, 8 Sup. Ct. Rep. 1096; Metcalf v. Watertown, 128 U. S. 586, 587, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; Crehore v. Ohio & M. R. Co. 131 U. S. 240, 242, 33 L. ed. 144, 145, 9 Sup. Ct. Rep. 692; Graves v. Corbin, 132 U. S. 571, 589, 33 L. ed. 462, 468, 10 Sup. Ct. Rep. 196; Neel v. Pennsylvania Co. 157 U. S. 153, 39 L. ed. 654, 15 Sup. Ct. Rep. 589; Continental Nat. Bank v. Buford, 191 U. S. 119, 120, 48 L. ed. 119, 24 Sup. Ct. Rep. 54.

We now come to the question of jurisdiction upon its merits. If, under the statutes relating to the jurisdiction of the Federal courts, and upon the facts as disclosed by the record and litigated, the circuit court could not have taken cognizance of the case, then, according to the authorities above cited, it was the duty of the

circuit court of appeals, upon its own motion, and without regard to the wishes of the parties or of either of them, to reverse the judgment of the trial court, with directions to remand the case to the state court.

We are of opinion that the circuit court could not properly take cognizance of this case. The action was brought by a citizen of Illinois against two companies,—one a corporation of Iowa and the other a cor-
422]poration of *Illinois. It is said that as, long before the injury complained of, the Illinois corporation, the legal owner of the railroad in question, had leased to the Iowa company its road, with its property, rights, privileges, yards, stations, etc., appertaining thereto (excepting only the lessor company's franchise to be a corporation), and was in nowise, by its agents or servants, in the control of the road or of its operations at the time the plaintiff intestate was killed, the making of that corporation a party defendant in order to defeat the removal of the case to the Federal court was fraudulent and improper. A complete answer to this suggestion is that, by the settled law of Illinois at the time the injury in question was received, the lessor company of Illinois, although it had ceased to operate the road, was liable with the lessee company in such an action as this. The cause of action arose in Illinois, and it was entirely competent for that state, in the exercise of its governmental powers, to say that one of its own corporations, operating a railroad within its limits, by its authority, shall not, by leasing its road and property, be freed from liability for damages for which it would have been legally liable under its charter had it not made such lease.

In Chicago & G. T. R. Co. v. Hart, 209 Ill. 414, 66 L.R.A. 75, 70 N. E. 654, the supreme court of Illinois, after referring to Elliott on Railroads, in which it is admitted that the weight of authority was that the lessor company, unless expressly exempted by statute, was liable for injuries caused by the negligence of the lessee company, its agents and servants, said: "We think this court is committed to the view held by the current of authorities on the question, and, moreover, that, in sound reason and as the better public policy, the doctrine should be maintained that the lessor company shall be required to answer for the consequences of the negligence of the lessee company in the operation of the road, not only to the public, but also to servants of the lessee company who have been injured by action-
423]able *negligence of the lessee company. The charter of the lessor company empowered it to construct this line of railroad and operate trains thereon. It became its duty to exercise those chartered powers, otherwise they would become lost by nonuser. The statute authorized it to discharge that duty through a lessee, and it adopted that means of performing the duty which the state had created it to perform. The statute which authorized it to operate its road by means of a lessee did not, however, purport to relieve it of the obligation to serve the public by operating the road, nor of any of the consequences or liabilities which would attach to it if it operated the road itself. 3 Starr & C. Anno. Stat. 1896, p. 3247. Statutory permission to lease its road does not relieve a railroad company from the obligations cast upon it by its charter unless such statute expressly exempts the lessor company therefrom. Balsley v. St. Louis, A. & T. H. R. Co. 119 Ill. 68, 59 Am. Rep. 784, 8 N. E. 859. While the duty which rests upon the lessor companies to operate their roads is an obligation which they owe to the public, the permission given by the legislature, as the representative of the public, to perform that duty through lessees, has no effect to absolve such companies from the duty of seeing that the lessee company provides and maintains safe engines and cars, and that the employees of the lessee companies to whom is intrusted the operation of their roads are competent, and that they perform the duties devolving upon them with ordinary care and skill; for upon the character and condition of safety of such engines and cars, and on the competency and care of such employees, depend the lives and property of the general public. As a matter of public policy, such lessor companies are to be charged with the duty of seeing that the operation of the road is committed to competent and careful hands. The general assembly of this state, though willing to permit railroad companies to operate their lines of road by lessees, refrained from relieving *the lessor companies[424 from any of their obligations, duties, or liabilities. Therefore it is that though a railroad company may, by lease or otherwise, intrust the execution of its chartered powers and duties to a lessee company, this court has expressed the view [that] the lessee company, while engaged in exercising such chartered privileges or chartered powers of the railroad company, is to be regarded as the servant or agent of the lessor company."

In West Chicago Street R. Co. v. Horne, 197 Ill. 250, 251, 64 N. E. 331, the state supreme court said that "the law is well settled that when an injury results from the negligence or unlawful operation of a railway, whether by the corporation to which the franchise is granted or by another corporation which the proprietary company authorizes or permits to use its

tracks, both the lessor and the lessee are liable to respond in damages to the party injured,"—citing Pennsylvania Co. v. Ellett, 132 Ill. 654, 24 N. E. 559; Chicago & E. R. Co. v. Meech, 163 Ill. 305, 45 N. E. 290. In the Ellett case, the language of the court was: "The law has become settled in this state, by an unbroken line of decisions, that the grant of a franchise giving the right to build, own, and operate a railway carries with it the duty to so use the property and manage and control the railroad as to do no unnecessary damage to the person or property of others; and where injury results from the negligent or unlawful operation of the railroad, whether by the corporation to which the franchise is granted, or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railway and franchise will be liable." Many cases in Illinois were cited by the state court in support of its view.

It is thus made clear that if the plaintiff had any cause of action on account of the injury in question, he could bring a joint action in an Illinois court against the lessor and lessee companies. Whatever liability was in-
425]curred *on account of the death of the plaintiff's intestate could, at the plaintiff's election, be asserted against both companies in one joint action, or, at his election, against either of them in a separate action. In Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 96, 97, 42 L. ed. 673–675, 18 Sup. Ct. Rep. 264, which was an action against a railroad company and several of its servants for negligence resulting in an injury alleged to have been caused by the joint negligence or carelessness of all the defendants, the court, speaking by Mr. Justice Gray, said: "It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the circuit court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said: 'A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings,'"—citing Pirie v. Tvedt, 115 U. S. 41, 43, 29 L. ed. 331, 332, 5 Sup. Ct. Rep. 1034, 1161; Sloane v. Anderson, 117 U. S. 275, 29 L. ed. 899, 6 Sup. Ct. Rep. 730; Little v. Giles, 118 U. S. 596, 600, 601, 30 L. ed. 269–271, 7 Sup. Ct. Rep. 32; Louisville & N. R. Co. v. Wangelin, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203; Torrence v. Shedd, 144 U. S. 527, 530, 36 L. ed. 528, 531, 12 Sup. Ct. Rep. 726; Connell v. Smiley, 156 U. S. 335, 340, 39 L. ed. 443, 444, 15 Sup. Ct. Rep. 353.

In the case of Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 216, 218, 50 L. ed. 441, 446, 447, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147, after referring to Louisville & N. R. Co. v. Ide, 114 U. S. 52, 29 L. ed. 63, 5 Sup. Ct. Rep. 735, in which Chief Justice Waite said that a defendant had no right to say that an action shall be several which a plaintiff elects to make joint, this court, *speaking by Mr. Justice Day,[426 said: "The language is used of an action begun in the state court; and it is recognized that the plaintiff may select his own manner of bringing his action, and must stand or fall by his election. If he has improperly joined causes of action, he may fail in his suit; the question may be raised by answer and the right of the defendant adjudicated. But the question of removability depends upon the state of the pleadings and the record at the time of the application for removal. (Wilson v. Oswego Twp. 151 U. S. 56, 66, 38 L. ed. 70, 75, 14 Sup. Ct. Rep. 259), and it has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bill, or complaint, that being the only pleading in the case, is to determine the separable character of the controversy for the purpose of deciding the right of removal,"—citing the above cases, and, in addition, Louisville & N. R. Co. v. Ide, 114 U. S. 52, 29 L. ed. 63, 5 Sup. Ct. Rep. 735: Graves v. Corbin, 132 U. S. 571, 33 L. ed. 462, 10 Sup. Ct. Rep. 196; East Tennessee, V. & G. R. Co. v. Grayson, 119 U. S. 240, 30 L. ed. 382, 7 Sup. Ct. Rep. 190; Chesapeake & O. R. Co. v. Dixon, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; Southern R. Co. v. Carson, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609. Again, in the same case: "Does this become a separable controversy within the meaning of the act of Congress because the plaintiff has misconceived his cause of action and had no right to prosecute the defendants jointly? We think, in the light of the adjudications

above cited from this court, it does not. Upon the face of the complaint, the only pleading filed in the case, the action is joint. It may be that the state court will hold it not to be so. It may be, which we are not called upon to decide now, that this court would so determine if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal. The case cannot be removed unless it is one which presents 427]a separable controversy wholly *between citizens of different states. In determining this question the law looks to the case made in the pleadings, and determines whether the state court shall be required to surrender its jurisdiction to the Federal court."

It results that, upon the face of the record, the action throughout was proceeded in as a joint action, and that there was no separable controversy in such an action, entitling the Iowa corporation, as matter of law, to remove the case from the state court. And it cannot be predicated of the plaintiff that he fraudulently and improperly made the Illinois corporation a codefendant with the Iowa corporation when such a charge is negatived, as matter of law, by the fact that the plaintiff was, as we have seen, entitled under the laws of Illinois, where the cause of action originated and within which the road in question was located, to bring a joint action against the Illinois and Iowa companies. Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 316, 54 L. ed. 208, 211, 30 Sup. Ct. Rep. 101. He may have preferred to have the case tried in the state court, just as the Iowa corporation preferred the Federal court. But these preferences or motives, not fraudulent or unnatural, were of no consequence. They were immaterial in determining whether the plaintiff had a legal right to bring a joint action against the lessor and lessee companies, and to carry it on in that form to a conclusion. The silence of the parties, at the trial or in the appellate court, on the question of jurisdiction, could not, in disregard of the judiciary act, confer authority on the circuit court to try the case. The circuit court of appeals, therefore, properly, of its own motion, reversed the judgment of the trial court, and sent the case back to the circuit court, with instructions to remand it to the state court. Restricting this opinion to the case made by the record before us, and as litigated, and without imagining cases in which the rules herein announced might be difficult to apply, the judgment is affirmed.

*DIAMOND RUBBER COMPANY[428 OF NEW YORK, Petitioner,

v.

CONSOLIDATED RUBBER TIRE COMPANY and Rubber Tire Wheel Company.

(See S. C. Reporter's ed. 428–445.)

Patents — invention — commercial success.

1. The widespread commercial success of a patented device should be taken into consideration in determining the question of invention.

[For other cases, see Patents, V. c, in Digest Sup. Ct. 1908.]

Patents — combination — ignorance of inventor — commercial success.

2. A combination patent for an article which, when constructed in accordance with the specifications, has proved a great commercial success, may not be held devoid of invention because the inventor may not have known all of the forces which he had brought into operation.

[For other cases, see Patents, V. b, 6, in Digest Sup. Ct. 1908.]

Evidence — presumption — ignorance of patentee.

3. Ignorance on the part of the patentee of a combination of the manner of the operation of the elements which he has combined will not readily be inferred.

[For other cases, see Evidence, II. 3, 5, in Digest Sup. Ct. 1908.]

Patents — combination — utility — anticipation.

4. The Grant patent No. 554,675, for an improvement in rubber-tired wheels, consisting of a solid rubber tire, held in place in a flaring rim by the tension of two tightly drawn wires embedded in the rubber within the periphery of the flanges, which has almost universally been accepted as the termination of the struggle for a completely successful tire, a tire so constructed possessing the function of rising, falling, and reseating itself under lateral strain, involves

NOTE.—On utility, extent of use, and commercial success as evidence of invention —see notes to Doig v. Morgan Mach. Co. 59 C. C. A. 620, and Dashiell v. Grosvenor, 40 L. ed. U. S. 1025.

On presumption and burden of proof of invention—see note to American Sulphite Pulp Co. v. De Grasse Paper Co. 87 C. C. A. 264.

On patentability of combinations of old elements as dependent upon results attained —see note to National Tube Co. v. Aiken, 91 C. C. A. 123.

On anticipation of patent—see notes to Evans v. Eaton, 4 L. ed. U. S. 433; Leggett v. Standard Oil Co. 37 L. ed. U. S. 737; Wollensak v. Sargent, 38 L. ed. U. S. 138; and Dashiell v. Grosvenor, 40 L. ed. U. S. 1025.

On jurisdiction of circuit courts of appeals in patent proceedings—see note to United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 484.

patentable invention, and was not anticipated by prior patents covering combinations of some of the same elements, but which do not possess the distinctive "tipping" function of the Grant tire, and hence failed of commercial success.

[For other cases, see Patents, V. b, 6; V. c; V. e, in Digest Sup. Ct. 1908.]

Patents — utility — litigation.

5. The utility of a patented device may be attested by the litigation over it.

[For other cases, see Patents, V. c, in Digest Sup. Ct. 1908.]

Judgment — conclusiveness — in patent case.

6. A decree enjoining the infringement of a patent for an improvement in rubber-tired wheels, which has been held invalid in other Federal circuits, need not go further than to except from its operation the handling, using, or selling of tires and rims authorized by the decrees invalidating the patent, and may reserve until the question properly arises on the facts, the determination of the defendant's right to handle or sell other tires or rims throughout those circuits.

[For other cases, see Judgment, 581–587, in Digest Sup. Ct. 1908.]

[No. 36.]

Argued February 28 and March 1, 1911.
Decided April 10, 1911.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed, with a slight modification, a decree of the Circuit Court for the Southern District of New York, enjoining the infringement of a patent. Affirmed.

See same case below, 89 C. C. A. 582, 162 Fed. 892.

The facts are stated in the opinion.

Mr. **Charles K. Offield** argued the cause and filed a brief for petitioner:

In all cases where the patentee's claim is for an improvement on a machine, it will be incumbent upon him to show the extent of his improvement, so that a person understanding the subject may comprehend distinctly of what it consists.

Evans v. Eaton, 3 Wheat. 454, 4 L. ed. 433; Grant v. Raymond, 6 Pet. 248, 8 L. ed. 386; Gill v. Wells, 22 Wall. 25, 22 L. ed. 710.

A failure on the part of the patentee in those prerequisites of the act which authorize a patent is a bar to a recovery in an action for its infringement, and the validity of the defense does not depend on the invention or the inventor, but is a legal inference from his conduct.

Grant v. Raymond, 6 Pet. 248, 8 L. ed. 386.

The specific claim of a patent is notice to the world, of the most public and solemn kind, that all those parts of the machine or manufacture set out and described in the specification, and not embraced in such specific claim, are not claimed by the patentee, and are not his invention, or if so, have thus been surrendered to the public.

Mahn v. Harwood, 112 U. S. 360, 28 L. ed. 667, 5 Sup. Ct. Rep. 174, 6 Sup. Ct. Rep. 451; Fay v. Cordesman, 109 U. S. 421, 27 L. ed. 984, 3 Sup. Ct. Rep. 236; Keystone Bridge Co. v. Phœnix Iron Co. 95 U. S. 274, 24 L. ed. 344; Merrill v. Yeomans, 94 U. S. 568, 24 L. ed. 235; White v. Dunbar, 119 U. S. 51, 30 L. ed. 304, 7 Sup. Ct. Rep. 72.

Where the patent is for an improvement, and clearly identifies the invention, which invention is set forth in the claim, and where such claim is clear and explicit, as well as the specifications, neither court nor counsel are required to go into and examine the old art, and the patentee must abide by his claim.

LeRoy v. Tatham, 14 How. 156, 14 L. ed. 367; James v. Campbell, 104 U. S. 356, 26 L. ed. 786; Mahn v. Harwood, 112 U. S. 360, 28 L. ed. 667, 5 Sup. Ct. Rep. 174, 6 Sup. Ct. Rep. 451; Fay v. Cordesman, 109 U. S. 421, 27 L. ed. 984, 3 Sup. Ct. Rep. 236; Keystone Bridge Co. v. Phœnix Iron Co. 95 U. S. 274, 24 L. ed. 344; Merrill v. Yeomans, 94 U. S. 568, 24 L. ed. 235; White v. Dunbar, 119 U. S. 51, 30 L. ed. 304, 7 Sup. Ct. Rep. 72; Burns v. Meyer, 100 U. S. 671, 25 L. ed. 738; Morley Sewing Mach. Co. v. Lancaster, 129 U. S. 263, 32 L. ed. 715, 9 Sup. Ct. Rep. 299; Snow v. Lake Shore & M. S. R. Co. 121 U. S. 629, 30 L. ed. 1008, 7 Sup. Ct. Rep. 1343.

The construction of the patent is governed by the claim. A claim must be construed by its terms, when they are clear, and cannot be enlarged.

Chicago & N. W. R. Co. v. Sayles, 97 U. S. 554, 24 L. ed. 1053; Lehigh Valley R. Co. v. Mellon, 104 U. S. 112, 26 L. ed. 639; Yale Lock Co. v. Greenleaf, 117 U. S. 554, 29 L. ed. 952, 6 Sup. Ct. Rep. 846.

The burden of proof is always upon the complainant, and is never shifted to establish the fact of infringement.

Seymour v. Osborne, 11 Wall. 516, 20 L. ed. 33; Fuller v. Yentzer, 94 U. S. 288, 24 L. ed. 103; Imhaeuser v. Buerk, 101 U. S. 647, 25 L. ed. 945; Agawan Woolen Co. v. Jordan, 7 Wall. 583, 19 L. ed. 177.

The rubber tire of the petitioner appellant having been rightfully made and rightfully sold in the sixth circuit, where and after the Grant patent had been declared invalid, the petitioner appellant has full right to handle, use, and sell the tire so purchased, in the second circuit.

Kessler v. Eldred, 206 U. S. 285, 51 L. ed. 1065, 27 Sup. Ct. Rep. 611; Adams v.

Burke, 17 Wall. 453, 21 L. ed. 700; Birdsell v. Shaliol, 112 U. S. 487, 28 L. ed. 769, 5 Sup. Ct. Rep. 244; Hobbie v. Jennison, 149 U. S. 355, 37 L. ed. 766, 13 Sup. Ct. Rep. 879; Wade v. Metcalf, 129 U. S. 202, 32 L. ed. 661, 9 Sup. Ct. Rep. 271; Boesch v. Graff, 133 U. S. 697, 33 L. ed. 787, 10 Sup. Ct. Rep. 378; Keeler v. Standard Folding Bed Co. 157 U. S. 659, 39 L. ed. 848, 15 Sup. Ct. Rep. 738.

Where the old art is crowded and replete with close approximations to the invention of an asserted patent, it is a saving of labor and time of court and counsel to select and compare the closest approximation to the asserted invention of the patent; for if these close approximations do not anticipate the invention, certainly none of the others do so; and if they do so anticipate, or so closely anticipate, the inventions of the patent in suit, as to its pretended novelty, it is immaterial whether the other old patents do or do not.

Topliff v. Topliff, 145 U. S. 160, 36 L. ed. 660, 12 Sup. Ct. Rep. 825.

The general use and adoption of a patented article, as affecting patentable novelty or invention, is without probative force,—especially if it is shown that large capital and extensive advertisement can account for such general use.

McClain v. Ortmayer, 141 U. S. 419, 35 L. ed. 800, 12 Sup. Ct. Rep. 76; Dueber Watch-Case Mfg. Co. v. Robbins, 21 C. C. A. 198, 43 U. S. App. 391, 75 Fed. 17; Lane v. Wells, 39 C. C. A. 528, 99 Fed. 286.

Mr. **Frederick P. Fish** argued the cause, and, with Messrs. Charles W. Stapleton and J. L. Stackpole, filed a brief for respondents:

The Grant tire is not an aggregation.

Hailes v. Van Wormer, 20 Wall. 353, 22 L. ed. 241; Reckendorfer v. Faber, 92 U. S. 347, 23 L. ed. 719; Pickering v. McCullough, 104 U. S. 310, 26 L. ed. 749.

A new combination of elements old in themselves, but which produces a new and useful result, entitles the inventor to the protection of a patent.

Webster Loom Co. v. Higgins, 105 U. S. 580, 26 L. ed. 1177; C. & A. Potts & Co. v. Creager, 155 U. S. 597, 608, 39 L. ed. 275, 279, 15 Sup. Ct. Rep. 194; Carnegie Steel Co. v. Cambria Iron Co. 185 U. S. 403, 446, 46 L. ed. 968, 989, 22 Sup. Ct. Rep. 698; Krementz v. S. Cottle Co. 148 U. S. 556, 559, 37 L. ed. 558, 559, 13 Sup. Ct. Rep. 719; Cantrell v. Wallick, 117 U. S. 689, 29 L. ed. 1017, 6 Sup. Ct. Rep. 970; Expanded Metal Co. v. Bradford, 214 U. S. 366, 381, 53 L. ed. 1034, 1039, 29 Sup. Ct. Rep. 652.

If the patentee describes his invention so fully that those skilled in the art can practice it, he is entitled to all the benefits and uses that are inherent in the patented structure.

Eames v. Andrews, 122 U. S. 40, 55, 30 L. ed. 1064, 1069, 7 Sup. Ct. Rep. 1073; Dixon-Woods Co. v. Pfeifer, 5 C. C. A. 148, 14 U. S. App. 245, 55 Fed. 395; Cleveland Foundry Co. v. Detroit Vapor Stove Co. 68 C. C. A. 233, 131 Fed. 855; Van Epps v. United Box Board & Paper Co. 75 C. C. A. 77, 143 Fed. 872; Westmoreland Specialty Co. v. Hogan, 93 C. C. A. 31, 167 Fed. 328.

Mr. Justice **McKenna** delivered the opinion of the court:

Writ of certiorari to review a decree of the circuit court of appeals of the second circuit, sustaining a patent for an improvement in rubber tires, issued to Arthur W. Grant, February 18, 1896. The patent, and those which it is contended anticipate it, have received full exposition in the opinion of that court. 85 C. C. A. 349, 157 Fed. 677, and 89 C. C. A. 582, 162 Fed. 892, affirming 147 Fed. 739. It and they were also passed upon and the patent sustained in Rubber Tire Wheel Co. v. Columbia Pneumatic Wagon Wheel Co. 91 Fed. 978, and in Consolidated Rubber Tire Co. v. Finley Rubber Tire Co. 116 Fed. 629; Consolidated Rubber Tire Co. v. Firestone Tire & Rubber Co. 80 C. C. A. 589, 151 Fed. 237. See also Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. 142 Fed. 531, 533, and the same case, 83 C. C. A. 336, 154 Fed. 358, 362. It was held invalid in Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co. (C. C. App. 6th C.) 53 C. C. A. 583, 116 Fed. 363, reversing the circuit court, Judge Wing presiding. It was also declared invalid in Rubber-Tire Wheel Co. v. Victor Rubber-Tire Co. 59 C. C. A. 215, 123 Fed. 85, following 116 Fed. 363, supra.

*A further display of the patent and [430 of its alleged anticipating devices would seem to be unnecessary, and that we might immediately take up a review of the divergent decisions. There is controversy as to whether they are divergent and irreconcilable in fundamental conceptions of the patent as well as in result.

We may say at the outset of this asserted conflict between the cases that the court of appeals of the second circuit considered that there was no antagonism between its decision and that of the court of appeals of the sixth circuit. It proceeded, as it in effect said, upon "new facts and features which have been added to or developed from the records in the earlier cases." However, something more is required of us than the reconcilation of other cases,—

some consideration of the patent and the state of the art prior to it.

The patent was issued to Arthur W. Grant, February 18, 1896, and he declares in the specification he has invented "certain new and useful improvements in rubber tire wheels . . . designed for use on ordinary vehicles, such as wagons, buggies, and carriages, . . . and consist in the construction of parts hereinafter described and set forth in the claim." The claims are as follows:

"1. A vehicle wheel having a metallic rim with angularly propelling flanges to form a channel or groove with tapered or inclined sides, a rubber tire, the inner portion of which is adapted to fit in said groove or channel, and the outer portion having sides at an angle to the inner portion, the angle or corner between the outer and inner portions being located within the outer periphery of the flanges, and independent retaining wires passing entirely through the inner portions of said tire and also within the outer peripheries of the flanges, substantially as described.

"2. A vehicle wheel having a metallic rim with outwardly projecting flanges at an 431]angle to the plane of said *wheel, so as to form a channel or groove having tapered or inclined sides, a rubber tire, the inner portion of which is adapted to fit in said tapered groove or channel, and the outer or exposed portions formed at an angle thereto, the angle or corner between the said portions being placed within the outer periphery of said flanges, openings extending entirely through the unexposed portion of said tire, and independent retaining wires in said openings, and a reinforcing strip of fibrous material placed at the bottom of said tire and wholly within said flanges, substantially as specified."

It will be observed that the tire is composed of three elements: First, the channel or groove with tapered or inclined sides; second, the rubber tire adapted to fit into the channel or groove, and shaped as described; third, the fastening device; that is, the independent retaining wires located as indicated.

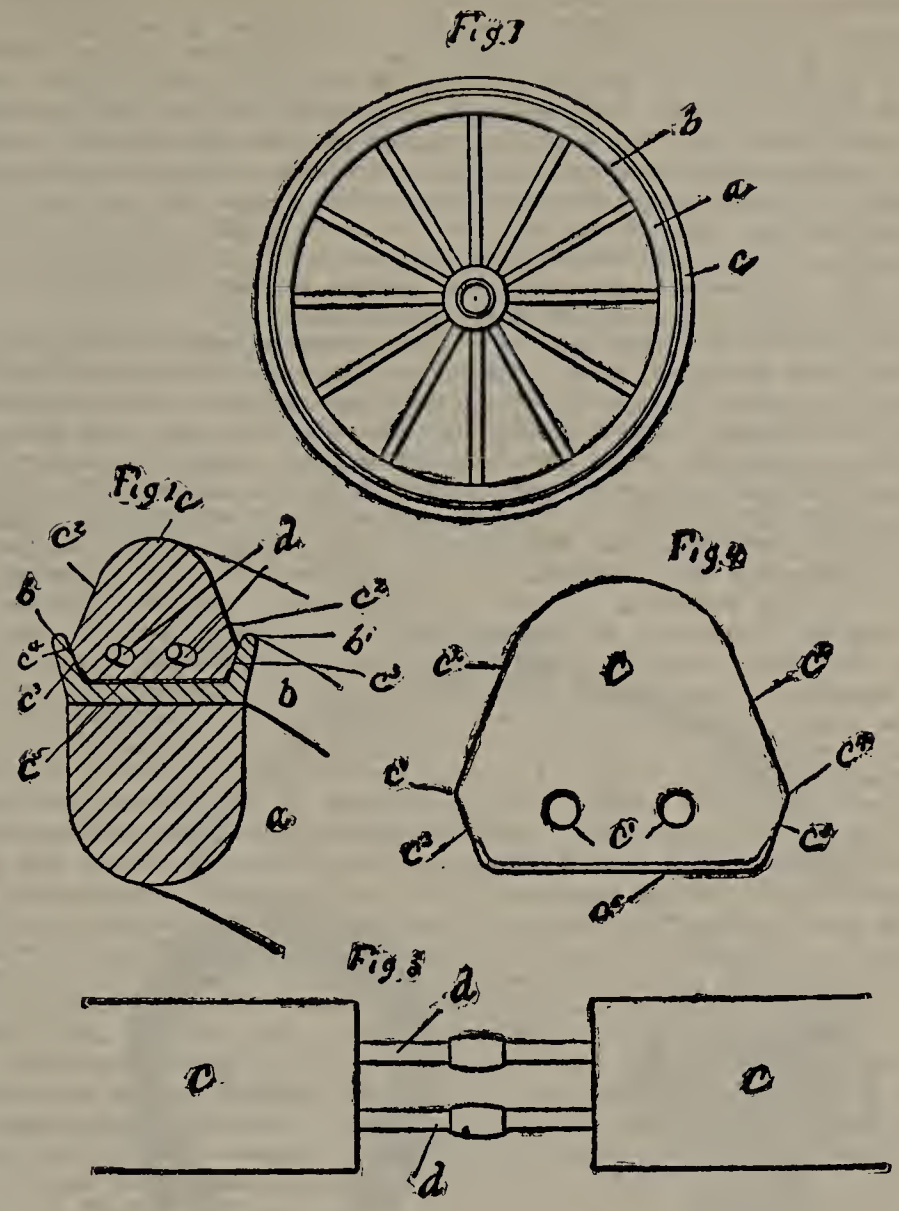
The shape and relation of the parts are illustrated in the following figures taken from the patent: [See opposite page.]

These figures explain themselves, but we copy the following from the specifications:

"In the accompanying drawings, Fig. 1 is a side elevation of a wheel embodying my invention. Fig. 2 is a sectional elevation of the wheel rim, shown partly in perspective. Fig. 3 is a partial longitudinal section through the tire, showing the open-433]ings for the retaining wires. *Fig. 4 is a transverse sectional view of the rubber tire in detail."

It is conceded that the claims are narrow, counsel saying that they are "limited closely to the specific construction of the Grant tire as it is actually shown and described in the patent." And a right to equivalents is disclaimed. Indeed, a certain merit is made of this as exhibiting at once the simplicity and perfection of the invention and the tribute paid to its excellence by respondent by exactly imitating it, instead of attempting to evade it. It is pointed out that the coaction of the parts is so dependent upon their shape and relation that any alteration destroys their cooperation and the utility of the tire. There is strength in the contention, as we shall presently see.

Anticipating somewhat, we may say that the tire has utility is not disputed; to what its utility is to be attributed is in controversy. The respondents the tire company contend that the tire is at once firm and mobile in its channel, "creeps" (moves slowly around the edge of the rim), and will yield laterally, and thus the lateral blows against it will be cushioned. It is further contended that if the tire be "tipped from its seat in the channel by a side blow" it "automatically restores itself to normal position when the side pressure is released." In other words, and in the language of one of the expert witnesses, the tire has the capacity to rise and fall and recat itself under lateral strain; that is, to rise slightly from the rim on one side, independently of the other, when subjected to very great strain, and immediately reseat itself when such strain is removed. "It must be borne in mind," counsel say, "that the Grant tire is not cemented into the channel. This is an essential and important point. Any tire that is cemented in its channel is rigid and cannot 'creep' or yield to lateral blows. It is therefore easily and quickly destroyed. The absence of cement in the Grant tire is a vital characteristic." And, further, that Grant, *"by omitting the ce-[434 ment, and by permitting the tire to tip, to creep, and to move in its channel, obtained a radically new and useful result." And it is insisted that this results because the tire is a new and patentable combination of parts, coacting in the manner of a true combination to produce a new and useful result, and is not an aggregation of old elements or parts, each performing its own function and nothing more. These propositions are combated by the rubber company, and it is insisted that the testimony is "conclusive and uncontradicted that the Grant tire, clamped to the tire or rim by the straining tension of the two



wires," has not the capacity attributed to it, "and never could have." And it is said that "it is manifest that this question can be easily determined as a question of fact," and that the testimony "proves such asserted movement a myth and a fallacy." And it is urged that such capacity in the tire is not recited in the specifications of the patent, and was unknown to Grant.

This tipping capacity is made the pivot of the controversy. It was as to that that the courts of appeals of the sixth and second circuits disagreed either upon the difference of the testimony in the cases, or more deeply, on principle. The controversy and Grant's alleged ignorance of the tipping characteristic of the tire really present some anomaly. The tire has utility, a utility that has secured an almost universal acceptance and employment of it, as will subsequently appear. It was certainly not an exact repetition of the prior art. It attained an end not attained by anything in the prior art, and has been accepted as the termination of the struggle for a completely successful tire. It possesses such amount of change from the prior art as to have received the approval of the Patent Office, and is entitled to the presumption of invention which attaches to a patent. Its simplicity should not blind us as to its character. Many things, *and[435 the patent law abounds in illustrations, seem obvious after they have been done, and, "in the light of the accomplished result," it is often a matter of wonder how they so long "eluded the search of the discoverer and set at defiance the speculations of inventive genius." Pearl v. Ocean Mills, 2 Bann. & Ard. 469, Fed. Cas. No.

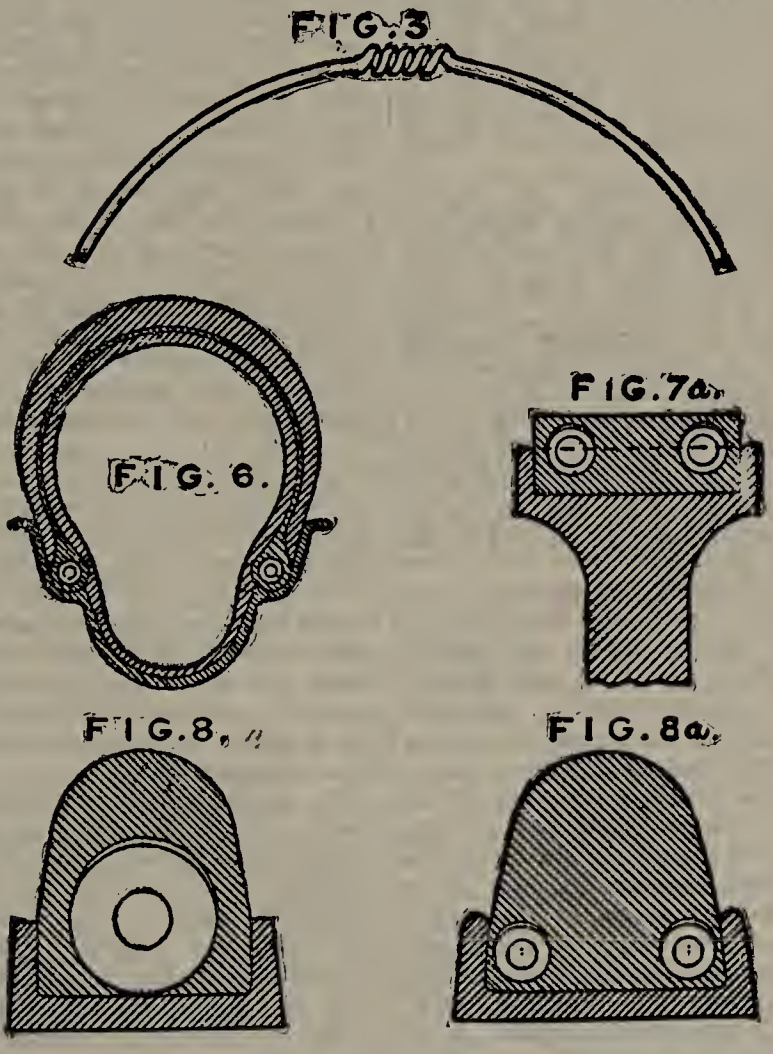
10,876, 11 Off. Gaz. 2. Knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skilful attention. But the law has other tests of the invention than subtle conjectures of what might have been seen and yet was not. It regards a change as evidence of novelty, the acceptance and utility of change as a further evidence, even as demonstration. And it recognizes degrees of change, dividing inventions into primary and secondary, and as they are, one or the other, gives a proportionate dominion to its patent grant. In other words, the invention may be broadly new, subjecting all that comes after it to tribute (Chicago & N. W. R. Co. v. Sayles, 97 U. S. 554, 556, 24 L. ed. 1053, 1054); it may be the successor, in a sense, of all that went before, a step only in the march of improvement, and limited, therefore, to its precise form and elements, as the patent in suit is conceded to be. In its narrow and humble form it may not excite our wonder as may the broader or pretentious form, but it has as firm a right to protection. Nor does it detract from its merit that it is the result of experiment and not the instant and perfect product of inventive power. A patentee may be baldly empirical, seeing nothing beyond his experiments and the result; yet if he has added a new and valuable article to the world's utilities, he is entitled to the rank and protection of an inventor. And how can it take from his merit that he may not know all of the forces which he has brought into 436]operation? It is certainly *not necessary that he understand or be able to state the scientific principles underlying his invention, and it is immaterial whether he can stand a successful examination as to the speculative ideas involved. Andrews v. Cross, 19 Blatchf. 294, 8 Fed. 269; Eames v. Andrews, 122 U. S. 40, 55, 30 L. ed. 1064, 1069, 7 Sup. Ct. Rep. 1073; St. Louis Stamping Co. v. Quinby, 4 Ban. & Ard. 192, Fed. Cas. No. 12,240, 16 Off. Gaz. 135; Pfeifer v. Dixon-Woods Co. 5 C. C. A. 148, 14 U. S. App. 245, 55 Fed. 390; Cleveland Foundry Co. v. Detroit Vapor Stove Co. (C. C. A. 6th C.) 68 C. C. A. 233, 131 Fed. 853; Van Epps v. United Box Board & Paper Co. (C. C. A. 2d C.) 75 C. C. A. 77, 143 Fed. 869; Westmoreland Specialty Co. v. Hogan (C. C. A. 3d C.) 93 C. C. A. 31, 167 Fed. 327. He must, indeed, make such disclosure and description of his invention that it may be put into practice. In this he must be clear. He must not put forth a puzzle for invention or experiment to solve, but the description is sufficient if those skilled in the art can understand it. This satisfies the law, which only requires as a condition of its protection that the world be given something new and that the world be taught how to use it. It is no concern of the world whether the principle upon which the new construction acts be obvious or obscure, so that it inheres in the new construction.

This discussion may be broader than the contention of the rubber company requires; indeed, may imply a misunderstanding of it. The contention may only mean that Grant did not discern the manner of the operation of the elements which he combined, and therefore did not really invent anything, only assembled old elements, changing their relations somewhat, and retaining their essential character and effect. We should be slow to infer such ignorance. It is difficult to suppose that the contriver of a successful device did not understand how it operated; that he saw nothing in it, and committed it to the world without seeing anything in it but a composition of wood, rubber, and iron in certain relations, without understanding or attempting to discover the law and principle of its organization *and efficiency.[437 Grant's situation demanded caution and knowledge. He was confronted by what has been termed a "crowded" prior art; he might expect to encounter litigation, and, even before litigation, he would have to satisfy the Patent Office of the novelty and utility of his device, and it is hard to believe that he did not know the co-operating law of the elements which he had combined, and only unconsciously made use of it. We find the contention difficult to handle. When a person produces a useful instrument, to say that he did not know what he was about is at least confusing. To take from him the advantage of it upon nice speculation as to whether it was an ignorant guess or confident knowledge and adaptation might do him great injustice. His success is his title to consideration.

In our decision thus far we have assumed that the Grant tire is an invention; but as that is disputed, we must examine its right to such distinction. The rubber company denies invention to it, and, considering that its pretension to such quality depends upon the possession of tipping power (including in this reseating power), contests the existence of such power; and, even granting its existence, it is yet contended that anticipation may be demonstrated. In other words, it is insisted that if tipping

power exist in the Grant patent, it existed in prior patents, and that "the old art was crowded with numerous prototypes and predecessors of this Grant tire, with every thought and suggestion of novelty and utility that can be found in drawings and specifications of the Grant patent, or in the idealized contentions as to the patent by the visions and dreams of the experts and counsel for the patent."

Two patents are selected to sustain the contention, out of what are said to be a large number of United States and foreign patents, with the comment that "if they do not show anticipation, none of the others will show it, and if they do anticipate the Grant patent, it is entirely immaterial 438]*whether the others do or not." They are both English patents issued to Frank Stanley Willoughby. We copy from the rubber company's brief the figures of the patent 5,924.



The following is the explanation given by counsel of the figures:

"The drawings of the Willoughby patent of March 26, 1892, No. 5,924, as to the flanged channel, show the flanges in three different positions as to the solid rubber tire. Fig. 8 *shows the flange at right[439 angles of the rim; Fig. 8a shows the flanges somewhat inwardly inclined with the two retaining wires, and Fig. 7a shows the flanges vertical with two retaining wires, the retaining wires in Fig. 8a being below the outer periphery of the flanges, and the two retaining wires of Fig. 7a being centrally located, as to their openings, with the periphery of the flanges. In Fig. 6, however, which is a pneumatic tire (a tire when highly inflated is as solid as a rubber tire), the flanges are outwardly flaring, and the two retaining wires are substantially below the periphery of the flanges."

There are resemblances and differences in the figures to those of the Grant patent, and we have let the rubber company set forth the resemblances. The differences are substantial. To represent them we cannot do better than to quote the description given of them by Judge Thomas (91 Fed. 988), as follows:

"The Willoughby patent, No. 5,924, Fig.

8ª, shows in combination wire connections, also described in the specification, very similar, save in location, to those used by Grant, and the figure shows also a very slight angle located slightly within the flanges. The rim, however, is of the clinger variety; that is, the flanges incline inwardly, and bind the rubber on each side. Such a tire thwarts the lateral play otherwise permitted to the rubber by the wires, and, although almost imperceptible angles appear, made by the sides of the rubber, they are not sufficient to give the immunity resulting from a well-defined angle whose vertex is within the flaring rim. Figures 5ª and 5ᶜ show rims shaped like the segment of a circle, in which are seated spherical rubbers held in place by a single wire. The rim is described in the specifications as U or V-shaped. A V-shaped rim must have flaring flanges, but the rim is quite unlike that employed by Grant, and in the entire absence of the angle the functions attributed to the Grant tire seem to be absent. Indeed, the freedom of action permitted by the wire in the rim used by Grant 440]seems to *be denied the tire, for the reason that the rubber is confined by the V-shaped channel.

"The Willoughby patent, No. 18,030, shows wire connection, flaring flanges, and angle (see Figs. 26, 30, 31), and in mere coincidence of parts seems to be the nearest approach to the Grant tire. But look at these figures, and all possible conception of coincidence of function is dissipated at once. There is the flaring rim, in which is seated a rubber upon which is placed a steel outer tire, through which pass the openings and wires. The angle is far without the upper edges of the rim, and it appears that neither function ascribed to the Grant tire is obtained."

Willoughby patent No. 18,030, has no relevancy whatever. It is true it has flanges upon the rim, flaring and at right angles, and it is illustrated by figures showing what may be called retaining wires, to quote from the brief of counsel, "above the periphery of the flanges, another substantially on a line with the periphery of the flanges, and three of the figures showing the retaining wires substantially below the periphery of the respective flanges." It is manifest that the relation of the retaining wires to the periphery of the flanges is absolutely unimportant in the tire. Willoughby, describing his invention, says: "The object of my present invention is, as in my previous one, to provide a metallic outer tire or armor to rubber which is of itself flexible." The retaining wires hold the metallic exterior to the rubber bed.

The utility of the Grant patent, therefore, was not attained in the Willoughby patent. The rubber company's conduct is confirmation of this. It uses the Grant tire, as we shall presently see, not the Willoughby tires. Let it be granted that they afforded suggestions to Grant, and that he has gone but one step beyond them. It is conceded, as we have said, that his invention is a narrow one,—a step beyond the prior art,—built upon it, it may *be,[441 and only an improvement upon it. Its legal evasion may be the easier (Chicago & N. W. R. Co. v. Sayles, 97 U. S. 554, 556, 24 L. ed. 1053, 1054), and hence we see the strength of the concession to its advance beyond the prior art and of its novelty and utility by the rubber company's imitation of it. The prior art was open to the rubber company. That "art was crowded," it says, "with numerous prototypes and predecessors" of the Grant tire, and they, it is insisted, possessed all of the qualities which the dreams of experts attributed to the Grant tire. And yet the rubber company uses the Grant tire. It gives the tribute of its praise to the prior art; it gives the Grant tire the tribute of its imitation, as others have done. And yet the narrowness of the claims seemed to make legal evasion easy. Why, then, was there not evasion by a variation of the details of the patented arrangement? Business interests urged to it as much as to infringement. We can find no answer except that given by the tire company: "The patented organization must be one that is essential. Its use in the precise form described and shown in the patent must be inevitably necessary."

That the tire is an invention is fortified by all of the presumptions,—the presumption of the patent by that arising from the utility of the tire. And we have said that the utility of a device may be attested by the litigation over it, as litigation "shows and measures the existence of the public demand for its use." Eames v. Andrews, 122 U. S. 40, 55, 30 L. ed. 1064, 1069, 7 Sup. Ct. Rep. 1073. We have shown the litigation to which the grant tire has been subjected.

We have taken for granted in our discussion that the Grant tire immediately established and has ever since maintained its supremacy over all other rubber tires, and has been commercially successful while they have been failures. The assumption is justified by the concession of counsel. They do not deny the fact, but attribute it to "three subsequent discoveries and conditions" since the *Grant patent, these[442 being—(1) "that the tire can be held in place and fixed upon its base by straining the wires to a clamping point; (2) the production, by mechanical means, cheaply

and expeditiously as a commercial product, of the channel rim in straight lengths, to be applied to the wheel; and (3) the improvement of the rubber itself; the demand of the public for a solid rubber tire, and the wealth of the complainant, advertising in the market, and pushing and exploiting the tire."

The first ground is a somewhat distant assertion that the tire does not involve invention, but as to that we have sufficiently expressed opinion. The second ground is an inversion of cause and effect, and there is an obvious answer to the third ground. Without suitable rubber, there could have been no rubber tires, and the desire for them necessarily induced their manufacture, and Grant exercised invention to produce an efficient one. We can understand that some advertising was necessary to bring it into notice, and give it a certain use, but the extensive use which it attained, and more certainly the exclusive use which it attained, could only have been the result of its essential excellence, indeed, its pronounced superiority over all other forms. Here, again, in our discussion, a comparison is suggested between it and other tires, and the inquiry occurs why capital has selected it to invest in and advertise, and not one of the tires of the prior art, if it be not better than they? But the effect of advertising is mere speculation; to the utility and use of an article the law assigns a definite presumption of its character, as we have seen, and which we are impelled by the facts of this record to follow.

To what quality the utility of the tire may be due will bear further consideration, if for no other reason than the earnest contentions of counsel. Aside from those contentions and the ability by which they are supported, we might point to what it does as [443] a demonstration of its difference *from all that preceded it, that there is something in it, attribute or force, which did not exist before,—something which is the law of its organization and function, and raises it above a mere aggregation of elements to a patentable combination. And we may say, in passing, the elements of a combination may be all old. In making a combination the inventor has the whole field of mechanics to draw from. Leeds & C. Co. v. Victor Talking Mach. Co. 213 U. S. at page 318, 53 L. ed. 812, 29 Sup. Ct. Rep. 495.

The tire company gives a definition of the "something" as tipping and reseating power. The rubber company earnestly denies the existence of the power, and, as we have seen, the courts of appeals of the sixth and second circuits divided in opinion on its existence. We think such power is possessed by the tire. This is shown by the evidence, and was shown at the oral argument. And it is the result of something more than each element acting separately. It is not the result alone of the iron channel with diverging sides, nor alone of the retaining bands or the rubber. They each have uses and perform them to an end different from the effect of either, and they must have been designed to such end,—contrived to exactly produce it. There can be no other deduction from their careful relation. The adaptation of the rubber to the flaring channel, the shape of that permitting lateral movement and compression, the retaining band, holding and yielding, placed in such precise adjustment and correlation with the other parts, producing a tire that "when compressed and bent sidewise shall not escape from the channel, and shall not be cut on the flange of the channel," and yet shall "be mobile in the channel." We agree with the court of appeals that "this was not the result of chance or the haphazard selection of parts; his [Grant's] success could only have been achieved by a careful study of the scientific and mechanical problems necessary to overcome the defects which rendered the then-existing tires *ineffect-[444] ive and useless." [80 C. C. A. 590, 151 Fed. 238.] This conclusion is not shaken by the testimony and argument urged against it.

The contention of noninfringement is very hesitatingly advanced, — suggested rather than urged. It is conceded that infringement existed in the prior litigations, but it is said that if, under the closer analysis of the Grant patent "as here presented, and as considered as contended for, if to be confined to exact angles and relations of angles and precise configuration of parts,"—the rubber company's device does not infringe. And this is attempted to be supported by the testimony of a witness who found, he said, in the rubber company's tire, "the three fundamental mechanical elements" of the Grant patent in suit, which, he interjected, were borrowed by Grant, "both individually and in combination, from the prior art long antedating his alleged invention," and then proceeded to declare a difference between the "angles and relations of angles and precise configuration of parts," to use counsel's language, of the two tires, and briefly summarizing his conclusion, said that he did not "find the alleged invention, combinations, and devices of either of the claims of the Grant patent in suit embodied in or contained in either of

the exhibits introduced in evidence professing to represent the defendant's tire." We are unable to concur in the conclusion. The exhibits demonstrate the contrary. And we are fortified in this by the conduct of the rubber company in the circuit court. The defense of nonfringement was not there seriously urged. After considering to what extent the case, as presented, differed from the prior litigation, Judge Holt said: "Of course, if your defense was that this defendant does not infringe, that would be an entirely different question; but the only question argued here is as to the validity of the patent." In the opinion of the court of appeals, noninfringement received no attention; presumably because that defense was not pressed upon it.

445] *The final contention of the rubber company is that, the Grant patent having been declared invalid by the circuit court of appeals of the sixth circuit and by the circuit court for the district of Indiana in the seventh circuit, the rubber company should not have been enjoined from the handling or sale of tires manufactured in the sixth and seventh circuits, and cites Kessler v. Eldred, 206 U. S. 285, 51 L. ed. 1065, 27 Sup. Ct. Rep. 611.

The court of appeals practically reserved the question. It modified the decree of the circuit court so far as it prevented the handling, using, or selling tires and rims authorized by any judicial decree, recognizing, as it said, the applicability of Kessler v. Eldred. But it is further said:

"Whether it should be given a broader interpretation is a question upon which we express no opinion, deeming it more prudent to wait until the facts are fully developed.

"There is no occasion for attempting at this time to anticipate the future, and to provide for a contingency which may not arise. . . . To provide in a decree that the defendant is not enjoined from making, using, and selling devices which do not infringe, or which have been licensed, seems unnecessary. The doctrine of Eldred and Kessler, if carried to the extent contended for by the defendant, will introduce radical and far-reaching limitations upon the rights of patentees. These questions may not arise in the case at bar, but if they should, the court should have the facts, and all the facts, before attempting to decide them." [89 C. C. A. 584, 162 Fed. 894.]

We concur in these remarks.

Decree affirmed.

Mr. Justice Day and Mr. Justice Lurton took no part in the decision.

*STANDARD PAINT COMPANY, [446
Appt.,
v.
TRINIDAD ASPHALT MANUFACTURING COMPANY.

(See S. C. Reporter's ed. 446–462.)

Trademark — descriptive word — "Ruberoid."

1. The word "Ruberoid" is not the subject of exclusive appropriation as a trademark for a flexible waterproof roofing, since, even though the roofing contains no rubber, the word is descriptive, and not indicative of origin or ownership.

[For other cases, see Trademark, 29–39, in Digest Sup. Ct. 1908.]

Appeal — from circuit court of appeals — scope of review.

2. The issue of unfair competition must be regarded as open for consideration by the Federal Supreme Court, on an appeal from the circuit court of appeals, where there was both diversity of citizenship and the assertion of a valid trademark to give jurisdiction to the circuit court, in view of the statutory provision making the judgments of circuit courts of appeals final only where the jurisdiction below depended entirely upon diversity of citizenship, or where the case arose under the patent, revenue, criminal, or admiralty laws.

[Appellate jurisdiction over circuit court of appeals, see Appeal and Error, III. d, 2, in Digest Sup. Ct. 1908.]

Unfair competition — use of descriptive word.

3. A manufacturer of roofing under the name of "Ruberoid" does not make out a case of unfair competition against another manufacturer of roofing using the word "Rubbero" to designate its product, where the only imitation by the latter of the former's goods lies in the similarity of names, since to grant equitable relief in such case would be to give the full effect of a trademark to a word which cannot be appropriated as such.

[For other cases, see Unfair Competition, in Digest Sup. Ct. 1908.]

[No. 106.]

Argued and submitted March 16, 1911.
Decided April 10, 1911.

Note.—On descriptive words as trademarks—see notes to Lawrence Mfg. Co. v. Tennessee Mfg. Co. 34 L. ed. U. S. 997; Coates v. Merrick Thread Co. 37 L. ed. U. S. 847; Dr. S. A. Richmond Nervine Co. v. Richmond, 40 L. ed. U. S. 155; and Searle & H. Co. v. Warner, 50 C. C. A. 323.

On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

On unfair competition in trade—see notes to Lare v. Harper, 30 C. C. A. 376, and Scheuer v. Muller, 20 C. C. A. 165.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which reversed a decree of the Circuit Court for the Eastern District of Missouri, in favor of complainant in a suit to enjoin the infringement of a trademark and to restrain unfair competition, and remanded the cause, with directions to dismiss the bill. Affirmed.

See same case below, 90 C. C. A. 195, 163 Fed. 977.

The facts are stated in the opinion.

Mr. **John F. Green** argued the cause, and, with Mr. Frederick N. Judson, filed a brief for appellant:

Under the Federal statutes in force when complainant's trademark was registered and when this action was instituted, this court, upon this appeal, has jurisdiction of the entire case, and should decide all the questions arising upon the record, because the bill of complaint presents a claim arising under a Federal statute, in addition to alleging the diverse citizenship of the litigants.

Henningsen v. United States Fidelity & G. Co. 208 U. S. 404, 52 L. ed. 547, 28 Sup. Ct. Rep. 389; Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365; Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; Northern P. R. Co. v. Amato, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740; Warner v. Searle & H. Co. 191 U. S. 195, 48 L. ed. 145, 24 Sup. Ct. Rep. 79; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270.

The jurisdiction of this court, on this appeal, extends not merely to the determination of the question of a valid trademark in the word "Ruberoid," but it extends also to the determination of the question whether complainant is not entitled to relief on the distinct ground of unfair trade and competition, irrespective of any question of a valid trademark registered under the Federal statutes. Therefore, even if this court should hold that complainant has no valid trademark in the work "Ruberoid," it must also determine whether complainant is not entitled to the relief prayed for upon the ground of unfair trade.

Holder v. Aultman, M. & Co. 169 U. S. 81, 42 L. ed. 669, 18 Sup. Ct. Rep. 269; Henningsen v. United States Fidelity & G. Co. 208 U. S. 404, 52 L. ed. 547, 28 Sup. Ct. Rep. 389; Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365; Penn. Mut. L. Ins. Co. v. Austin, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; Northern P. R. Co. v. Amato, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740; Warner v. Searle & H. Co. 191 U. S. 195, 48 L. ed. 145, 24 Sup. Ct. Rep. 79; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270.

The word "Rubcroid," as used by complainant to designate its roofing product, is a valid and proper trademark and tradename.

Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143; Keasbey v. Brooklyn Chemical Works, 142 N. Y. 467, 40 Am. St. Rep. 623, 37 N. E. 476; Eastman Photographic Materials Co. v. Comptroller General [1898] A. C. 571, 15 Rep. Pat. Cas. 476, 67 L. J. Ch. N. S. 628, 79 L. T. N. S. 195, 14 Times L. R. 527, 47 Week. Rep. 152, 25 Eng. Rul. Cas. 240. ("Solio" case).

The word "Ruberoid" is not descriptive of any qualities or properties of complainant's roofing, or of any materials used in its manufacture. Within the meaning of the law it is an arbitrary or a fanciful term.

Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143; Saxlehner v. Eisner & M. Co. 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7; Wellcome v. Thompson [1904] 1 Ch. 744, 73 L. J. Ch. N. S. 474, 32 Week. Rep. 581, 91 L. T. N. S. 58, 20 Times L. R. 415, 21 Rep. Pat. Cas. 217; Reddaway v. Banham [1896] A. C. 199, 13 Rep. Pat. Cas. 218, 65 L. J. Q. B. N. S. 381, 44 Week. Rep. 638, 74 L. T. N. S. 289, 25 Eng. Rul. Cas. 193.

The word "Ruberoid" is suggestive merely, and not descriptive, as those terms have been defined in the law of trademarks. If we assume that it is derived from the word "rubber," as held in the majority opinion of the circuit court of appeals, and that, with the suffix "oid" added thereto, it means "like rubber," still, this derivation and meaning would not render it so descriptive as to be incapable of appropriation as a tradename, because there is in fact no rubber used in its composition, and its only resemblance to rubber is in respect of its flexibility and its being waterproof. It has not any of the most distinctive properties of rubber, such as elasticity or resiliency. Therefore it is suggestive, and not descriptive, in any view which may be taken of its origin and derivation.

Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143; Keasbey v. Brooklyn Chemical Works, 142 N. Y. 467, 40 Am. St. Rep. 623, 37 N. E. 476; Wellcome v. Thompson [1904] 1 Ch. 744, 73 L. J. Ch. N. S. 474, 32 Week. Rep. 581, 91 L. T. N. S. 58, 20 Times L. R. 415,

21 Rep. Pat. Cas. 217. See also "Pepto-Mangan" case (M. J. Breitenbach Co. v. Spangenberg, 131 Fed. 160); "Elastic" book case (Globe-Wernicke Co. v. Brown, 121 Fed. 185); "Eureka" rubber case (Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. 69 N. J. Eq. 159, 60 Atl. 561); "Club whisky case (Heublein v. Adams, 125 Fed. 782); "Uneeda" biscuit case (National Biscuit Co. v. Baker, 95 Fed. 135); "Anti-Washboard" soap case (O'Rourke v. Central City Soap Co. 26 Fed. 576); "Swan-Down" complexion powder case (Tetlow v. Tappan, 85 Fed. 774); beef extract case (Re Bovril [1896] 2 Ch. 600, 65 L. J. Ch. N. S. 715, 74 L. T. N. S. 805, 45 Week. Rep. 150); "Camel's Hair" belting case (Reddaway v. Banham [1896] A. C. 199, 13 Rep. Pat. Cas. 218, 65 L. J. Q. B. N. S. 381, 44 Week. Rep. 638, 74 L. T. N. S. 289, 25 Eng. Rul. Cas. 193).

The following is a list of some additional words which have been held to be valid trademarks, and also held to have been infringed by the use of certain similar words.

"Cottolene" held to be infringed by "Cottoleo."

N. K. Fairbank Co. v. Central Lard Co. 64 Fed. 133.

"German" by "Germania."

Walter Baker & Co. v. Baker, 77 Fed. 181.

"Gold Dust" by "Gold Drop."

N. K. Fairbank Co. v. Luckel, K. & C. Soap Co. 42 C. C. A. 376, 102 Fed. 327.

"Momaja" by "Mojava."

American Grocery Co. v. Sloan, 68 Fed. 539.

"Moxie Nerve Food" by "Standard Nerve Food."

Moxie Nerve Food Co. v. Baumbach, 32 Fed. 205.

"Stark" by "Star."

Gardner v. Bailey, Fed. Cas. No. 5,221.

"Uneeda" by "Iwanta."

National Biscuit Co. v. Baker, 95 Fed. 135.

But, wholly irrespective of the question of complainant's right to appropriate this word as a tradename in the first instance, it is entitled to the relief prayed for, on the distinct ground of unfair trade and competition.

Coats v. Merrick Thread Co. 149 U. S. 562, 37 L. ed. 847, 13 Sup. Ct. Rep. 966; Florence Mfg. Co. v. Dowd, 101 C. C. A. 565, 178 Fed. 73; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270; Wolf Bros. v. Hamilton-Brown Shoe Co. 91 C. C. A. 363, 165 Fed. 413; Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 34 L. ed. 997, 11 Sup. Ct. Rep. 396; Cleveland Stone Co. v. Wallace, 52 Fed. 431; Pillsbury-Washburn Flour Mills Co. v. Eagle, 41 L.R.A. 162, 30 C. C. A. 386, 58 U. S. App. 490, 86 Fed. 608.

The evidence clearly indicates that defendant adopted and has used the word "Rubbero," only because of its similarity to the word "Ruberoid," in order to enable it to obtain the benefit of the advertising done by complainant in its territory, and to sell its product to purchasers under the belief on their part that they are purchasing the product of complainant. Such conduct is unfair and fraudulent, and should be enjoined.

Bates Mfg. Co. v. Bates Numbering Mach. Co. 172 Fed. 892; American Lead Pencil Co. v. Gottlieb, 181 Fed. 178.

Even if the evidence did not indicate such fraudulent purpose on the part of the defendant in adopting the tradename of "Rubbero," complainant would still be entitled to the relief prayed for, irrespective of any fraudulent intention on the part of the defendant, because there is sufficient similarity between the words "Ruberoid" and "Rubbero" to mislead the ordinary purchaser.

Saxlehner v. Eisner & M. Co. 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7; Saxlehner v. Siegel-Cooper Co. 179 U. S. 42, 45 L. ed. 77, 21 Sup. Ct. Rep. 16; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270; Reddaway v. Benthan, 9 Rep. Pat. Cas. 503; Eagle White Lead Co. v. Pflugh, 180 Fed. 579.

The word "Ruberoid" has been so long used, and so exclusively appropriated, by complainant as a name for its roofing material, that it had come to signify to the roofing trade the product of complainant exclusively; that is, the word "Ruberoid" had acquired a "secondary" meaning, and therefore, on this ground also, complainant was entitled to the relief prayed for.

Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270; Lowe Bros. Co. v. Toledo Varnish Co. 94 C. C. A. 83, 168 Fed. 627; American Lead Pencil Co. v. Gottlieb, 181 Fed. 178; R. Guastavino Co. v. Comerma, 180 Fed. 920.

Mr. **W. B. Homer** submitted the cause for appellee. Mr. R. M. Homer was on the brief:

The decision of the circuit court of appeals in this cause was final, and this court will not take jurisdiction thereof.

Warner v. Searle & H. Co. 191 U. S. 195, 206, 48 L. ed. 145, 148, 24 Sup. Ct. Rep. 79; Ryder v. Holt, 128 U. S. 525, 32 L. ed. 529, 9 Sup. Ct. Rep. 145; A. Leschen & Sons Rope Co. v. Broderick & B. Rope

Co. 201 U. S. 167, 50 L. ed. 710, 26 Sup. Ct. Rep. 425; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270; Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550; Allen B. Wrisley Co. v. George E. Rouse Soap Co. 32 C. C. A. 496, 62 U. S. App. 240, 90 Fed. 5; Illinois Watch Case Co. v. Elgin Nat. Watch Co. 35 C. C. A. 237, 94 Fed. 671.

The complainant's trademark is descriptive of the article upon which it is used, of its qualities, ingredients, and characteristics, and is therefore void.

Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 323, 20 L. ed. 581, 583; Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166; Brown Chemical Co. v. Meyer, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625; Raggett v. Findlater, L. R. 17 Eq. 29, 43 L. J. Ch. N. S. 64, 29 L. T. N. S. 448, 22 Week. Rep. 53; Bickmore Gall Cure Co. v. Karns, 67 C. C. A. 439, 134 Fed. 833; Marvel Co. v. Pearl, 66 C. C. A. 226, 133 Fed. 160; Computing Scale Co. v. Standard Computing Scale Co. 55 C. C. A. 459, 118 Fed. 965; Brennan v. Emery-Bird-Thayer Dry Goods Co. 47 C. C. A. 532, 108 Fed. 624, 99 Fed. 971; American Washboard Co. v. Saginaw Mfg. Co. 50 L.R.A. 609, 43 C. C. 233, 103 Fed. 281; Bennett v. McKinley, 13 C. C. A. 25, 26 U. S. App. 496, 65 Fed. 505; Brown Chemical Co. v. Myer, 31 Fed. 453, affirmed in 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625; Rumford Chemical Works v. Muth, 1 L.R.A. 44, 35 Fed. 524; Indurated Fibre Co. v. Amoskeag Indurated Fibre Ware Co. 37 Fed. 695; L. H. Harris Drug Co. v. Stucky, 46 Fed. 624; Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co. 65 Fed. 424; Leonard v. Wells, 53 L. J. Ch. N. S. 233, 32 Week. Rep. 532; Re Roach 10 Off. Gaz. 333; Re Goodyear Rubber Co. 11 Off. Gaz. 1062; Ex parte Kipling, 24 Off. Gaz. 899; Scott v. Standard Oil Co. 106 Ala. 475, 31 L.R.A. 374, 19 So. 71; Burke v. Cassin, 45 Cal. 467, 13 Am. Rep. 204; Larrabee v. Lewis, 67 Ga. 561, 44 Am. Rep. 735; Gilman v. Hunnewell, 122 Mass. 139; Trask Fish Co. v. Wooster, 28 Mo. App. 408; Van Beil v. Prescott, 82 N. Y. 630; Town v. Stetson, 3 Daly, 53; Gessler v. Grieb, 80 Wis. 21, 27 Am. St. Rep. 20, 48 N. W. 1098; Alff v. Radam, 77 Tex. 530, 9 L.R.A. 145, 19 Am. St. Rep. 792, 14 S. W. 164; Newcomer v. Scriven Co. 94 C. C. A. 77, 168 Fed. 621; Carbolic Soap Co. v. Thompson, 25 Fed. 625; New York Asbestos Mfg. Co. v. Ambler Asbestos Air-Cell Covering Co. 99 Fed. 85; New York Asbestos Mfg. Co. v. New York Fireproof Covering Co. 62 N. Y. Supp. 339; Green v. Manufacturers' Belt Hook Co. 158 Fed. 640; Scriven v. North, 67 C. C. A. 348, 134 Fed. 366; Allen B. Wrisley Co. v. Geo. E. Rouse Soap Co. 87 Fed. 589; Pratt Mfg. Co. v. Astral Ref. Co. 27 Fed. 492; Chalmers Knitting Co. v. Columbia Mesh Knitting Co. 160 Fed. 1013; Florence Mfg. Co. v. Dowd, 101 C. C. A. 565, 178 Fed. 73; Chance v. Gulden, 92 C. C. A. 58, 165 Fed. 624; Wolf Bros. v. Hamilton-Brown Shoe Co. 91 C. C. A. 363, 165 Fed. 413; Rice-Stix Dry Goods Co. v. J. A. Scriven Co. 91 C. C. A. 475, 165 Fed. 639; Searle & H. Co. v. Warner, 50 C. C. A. 321, 112 Fed. 674, 191 U. S. 195, 48 L. ed. 145, 24 Sup. Ct. Rep. 79; Leclanche Battery Co. v. Western Electric Co. 23 Fed. 276; Rumford Chemical Works v. Muth, 1 L.R.A. 44, 35 Fed. 524; Caswell v. Davis, 58 N. Y. 223, 17 Am. Rep. 233; Coats v. Merrick Thread Co. 149 U. S. 562, 37 L. ed. 847, 13 Sup. Ct. Rep. 966; Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 34 L. ed. 997, 11 Sup. Ct. Rep. 402; Amoskeag Mfg. Co. v. Spear, 2 Sandf. 599.

The word used as a trademark had, when adopted by complainant, and long before its registration, become a word in general use. It had been used as a trademark by others, and had found a place in the dictionaries as a word describing substances which resembled rubber, without being rubber; that is, it was a word made up by adding the common suffix "oid," meaning "like," to the word "rubber."

Dadirrian v. Yacubian, 39 C. C. A. 321, 98 Fed. 872; Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 604, 32 L. ed. 535, 537, 9 Sup. Ct. Rep. 166.

There was no infringement of the complainant's trademark by the defendant.

Columbia Mill Co. v. Alcorn, 150 U. S. 460, 467, 37 L. ed. 1144, 14 Sup. Ct. Rep. 151; Kann v. Diamond Steel Co. 32 C. C. A. 329, 61 U. S. App. 22, 89 Fed. 706; Dunlap v. Willbrandt Surgical Mfg. Co. 80 C. C. A. 575, 151 Fed. 233; Diamond Match Co. v. Saginaw Match Co. 74 C. C. A. 59, 142 Fed. 727; Marvel Co. v. Pearl, 66 C. C. A. 226, 133 Fed. 160; Chalmers Knitting Co. v. Columbia Mesh Knitting Co. 160 Fed. 1013; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 674, 45 L. ed. 365, 380, 21 Sup. Ct. Rep. 270; Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 140, 49 L. ed. 972, 986, 25 Sup. Ct. Rep. 609; Chance v. Gulden, 92 C. C. A. 58, 165 Fed. 624; Searle & H. Co. v. Warner, 112 Fed. 674, 191 U. S. 195, 48 L. ed. 145, 24 Sup. Ct. Rep. 79.

Mr. Justice **McKenna** delivered the opinion of the court:

The Standard Paint Company, which we 452]shall call the *paint company, a West Virginia corporation and a citizen of that state, brought this suit against the Trinidad Asphalt Manufacturing Company, herein referred to as the asphalt company, a Missouri corporation, having its principal office in the city of St. Louis, Missouri, in the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, to restrain the infringement of a duly registered trademark for the word "Ruberoid" to designate a certain kind of roofing materials for covering houses and other buildings. The paint company alleges in its bill that it has used the trademark for more than twelve years, and has advertised the roofing very extensively under the name "Ruberoid" roofing, and have built up a large and valuable trade therein in all parts of the United States and in foreign countries.

The roofing is manufactured in three different thicknesses, respectively called one, two, and three-ply, and is then made up into rolls, the strips in each roll being about 3 feet in width and about 70 feet long. The rolls are covered with paper wrappers, on which are printed, in large type, the words "Ruberoid Roofing," and inclosed in the rolls are directions for handling and laying the same, and the name of the paint company as manufacturer. The roofing contains no rubber.

The asphalt company also makes a roofing, not, however, of the same material as that of the paint company, but of the same thickness as the latter, and cut in similar widths and lengths, and sells it under the name of "Rubbero" roofing.

Two contentions are made by the paint company: (1) That its trademark is a valid one and has been infringed by the asphalt company. (2) That the latter has been guilty of unfair competition. The court of appeals decided adversely to both contentions. 90 C. C. A. 195, 163 Fed. 977. Of the first contention the court said it was clear that the paint company "sought to 453]appropriate the exclusive *use of the term rubberoïd," and that its rights were to be adjudged accordingly; and that as the latter, being a common descriptive word, could not be appropriated as a trademark, the one selected by the paint company could not be appropriated. The court said: "A public right in rubberoid and a private monopoly of rubberoid cannot coexist." The court expressed the determined and settled rule to be "that no one can appropriate as a trademark a generic name or one descriptive of an article of trade, its qualities, ingredients, or characteristics, or any sign, word, or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth." For this cases were cited and many illustrations were given, which we need not repeat. The definition of a trademark has been given by this court and the extent of its use described. It was said by the chief justice, speaking for the court, that "the term [trademark] has been in use from a very early date; and, generally speaking, means a distinctive mark of authenticity, through which the products of particular manufacturers or the vendible commodities of particular merchants may be distinguished from those of others. It may consist in any symbol or in any form of words; but as its office is to point out distinctively the origin or ownership of the articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trademark which, from the nature of the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purpose." Elgin Nat. Watch Co v. Illinois Watch Case Co. 179 U. S. 665, 673, 45 L. ed. 365, 378, 21 Sup. Ct. Rep. 270. There is no doubt, therefore, of the rule. There is something more of precision given to it in Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 323, 20 L. ed. 581, 583, where it is said that the essence of the wrong for the violation of a trademark "consists in the sale of the goods of one manufacturer or vendor as those of another; and that it is only when this false representation is directly *or indirect-[454 ly made that the party who appeals to a court of equity can have relief." A trademark, it was hence concluded, "must therefore be distinctive in its original signification, pointing to the origin of the article, or it must have become such by association." But two qualifying rules were expressed, as follows: "No one can claim protection for the exclusive use of a trademark or tradename which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trademark and the exclusive use of it be entitled to legal protection." And, citing Amoskeag Mfg. Co. v. Spear, 2 Sandf. 599, it was further said there can be "no right to the exclusive use of any words, letters, figures, or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or qualities."

Does the trademark of the paint company come within the broad rule or within the qualifying ones? In other words, does it have relation to the origin or ownership of the roofing, or is it merely descriptive of the roofing? It is conceded that there is no rubber used in the preparation of the roofing. It is put forth as being in the "nature of soft, flexible rubber." It is described in the certificate of registration as follows: "The class of merchandise to which this trademark is appropriated is solid substance in the nature of soft, flexible rubber in the form of flexible roofing, flooring, siding, sheathing, etc., and the particular class of goods upon which the said trademark is used is solid substance in the nature of flexible rubber." And it is said that the "trademark consists in the arbitrary word 'Ruberoid.'" Rubberoid is de-
455]fined in the Century *Dictionary as a tradename for an imitation of hard rubber. It is a compound of the word "rubber" and the suffix "oid," and "oid" is defined in the same dictionary as meaning "having the form or resemblance of the thing indicated, 'like,' as in *anthropoid*, like man; *crystalloid*, like crystal; *hydroid*, like water, etc. It is much used as an English formative, chiefly in scientific words." Rubberoid, therefore, is a descriptive word, meaning like rubber; but the paint company insists "Ruberoid" is suggestive merely, not descriptive, "because there is in fact no rubber used in its composition, and its only resemblance to rubber is in respect to its flexibility and its being waterproof." But this contention makes likeness and resemblance the same as identity. If the roofing of the paint company was identical with rubber, it would be rubber, and not, as it is represented to be, as we have seen, "in the nature of soft, flexible rubber." It may rightly be called rubberoid, and so may be roofing made by others than the paint company, having the same rubber-like qualities,—flexibility and not pervious to water. The word, therefore, is descriptive, not indicative of the origin or the ownership of the goods; and, being of that quality, we cannot admit that it loses such quality and becomes arbitrary by being misspelled. Bad orthography has not yet become so rare or so easily detected as to make a word the arbitrary sign of something else than its conventional meaning, as different, to bring the example to the present case, as the character of an article is from its origin or ownership.

We content ourselves with applying the principle of the cases which we have cited, and will not review the many cases in which it has been considered determinative or otherwise. These cases are collected in the opinions of the circuit court of appeals, and need not be repeated.

The second contention of the paint company is that the asphalt company has been guilty of unfair trade and *competi-[456
tion. The latter company urges that we are without jurisdiction to consider the contention, and cites A. Leschen & Sons Rope Co. v. Broderick & B. Rope Co. 201 U. S. 166, 50 L. ed. 710, 26 Sup. Ct. Rep. 425, in which a claim to a trademark for a distinctively colored streak applied to or woven in a wire rope was declared invalid. The bill, in addition to the infringement of the trademark, alleged unfair competition. The defendant in the case demurred on the ground that the trademark set up in the bill was not a lawful and valid trademark. The demurrer was sustained and the bill dismissed and the decree of the circuit court was affirmed by the circuit court of appeals. The case was appealed to this court, and we affirmed the decree holding that the trademark was invalid. Excluding a right to take jurisdiction because the bill set forth unfair competition, we said: "Nor can we assume jurisdiction of this case as one wherein the defendant had made use of plaintiff's devise for the purpose of defrauding the plaintiff and palming off its goods upon the public as of the plaintiff's manufacture. Our jurisdiction depends solely upon the question whether plaintiff has a registered trademark, valid under the act of Congress."

The parties in that case were citizens of the same state, and the jurisdiction of the circuit court depended entirely upon the trademark statute. In the case at bar there is diversity of citizenship as a ground of jurisdiction as well as the assertion of a valid trademark. It is therefore contended that A. Leschen & Sons Rope Co. v. Broderick & B. Rope Co. is not applicable, because, as there was no valid trademark under the Federal statute, it necessarily followed that the circuit court was wholly without jurisdiction to try the case in the first instance, the parties being citizens of the same state; and, as the circuit court was without jurisdiction to try the issue of unfair trade, the circuit court of appeals was also without jurisdiction, and that this court, on appeal, could not decide that issue. In the case at bar, however, it is urged there is a diversity of citizenship *as[457
well as the assertion of a right under the Federal statute, and that the circuit court and the circuit court of appeals both had jurisdiction on that ground as well as on the other, and the case, therefore, it is contended, falls under Henningsen v. United States Fidelity & G. Co. 208 U. S. 404, 52 L. ed. 547, 28 Sup. Ct. Rep. 389; Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed.

575, 23 Sup. Ct. Rep. 365; Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; Northern P. R. Co. v. Amato, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740; Warner v. Searle & H. Co. 191 U. S. 195, 48 L. ed. 145, 24 Sup. Ct. Rep. 79; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270.

Passing the last two cases for the moment, we may say of the others that while there was diversity of citizenship, and that would have given jurisdiction to the circuit court independently of any Federal question, statutory or constitutional, a consideration of a statute or the Constitution of the United States entered into the merits. Such is not the condition in the case at bar as to the issue of unfair trade. The asserted trademark as such is not an element. The issue is made independently of it, and under the assumption of its invalidity. If the trademark were valid, the issue of unfair trade would be unnecessary to decide. Such an issue between citizens of different states, even if there were no technical trademark, a circuit court would have jurisdiction to try, and the circuit court of appeals would have jurisdiction to review; but the judgment of the latter court would be final.

Warner v. Searle & H. Co. and Elgin Nat. Watch Co. v. Illinois Watch Case Co. require special notice. In the latter case there was not diversity of citizenship, but there was the assertion of a trademark in the word "Elgin." The circuit court sustained it; the circuit court of appeals held it invalid, and reversed the decree of the circuit court, and ordered a dismissal of the bill. This court affirmed the action of the circuit court of appeals. It was held that the word was geographically descriptive, and not subject to be registered as a trade-
458]mark. It was contended, *however, that the word had acquired a secondary signification, and should not therefore be considered as merely a geographical name. It was conceded, in answer to the contention, that words could acquire a secondary signification, and their use in that sense be protected. But the concession and the discussion were for no other purpose than to bring out clearly, in opposition to the contention based on the secondary signification of a word, that it could be, though a generic and descriptive name, "lawfully withdrawn from common use" by being registered as a trademark. And the court was careful to observe that the question considered was not "whether the record made out a case of false representation or perfidious dealing, or unfair competition, but whether appellant had the exclusive right to use the word 'Elgin' as against all of the world." The question was asked, "Was it a lawful registered trademark?" If so, the answer was, "Then the circuit court had jurisdiction, under the statute, to award relief for infringement; but if it were not a lawful registered trademark, then the circuit court of appeals correctly held that jurisdiction could not be maintained." The case may be said to be only of negative value. Unfair trade, we have seen, was referred to, and it was discussed also by the circuit court of appeals, but it put it aside as an element of decision, because the court was, as it said, "without jurisdiction to grant relief," as the right of the Elgin Watch Company arose under the act of Congress, and was limited by the act to recovery of damages for the wrongful use of a trademark, or to a remedy according to the course of equity, "to enjoin the wrongful use of said trademark used in foreign commerce or commerce with the Indian tribes." The remedy in equity for fraud, it was said, existed before the statute, and was not given by it, and that the Federal court would have no jurisdiction of it except between citizens of different states. 35 C. C. A. 237, 94 Fed. 667, 671.

*Warner v. Searle & H. Co. was a suit[459 between citizens of different states. The bill alleged the infringement of a trademark for the word "Pancreopepsine." Unfair competition was also alleged. The circuit court found that there was no proof of the latter, but held that the complainant had a valid trademark, and enjoined the defendant from its use. The circuit court of appeals concurred in the finding as to unfair competition, but decided against the validity of the trademark, and reversed the decree of the circuit court, and ordered the bill to be dismissed. We affirmed the decree of the circuit court of appeals, and said that the courts of the United States cannot take cognizance of an action on the case or a suit in equity between citizens of the same state, "unless the trademark in controversy is used on goods intended to be transported to a foreign country, or in lawful commercial intercourse with an Indian tribe." But we also said that "where diverse citizenship exists, and the statutory amount is in controversy, the courts of the United States have jurisdiction; but where those conditions do not exist, jurisdiction can only be maintained where there is interference with commerce with foreign na-

tions or Indian tribes." It was held, besides, that as diverse citizenship existed, the circuit court had jurisdiction; and in answer to the contention that, as jurisdiction depended entirely on diversity of citizenship, the decree of the circuit court of appeals was final, this was said: "We think, however, that as infringement of a trademark registered under the act was charged, the averments of the bill, though quite defective, were sufficient to invoke the jurisdiction also on the ground that the case arose under a law of the United States, and will not, therefore, dismiss the appeal."

No notice was given to the charge of unfair competition, and yet, if the contention of the paint company in the case at bar be sound, we should have decided that question, because it was decided in the courts 460]below; for, we have *seen, it is the contention of the paint company in this case that the lower courts having jurisdiction to decide the question of unfair competition, this court also has jurisdiction. But, as we have seen in Warner v. Searle & H. Co., we did not pass on the question of unfair competition, though the same conditions of jurisdiction existed which exist in this case. Warner v. Searle & H. Co. has in it, therefore, an element of uncertainty, but the statute must be considered. It makes the judgment of the circuit court of appeals "final in all cases in which the jurisdiction [the jurisdiction of the circuit court is meant] is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under criminal laws, and in admiralty laws." In all other cases there is a right of review by this court if there is the statutory amount involved. The case at bar is within the letter of the statute. The opposite parties to the suit are citizens of different states, and while this diversity of citizenship was not necessary to give the circuit court jurisdiction of the case in so far as it involved the validity of the trademark, it was necessary to give the court jurisdiction of the issue of unfair competition. If the latter had stood alone, its decision would have been final in the court of appeals, and this court would have had no jurisdiction to review its decision, and there is some objection on principle notwithstanding the union of the charge of unfair competition with the claim of a trade mark, to our taking jurisdiction, but such, we think, is the effect of the statute. Macfadden v. United States, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376.

We come, therefore, to a consideration of the question of unfair competition. The circuit court of appeals decided the question against the paint company. The views *of the circuit court may be open[461 to dispute. The majority of the court of appeals was of opinion that, aside from the use of the word "Rubbero," there was no imitation by the asphalt company of the paint company's roofing; indeed, that the "arrangement, color, design, or general appearance of the wrappers and markings on the packages" were in such "marked contrast as to repel all suggestion of design on the part of the former to misrepresent the origin or ownership of its product." The circuit court expressed itself as follows: "It is true that there is no imitation in the arrangement, color, or general appearance of the labels, as such, aside from the similarity of the names, but I think the use of names so similar on rolls of similar size and shape, both containing roofing material, is calculated, whether intentionally or unintentionally, to confuse and deceive the public." Circuit Judge Sanborn, dissenting from the opinion and judgment of the court of appeals, was of the opinion that the circuit court found that the asphalt company was guilty of unfair competition; and he concurred in the finding, thus giving the weight of his judgment to its support.

We think the evidence supports the conclusion of the circuit court of appeals. The only imitation by the asphalt company of the roofing of the paint company is that which exists in the use of the word "Rubbero," and this only by its asserted resemblance to the word "Ruberoid." To preclude its use because of such resemblance would be to give the word "Ruberoid" the full effect of a trademark, while denying its validity as such. It is true that the manufacturer of particular goods is entitled to protection of the reputation they have acquired against unfair dealing, whether there be a technical trademark or not; but the essence of such a wrong consists in the sale of the goods of one manufacturer or vendor for those of another. Elgin Nat. Watch Co. v. Illinois Watch Case Co. supra. Such a wrong is not established against the *asphalt company. It does[462 not use the word "Rubbero" in such a way as to amount to a fraud on the public.

Decree affirmed.

Mr. Justice Hughes concurs in the result.

SHAWNEE SEWERAGE & DRAINAGE COMPANY, Appt.,
v.
FRANK P. STEARNS, as Mayor of the City of Shawnee; A. D. Martin, as Clerk of the City of Shawnee; John Lain et al., Members of the City Council of the City of Shawnee, et al.

(See S. C. Reporter's ed. 462–472.)

Federal courts — jurisdiction — Federal question.

1. A suit to enjoin the officers of a municipality from violating its contract to take over the laterals of a drainage company, to be paid for by tax warrants, can present no real or substantial Federal question respecting the impairment of contract obligations or taking of property without due process of law which will sustain the original jurisdiction of a Federal circuit court, without regard to the citizenship of the parties.

[For other cases, see Courts, 489–504, in Digest Sup. Ct. 1908.]

Appeal — judgment — remanding for dismissal.

2. A decree of a Federal circuit court dismissing, apparently on the merits, a bill which, on its face, shows that the court had no jurisdiction, will be reversed by the Federal Supreme Court, and the case remanded to the circuit court with directions to sustain the demurrer for want of jurisdiction, and on that ground dismiss the suit.

[For other cases see Appeal and Error, 5485–5490, in Digest Sup. Ct. 1908.]

[No. 109.]

Submitted March 14, 1911. Decided April 10, 1911.

APPEAL from the Circuit Court of the United States for the Western District of Oklahoma to review a decree which dismissed, apparently on the merits, a suit to enjoin municipal officers from violating a contract to take over the laterals of a drainage company. Reversed and remanded, with directions to dismiss the bill for want of jurisdiction.

The facts are stated in the opinion.

Messrs. **B. B. Blakeney** and **James H. Maxey** submitted the cause for appellant.

Mr. **J. H. Everest** submitted the cause for appellees. Messrs. J. H. Woods and W. M. Engart were on the brief.

Note.—As to Federal question as conferring jurisdiction on United States courts —see notes to Bailey v. Mosher, 11 C. C. A. 308, and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 7.

Mr. Justice **McKenna** delivered the opinion of the court:

It is contended that this case involves the construction or application of the Constitution of the United States, and that therefore the appeal has been taken directly to this court from the circuit court.

The appellant, we shall call it the drainage company, is a corporation organized under the laws of Oklahoma; the appellees are the mayor, clerk, and the members of the city council of the city of Shawnee, a municipal corporation. The Walter Newman Plumbing Company and Walter Newman are also appellees.

A summary of the facts as presented by the bill is as follows: The city of Shawnee, a city of the first class under the laws of the territory of Oklahoma, granted by an ordinance (No. 228) to De Bruler-Newman & Company, their successors and assigns, the right, for the period of fifty years, to build and maintain a system of sewerage, with the necessary branches and appurtenances essential to the same, "along certain lines" in the city. It was provided that the city should have the right to purchase the system at the expiration of a period of fifteen years, at the exact cost of its construction. And further, that if the city did not desire to make the purchase, the ordinance should run for fifty years. There was a time fixed for the commencement and completion of the system.

The ordinance was amended by a subsequent ordinance (No. 241), by making the term of the right twenty-one years, and ratifying all the other provisions of the first ordinance.

On the 1st of February, 1902, De Bruler-Newman & Company assigned their rights under the ordinance to the *drainage[464 company. The assignment was ratified by the city by an ordinance (No. 242) passed February 26, 1902, and the drainage company authorized to mortgage the rights and properties in a sum not exceeding $25,000. The ordinance also provided that the city should have the right to purchase the system at the exact cost of its construction or any extension of it after the expiration of fifteen years.

De Bruler-Newman & Company commenced and continued the construction of the system until the assignment to the drainage company, as above stated, and after the assignment, the drainage company conducted its construction "and extended its mains and laterals over and throughout the limits" of the city, and expended and invested therein $40,000, and issued its bonds and notes in pursuance of ordinance No. 242, and secured the sum by a mort-

gage on the property and franchises. The company performed its duties to the city, met all of the demands for sewerage purposes, and carried out the terms and conditions of the ordinance until the 22d of December, 1906, at which time it sold and transferred its main line to the city. The company is the owner of the rest of the property, which is of the value of $30,000, and which is regularly assessed and pays to the city its just property taxes.

On the 1st of December, 1901, the city passed an ordinance providing that, wherever the system was extended, "all overground closets should be declared a public nuisance;" but after the company had extended the system, the ordinance was repealed, and the city has habitually and systematically discouraged, and by divers means has attempted to impair, the investment of the company.

On the 6th of November, 1906, after certain proceedings had, a question was submitted to the voters of the city, whether bonds should be issued in the sum of $165,000 for the construction of a sewer 465]system, which was duly *carried. The drainage company then commenced a suit in the district court of the county to enjoin the city from constructing and maintaining a sewer system in the city without having purchased the company's system or compensated it therefor, which suit was regularly tried and a decree rendered that the company had a legal and valid franchise, and that it "was authorized by such franchise to carry on the business of operating the said system of sewerage," and that the construction and operation of a sewer system by the city in the immediate vicinity of the company's system would confiscate its property and depreciate the value of the bonds thereon. The city was enjoined from constructing its system until the company's main sewer should be condemned or purchased by it, and, in the event that it should condemn or purchase the main sewer, the mayor and councilmen were enjoined from preventing the company "from connecting with any main sewer of the said defendant (the city) free of charge, and to use the same by such connection with the district sewers and laterals" belonging to the company in operation at the date of the rendition of the decree.

The legality of the election at which bonds were authorized to be issued by the city to the amount of $165,000 was adjudged.

Subsequent to this decree, to wit, on the 3d March, 1907, the company and the city entered into a contract, Exhibit E, by which the company sold to the city all of its main line of sewer for the consideration of $6,900, it being provided that the city would recognize the company's rights to the laterals which were then laid in the city, and which were of the value of $30,000.

It was further provided that at such time as the city should be divided into sewer districts for the purpose of laying and constructing laterals in the districts, the city would cause the property of the company to be appraised by a commission, in case agreement could not be had as to *the[466 price thereof. The price being fixed, the city was to "use all lawful means to tax up said laterals, at the price agreed upon, to the abutting property, and deliver the tax warrants to the" company, which should "be in full payment for such laterals, in so far as the abutting property" was concerned. It was provided that the city should not be liable for the payment of the warrants, and that it did "not attempt to bind itself any further than warranted and permitted by law."

On the 1st day of June, 1908, the company, in order to comply with the contract above referred to, submitted to the city a proposition offering to relay and lower all of the laterals owned by it, to the depth required by the plans and specifications, and under the directions of the city engineer, and at his estimated cost, if any of the same were not of such depth, which offer was refused. The city, in disregard of the judgment in favor of the company and of the contract with it, above referred to, entered into a contract with the Newman Plumbing Company (one of the appellees), by which the latter was granted a contract to lay the laterals necessary and desired by the city, "and in the vicinity and in the same streets and alleys which are now occupied by the laterals" of the company, and, unless enjoined, will proceed with the performance of the contract, and if it be performed, the city will cause its citizens to connect with the laterals, because it must tax to build and maintain them, "and no other or further consideration would be required," and the citizens whose property is connected with the company's system would be taxed to maintain the system, whether connected with it or not, and its property, which is now of the value of $30,000, being wholly underground, would be worthless. The company is ready and willing to carry out its contract above referred to (Exhibit E), and the citizens of the several sewer districts are willing that their property be taxed as provided, but that the city, in disregard of the *contract, allowed the Newman Plumb-[467 ing Company to build new, separate, and independent laterals in the sewer districts.

The contract of March 3, 1907, between the company and the city, was made in consideration of the city recognizing the rights of the company and the performance by the city of the matters agreed to be performed by it, which it has not done, "but for the purpose of confiscating" the company's "property, and rendering it worthless and valueless, and in total disregard of its contract," has let the contract, as above mentioned, to the Newman Plumbing Company, although the laterals of the company "were, on the 3d day of March, 1907, adequate to accommodate connection" with the city's main sewer, and if the same are inadequate, the company has offered and offers to make them adequate.

The city has refused to carry out the contract, for the purpose of confiscating the company's property and of appropriating the same without due process of law, and that the contract with the Newman Company is void, as it impairs the obligation of the contract of the city with the company, and is a confiscation of the company's property.

The city has attempted to assess the cost of the laterals laid by it upon the abutting property owners and the property of the company, for the purpose of damaging the company, and for no other purpose.

The contract (Exhibit E) was made by the city under the authority of an act of Congress, being the same under which the bonds for $165,000, above referred to, were issued, and its contract was in all respects legal and valid, and the company is entitled to have it enforced and the defendants (appellees) enjoined from violating it.

The company has no adequate remedy at law, and is entitled to an injunction against violating the rights of the company, as set forth in the bill, and to have 468] a mandatory *injunction, requiring the city "to conform to said contract and said decree." The prayer of the bill is that the city be enjoined from constructing laterals where the company's laterals "are situated and were situated on the 3d of March, 1908, and from doing or performing anything that tends to appropriate the property" of the company "without due compensation, or does impair the obligations of the contract of the parties, or deprive" the company "of its property without due process of law." General relief is also prayed.

There was a plea to the jurisdiction, stating as ground thereof, among others, that the allegations of the bill did not present a case of the violation of the Constitution of the United States. A demurrer to the bill was also filed, repeating the ground stated in the plea, and setting forth the further ground that the drainage company had "a full, complete, and adequate remedy at law." The bill was subsequently amended by alleging specifically that the amount involved was more than $2.000; and a temporary injunction was granted.

A general demurrer was filed to the amended bill for want of equity, which was sustained, and the temporary injunction dissolved and the bill dismissed.

No opinion was filed in the case, and the grounds upon which the demurrer was sustained we can only collect from the order allowing an appeal directly to this court, and from the assignments of error. By the latter the action of the court is attacked as deciding that the ordinance of the city granting the right to the drainage company to occupy the streets of the city "with its laterals, mains, and connections," that the decree of the district court, mentioned in the bill, and the subsequent contract between the company and the city, did not impair the obligations of the contract with the company, in violation of the provisions of the Constitution of the United States, and that the action of the city in tearing up the mains and *laterals of [469 the company was not a confiscation of its property without due process of law.

These assignments, therefore, present the question for our decision, and it is these that counsel have discussed in their briefs. Appellant refers to the plea filed to the jurisdiction of the circuit court as follows: "The respondent (appellee) presented a plea to the jurisdiction of the court, . . . which plea was by the court duly overruled, but which question will probably be presented in this court."

To sustain the jurisdiction, appellant advances the propositions (1) that the city had the power to pass the ordinance by which it granted to appellant's predecessor and to appellant the franchise to construct a sewer system; (2) that the original franchise constituted a contract between the company and the city, and that this contract had been construed and adjudicated by the district court of the territory of Oklahoma as being exclusive, and as prohibiting the city from building and maintaining a public sewer; (3) that the subsequent contract with regard to laterals was a valid contract, and that the contract with the Newman Plumbing Company, to build a public sewer, as set out in the bill, impaired its obligation, and appropriated

and deprived the company of its property without due process of law. All these propositions, it is said, present Federal questions.

It is manifest that the stress of the case is upon the contract mentioned in the third proposition. The rights conferred by the ordinance were exercised for four years, and no interference with them is asserted except by the bond election of November 6, 1906. The purpose of the suit in the district court of the territory was to restrain the issue of the bonds on the ground that two thirds of the voters had not voted for the same, and that the building of a public sewer system would affect and impair the rights of the company, much in the same 470]way as detailed in the *bill in this case. There was no allegation of the impairment of the contract constituted by the ordinance. But it was alleged that the bond election was illegal, and that, under the laws of the territory and the act of Congress applicable thereto, the city had no power to construct a sewer system of its own under the circumstances detailed, and no authority under the law to in any manner destroy the value of the company's property, or to confiscate the same, and to deprive the company of its vested rights and interests by virtue of the ordinance without just compensation.

It was prayed that the city be enjoined from issuing the bonds or causing a levy to be made upon the property of the company, or from doing anything which would tend to depreciate the property of the company.

It was decreed, as we have seen, that the drainage company had a legal franchise to build a sewer system, and that the construction by the city of a system in the immediate vicinity of the company's would confiscate its property and depreciate the value of the bonds thereof. But the bond election was declared legal, and that, under the act of Congress of March 4, 1898 [30 Stat. at L. 252, chap. 35], the city ought to issue the bonds, as directed, for the construction of sewers, among other purposes. The city, however, was enjoined from building or providing a sewerage system in the vicinity of that of the company until after it should purchase or condemn such system. It was further adjudged that, in the event the city should condemn or purchase the main sewer of the company, it be enjoined from preventing the company from connecting with the main sewer free of charge, and to use the same by such connections for all district sewers and laterals belonging to the company in operation at the date of the rendition of the decree.

The rights of the parties as fixed by this litigation are clear. The company was adjudged to have a franchise to operate a sewer system, and that, under the franchise, the company, "among other things, constructed a main *sewer" from and[471 to certain points, "together with certain manholes, connections, and bulkheads." It was valued at $6,900. The city's right to build a system was adjudged, but it was enjoined from building in the vicinity of that of the company. Its right to purchase or condemn the latter was recognized, but it was decreed that, until such right should be exercised, the city was enjoined from preventing the company from connecting all of its district sewers and laterals with the main sewer.

The rights of the parties thus being fixed by the decree, they entered into a contract in March, 1907, by which the city purchased the main sewer of the company, and agreed to take over the laterals of the company in the way we have pointed out, to be paid by tax warrants, the city not binding itself for the payment in any way.

The city, it is alleged, has not attempted to comply with the contract, but, on the contrary, has made a contract with the Newman Plumbing Company to lay the laterals it desires. A simple breach of contract is therefore alleged on the part of the city. We are pointed to no law impairing the obligation of the contract. The statute under which the bonds were authorized to be issued is not such a law. It was passed before the contract was made. The breach of a contract is neither a confiscation of property nor a taking of property without due process of law. The case, therefore, comes within the principles announced in St. Paul Gaslight Co. v. St. Paul, 181 U. S. 145, 45 L. ed. 789, 21 Sup. Ct. Rep. 575.

It is clear, therefore, that, on the face of the bill, the circuit court had no jurisdiction of the suit, there being no diversity of citizenship, and no real and substantial question arising under the Constitution of the United States being presented by the bill.

The bill was dismissed by the Circuit Court apparently on the merits. It should have been dismissed for want of jurisdiction. The decree, therefore, must be reversed, *and the cause remanded to the[472 Circuit Court with directions to sustain the demurrer for want of jurisdiction, and on that ground dismiss the bill McGilvra v. Ross, 215 U. S. 70, 80, 54 L. ed. 95, 101, 30 Sup. Ct. Rep. 27.

So ordered.

J. W. PERRY COMPANY and John L. Roper, Plffs. in Err.,
v.
CITY OF NORFOLK, Virginia. (No. 103.)

WILLIAM H. WHITE, Plff. in Err.,
v.
CITY OF NORFOLK, Virginia. (No. 104.)

(See S. C. Reporter's ed. 472–480.)

Error to state court — scope of review — non-Federal question — taxation.

1. A decision of a state court that the general rule making the landlord responsible for the taxes has no application to the case of a perpetual leaseholder where the tenant is, in effect, the virtual owner of the property and entitled to its use forever, presents no Federal question which can be reviewed by the Federal Supreme Court on writ of error.

[For other cases, see Appeal and Error, 2076–2088, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — impairing contract obligations — construction of contract.

2. Whether or not municipal taxation under a subsequent statute is a public tax within the meaning of a covenant by the lessee of a municipality to pay the public taxes which shall become due on the land is a question which the Federal Supreme Court will determine for itself on writ of error to a state court in a case involving the question of the impairment of contract obligations by the enforcement of the tax.

[For other cases, see Appeal and Error, 2240–2248, in Digest Sup. Ct. 1908.]

Landlord and tenant — covenant to pay public taxes — municipal taxation.

3. The covenant of a perpetual leaseholder with his municipal lessor to pay the public taxes which shall become due on the land embraces municipal taxes whenever they can thereafter be lawfully assessed on the land or the improvements which are part of the land, although when the lease was made the municipality had no power to taxation.

[For other cases, see Landlord and Tenant, II. b, in Digest Sup. Ct. 1908.]

Taxes — contract exemption — municipal taxation.

4. A contract exemption from municipal taxation cannot be deduced from the covenant of a perpetual leaseholder with his municipal lessor to pay all the public taxes which shall become due on the land, although the municipality possessed no power of taxation when the lease was made.

[Exemption from taxation, see Taxes, I. c, 8, in Digest Sup. Ct. 1908.]

[Nos. 103 and 104.]

Argued March 16, 1911. Decided April 17, 1911.

TWO WRITS OF ERROR to the Supreme Court of Appeals of the State of Virginia to review decrees which reversed decrees of the City Court of the City of Norfolk, in that state, enjoining the collection of municipal taxes. Affirmed.

See same case below, No. 103, 108 Va. 28, 128 Am. St. Rep. 940, 61 S. E. 867; No. 104, 108 Va. 35, 61 S. E. 870.

Statement by Mr. Justice Lamar:

From the bill in 103, to enjoin the collection of city taxes, it appears that prior to 1792 the borough of Norfolk, Virginia, existed as a municipality of limited power. it *had a mayor and council, but no[473 power to tax. The town owned the Fort land, and appointed commissioners to subdivide the tract and let out the lots at public outcry. Thereupon the borough "demised, leased, and farm-let lot No. 10 to Richard Evers Lee, his executors, administrators, and assigns, from August 26, 1792, for and during the term of ninety-nine years, and after that time renewable for the further term of ninety-nine years, and so on forever," he and they to pay yearly the rent of £6.6 and "the public taxes which shall become due on said land." It was provided that if there should be arrears for three years in paying rent or taxes the town should advertise and lease out the lots and improvements for the remainder of the term of ninety-nine years, said Lee and his assigns to make good the deficiency, if any, between the first and last prices, together with all arrears of rent and taxes, the overplus, if any, to be paid over to said Lee or his assigns. If the rent and taxes were paid as stipulated, the borough and its successors were to renew the lease for the further term of ninety-nine years, and so on forever. The leases were renewed in 1892 on practically identical terms. Subsequently, the eastern portion of lot 10 was assigned to John L. Roper and the western portion to the J. W. Perry Company, who, "relying on the stipulations and agreements

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Note.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

As to what questions the Federed Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

That exemption from taxation, whether a contract or not, is not implied—see note to Tucker v. Ferguson, 22 L. ed. U. S. 805.

therein, purchased the lease, and, at great expense erected costly improvements on the land." The bill charged that "it was the intention of all the parties, in both the original and renewal leases, that the stipulation as to the payment of public taxes applied solely to such taxes as might be imposed by Virginia and the United States, and neither the borough nor the city of Norfolk had ever attempted to impose any municipal tax upon the property. But "though the city owns the fee, it has for the year 1906 caused the lot to be assessed in the name of it, the said city of Norfolk, at a valuation of $21,000, and intends to collect the tax of $346 from the lessees 474]of lot 10." *The bill also charged that the buildings, on being attached to the land, became the property of the city as landlord, and likewise free and clear from the payment of city taxes, notwithstanding which it had assessed the improvement to the lessee at a value of $6,500, and demanded the tax thereon.

Lot 9 was held by White on substantially identical terms, except that the renewal lease made in 1892 provided that the lessee should "pay all rent and all state and national taxes." The city contended that this change was without consideration, and did not modify the rights or liabilities of either party, because, from the instrument as a whole, it appeared that there was no intention to change, but only to renew and continue in force the original lease of 1792.

In each case it was alleged that the assessment and collection of taxes for city purposes impaired the obligation of the lease contract.

The trial judge granted perpetual injunctions. Those rulings were reversed by the court of appeals of Virginia (108 Va. 28, 128 Am. St. Rep. 940, 61 S. E. 867, 108 Va. 35, 61 S. E. 870), and plaintiffs brought the case here, assigning as error that the collection of taxes by the city of Norfolk, in pursuance of authority conferred subsequent to the leases, impaired the obligations of the contracts.

Messrs. **Tazewell Taylor** and **Walter H. Taylor** argued the cause, and, with Mr. William Leigh Williams, filed a brief for plaintiffs in error:

This court may construe the contract for itself.

Jefferson Branch Bank v. Skelly, 1 Black, 436, 17 L. ed. 173; Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; Bryan v. Board of Education, 151 U. S. 639, 38 L. ed. 297, 14 Sup. Ct. Rep. 465; Mobile & O. R. Co. v. Tennessee, 153 U. S. 495, 38 L. ed. 793, 14 Sup. Ct. Rep. 968.

The contract is a lease.

State ex rel. Glenn v. Mississippi River Bridge Co. 134 Mo. 321, 35 S. W. 592; Wilgus v. Com. 9 Bush, 556; Taylor v. Taylor, 47 Md. 295; Thruston v. Mustin, 3 Cranch, C. C. 335, Fed. Cas. No. 14,013; Goodwin v. Goodwin, 33 Conn. 314; Moss Point Lumber Co. v. Harrison County, 89 Miss. 448, 42 So. 298, 873; Ware v. Washington, 6 Smedes & M. 741; Dillingham v. Jenkins, 7 Smedes & M. 479; James v. Kibler, 94 Va. 173, 26 S. E. 417; Wells v. Savannah, 181 U. S. 531, 45 L. ed. 986, 21 Sup. Ct. Rep. 697.

In the absence of contract stipulations to the contrary, the obligation rests upon the lessor to pay taxes on his interest.

Taylor, Land. & T. 4th ed. § 341; Wood, Land. & T. 2d ed. § 414.

Public taxes are not city taxes in this case.

Morgan v. Cree, 46 Vt. 773, 14 Am. Rep. 640.

The court should put itself in the place of the parties making the contract.

Pressed Steel Car Co. v. Eastern R. Co. 57 C. C. A. 635, 121 Fed. 611; Black v. Sherwood, 84 Va. 906, 6 S. E. 484; Love v. Howard, 6 R. I. 116; Woodruff v. Oswego Starch Factory, 177 N. Y. 23, 68 N. E. 994; Brown v. Wagner, 1 Pearson (Pa.) 254; Bolling v. Stokes, 2 Leigh, 178, 21 Am. Dec. 606.

The city of Norfolk is assessing itself on its own property, and endeavoring to make the lessees pay the same.

Trammell v. Faught, 74 Tex. 557, 12 S. W. 317; 2 Cooley, Taxn. 822; Clark, Contr. 9; Byrne v. Byrne, 94 Cal. 576, 29 Pac. 1115, 30 Pac. 196; Galveston Wharf Co. v. Galveston, 63 Tex. 14; Low v. Lewis, 46 Cal. 549; New Orleans v. McDonogh, 12 La. Ann. 240; Penick v. Foster, 129 Ga. 217, 12 L.R.A.(N.S.) 1163, 58 S. E. 773, 12 A. & E. Ann. Cas. 346; Clark v. Coolidge, 8 Kan. 195; Scott v. Society of Russian Israelites, 59 Neb. 571, 81 N. W. 624; Herriott v. Potter, 115 Iowa, 648, 89 N. W. 92; Soulard v. Peck, 49 Mo. 478; 2 Underhill, Land. & T. §§ 605–607; Philadelphia, W. & B. R. Co. v. Appeal Tax Ct. 50 Md. 397; Jetton v. University of the South, 208 U. S. 489, 52 L. ed. 584, 28 Sup. Ct. Rep. 375.

Covenants in a deed against encumbranches apply only to those of third persons.

Horrigan v. Rice, 39 Minn. 49, 38 N. W. 765; Bigelow, Estoppel, 293.

The law of principal and surety is applicable.

Hardaway v. National Surety Co. 211 U. S. 552, 53 L. ed. 321, 29 Sup. Ct. Rep. 202; United States v. Allsbury (United States v. Burbank) 4 Wall. 186, 18 L. ed. 321.

The parties bear the same relation with reference to the improvements.

Kutter v. Smith, 2 Wall. 491, 17 L. ed. 830; Bass v. Metropolitan West Side Elev. R. Co. 39 L.R.A. 711, 27 C. C. A. 147, 53 U. S. App. 542, 82 Fed. 857; Fraer v. Washington, 60 C. C. A. 194, 125 Fed. 280; People ex rel. International Nav. Co. v. Barker, 153 N. Y. 98, 47 N. E. 46; Madigan v. McCarthy, 108 Mass. 376, 11 Am. Rep. 371; West Shore R. Co. v. Wenner, 75 N. J. L. 494, 127 Am. St. Rep. 806, 68 Atl. 225.

The leasehold interest of the plaintiffs in error is taxable.

Jetton v. University of the South, 208 U. S. 489, 52 L. ed. 584, 28 Sup. Ct. Rep. 375; Philadelphia, W. & B. R. Co. v. Appeal Tax Ct. 50 Md. 397.

This court can and should protect lessees' contract.

Murray v. Charleston, 96 U. S. 432, 24 L. ed. 760; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 591, 52 L. ed. 630, 634, 28 Sup. Ct. Rep. 341.

Mr. **Nathaniel T. Green** argued the cause and filed a brief for defendant in error:

The judgment of the supreme court of appeals of Virginia should be affirmed because it proceeds on non-Federal grounds sufficient to sustain the same.

North Missouri R. Co. v. Maguire, 20 Wall. 46, 22 L. ed. 287; Henderson Bridge Co. v. Henderson, 141 U. S. 679, 35 L. ed. 900, 12 Sup. Ct. Rep. 114; Berea College v. Kentucky, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33.

When an exemption from taxation is claimed under a contract, the party claiming it must point out specifically an express exemption in the contract.

Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 273, 53 L. ed. 176, 182, 29 Sup. Ct. Rep. 50; St. Louis v. United R. Co. 210 U. S. 266, 273, 52 L. ed. 1054, 28 Sup. Ct. Rep. 630; New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705, 4 A. & E. Ann. Cas. 381.

The ordinary meaning of the word "public" embraces the taxes involved in this suit.

Buffalo City Cemetery v. Buffalo, 46 N. Y. 510.

The city of Norfolk possesses all the power of the state as to taxation (Norfolk v. Norfolk Landmark Pub. Co. 95 Va. 564, 28 S. E. 959, and it is well settled that a taxing power can tax its own property if it sees fit.

Cooley, Taxn. 3d ed. p. 263.

Very frequently public property is subjected to taxation, and the question is often made to depend upon the use made of the property, its situation and location, and the character or condition of the title of the governmental body in the land, and on other facts.

Herrick v. Sargent, 132 Am. St. Rep. 291, note.

The whole situation here is fully met by the case of Wells v. Savannah, 181 U. S. 531, 45 L. ed. 986, 21 Sup. Ct. Rep. 697.

Neither a lawful tax on a new subject, nor an increased tax on an old one, interferes with the contract or impairs its obligation, within the meaning of the Constitution, even though such taxation may affect particular contracts, as it may increase the debt of one person and lessen the security of another, or may impose additional burdens on one class, and release the burdens of another.

North Missouri R. Co. v. Maguire, 20 Wall. 46, 22 L. ed. 287.

Mr. Justice **Lamar**, after making the foregoing statement, delivered the opinion of the court:

In 1792, at a time when it had no right to tax, the municipality of Norfolk, Virginia, leased to Lee and others, several lots of land for ninety-nine years, renewable forever, the lessees and their assigns to pay the annual rent and "the public taxes which shall become due on said land." Subsequently the city was given the power of taxation, but made no effort to assess these lots until 1906. The lessees then sought to enjoin their collection on the ground that the "public taxes" they had assumed were those which might be due to the state and to the United States. They contended that for Norfolk to assess land belonging to Norfolk, for taxes payable to Norfolk, constituted an invalid charge, and was not a lawful public tax of the kind which the lessees had agreed to pay, and that if such a tax could be assessed, it was by virtue of statutes passed since the contract was made, and for the city to exert this new statutory power against them would impair the obligation of their contract.

In support of their claim that the city as lessor could not tax its own property, so as to make it a valid public tax, payable by the lessee, they rely on the general rule that taxes are assessed to the owner, and as the landlord receives the rent, he ought to bear the burdens imposed upon the property. On the authority of State ex rel. Glenn v. Mississippi River Bridge Co. 134 Mo. 321, 35 S. W. 592; Thurston v. Mustin, 3 Cranch, C. C. 335, Fed. Cas. No. 14,015,

and like cases, they insist that this is a liability arising out of the relation of land-
[478 lord and tenant, *and is not limited to short-term leases, but applicable to those for ninety-nine years, renewable forever.

It is true that in the present case the indenture uses apt words to create a lease, and the Virginia court held that it was technically such. But there are other and controlling features which show that, even if the legal title is in the city, the lessees have rights different from those usual in a mere leasehold estate.

On condition broken, they do not *ipso facto* lose all interest in the property and its proceeds. The contract does not contain the common stipulation that the tenant shall be compensated for his permanent improvements. On the tenant's default the city cannot at once enter into possession, but "the lot and improvements shall be leased out at public outcry for the remainder of the term," and after deducting unpaid rent and taxes, the overplus, if any, shall be paid to the lessees. This overplus would represent, in part, the value of permanent improvements and also of the unexpired term. Selling the city's property to pay rent due the city is not at all consistent with the idea of a mere lease. It indicated rather that the tenant had a substantial interest in the property which was security for the payment of whatever he owed the city. The contract creates an estate somewhat like the perpetual lease of the civil law, where the tenant was for many purposes treated as owner, and liable for taxes. 10 Merlin Rep. p. 232; Cooper, Inst. 277, 278; Sohmn, Inst. 3d ed. 346. It was also similar in its nature to ground rent, where an annual rental and public taxes are perpetually charged on the land, instead of a gross sum being paid or secured. There the grantor is treated as having a fee in the rent reserved, and the grantee a fee in the land, subject, among other things, to the payment of public taxes. Duane, Land. & T. 96; Cadwalader, Ground Rents, 101; Robinson v. Allegheny County, 7 Pa. 161.

The court of appeals held that in Vir-
[479 ginia the general *rule that the landlord is responsible for the taxes has "no application to the case of a perpetual leaseholder, where the tenant is in effect the virtual owner of the property, and entitled to its use forever. . . . For the purposes of taxation, the mere legal title remaining in the landlord will be disregarded." [108 Va. 30.] It adopted that part of the language in Wells v. Savannah, 87 Ga. 397, 13 S. E. 442, affirmed in 181 U. S. 531, 45 L. ed. 986, 21 Sup. Ct. Rep. 697, where, in speaking of the liability of one who had a perpetual lease and a right to convert it at will into a fee, Judge Bleckley said: "The value of property consists in its use, and he who owns the use forever, though it be on condition subsequent, is the true owner of the property for the time being." Crowe v. Wilson, 65 Md. 479, 57 Am. Rep. 343, 5 Atl. 427; Brainard v. Colchester, 31 Conn. 407.

Ordinarily it would be a useless thing for a city to tax its own property. But this can be done under Virginia practice, and is not a vain thing if thereby property of the city, subject to taxation, is listed in its name as holder of the legal title, so as to fix the amount of the tax on the property which the tenant may have agreed to pay. Cooley, Taxn. 3d ed. 263. This ruling of the Virginia court presents no Federal question, but does establish that the tax was not illegal, as claimed, but was based on an assessment valid under the laws of the state.

Whether it is a "public tax" contemplated by the contract, or whether forcing the lessees to pay it impairs that contract, is a matter we must consider; for a valid contract of exemption from taxation may be impaired by wrongful construction as well as by an unconstitutional statute attempting a direct repeal. This court, therefore, "has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is." Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; Bryan v. Board of Education, 151 U. S. 639, 38 L. ed. 297, 14 Sup. Ct. Rep. 465; Mobile & O. R. Co. v. Tennessee, 153 U. S. 495, 38 L. ed. 796, 14 Sup. Ct. Rep. 968; Jefferson Branch Bank v. Skelly, 1 Black, 446, 17 L. ed. 178.

*It is admitted that the lessees have
[480 expressly agreed to pay taxes due Virginia or the Federal government, regardless of the character of the estate created. And, while it is true that when the lease was made the borough had no authority to tax, both parties were charged with notice that such power might, and probably would, be conferred when increase of population made it necessary. Even if the borough could have made a valid contract of exemption in 1792, there is nothing to show that it did so. On the contrary, the provision that the lessee was to "pay public taxes" was sufficiently comprehensive to embrace municipal taxes whenever they could thereafter be lawfully assessed on land or the improvements which were a part of the land. Where one relies upon an exemption from taxation, both the power to exempt and the contract of exemption must be

clear. Any doubt or ambiguity must be resolved in favor of the public. St. Louis v. United R. Co. 210 U. S. 273, 52 L. ed. 1057, 28 Sup. Ct. Rep. 630. Here there is not only no language of exemption, but a positive agreement on the part of the lessees to pay public taxes on the land. In compelling them to do so, the contract is enforced instead of impaired. The judgment of the Court of Appeals of Virginia is therefore affirmed.

481]*SAC AND FOX INDIANS OF THE MISSISSIPPI IN IOWA, Appts.,

v.

SAC AND FOX INDIANS OF THE MISSISSIPPI IN OKLAHOMA and the United States.

(See S. C. Reporter's ed. 481–491.)

Indians — annuities — individual rights.

1. Indians absent from their reservation without permission from the United States had no individual rights to the annuities promised to their tribes by treaty, and paid at the tribal agency conformably to the act of August 30, 1852 (10 Stat. at L. 41, chap. 103, U. S. Rev. Stat. § 2086), § 3, which forbade payment to be made to any attorney or agent, and required it to be made directly to the Indians themselves or to the tribe *per capita*, "unless the imperative interest of the Indian or Indians or some treaty stipulation shall require the payment to be made otherwise, under the direction of the President."

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indians — annuities — individual rights.

2. Individual rights were not created by the provision of the Indian appropriation act of March 2, 1867 (14 Stat. at L. 492, chap. 173), that, as permitted by the treaty of October 1, 1859 (15 Stat. at L. 467), art. 6, the band of Sacs and Foxes "now in Tama county, Iowa, shall be paid *pro rata* according to their numbers, of the annuities, so long as they are peaceful and have the assent of the government of Iowa to reside in that state."

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indians — annuities — payment — ratification.

3. The payments theretofore made to the band of Sacs and Foxes who had left their reservation in Kansas and returned to their former home in Iowa, as their proportion of the annuities promised to their tribes, were ratified as to the amount by the act of May 17, 1882 (22 Stat. at L. 78, chap. 163), providing that thereafter they should have apportioned to them from appropriations for fulfilling treaty stipulations no greater sum thereof than that theretofore set apart for them.

Indians — annuities — individual rights.

4. The band of Sacs and Foxes who had left their reservation in Kansas and returned to their former home in Iowa possessed no individual rights in the annuities apportioned to them from treaty appropriations, under the act of July 4, 1884 (23 Stat. at L. 76, chap. 180), which confined its benefits to the "Sacs and Foxes now in Iowa, to be ascertained by the Secretary of the Interior."

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indians — annuities — rights of chiefs.

5. The chiefs of the band of Sacs and Foxes who left their reservation in Kansas and returned to their former home in Iowa could claim no right to the sum which, under the treaty of October 11, 1842 (7 Stat. at L. 596), each of the principal chiefs should receive annually "out of the annuities payable to the tribe,"—especially where the parties to the treaty have treated the chiefs on the reservation as the only ones to be paid.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indians — annuities — payment — mistake.

6. The direction to the Secretary of the Interior in the act of May 31, 1900 (31 Stat. at L. 221, chap. 598), thereafter to pay a named head chief of the band of Sacs and Foxes, who had left their reservation in Kansas and returned to their former home in Iowa, an annuity, in accordance with the terms of the treaty of October 11, 1842, art. 4, is not enough to establish that he had been guilty of mistake in not making the same payment in previous years.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indian treaty — condition precedent — notice.

7. The condition attached to the provisions of the treaty of October 1, 1859, art. 7, inviting nonresident members of the Sac and Fox tribes to come in, and providing for notice to them, that those who do not rejoin and permanently reunite with the tribe within one year shall have none of the benefits of any of the treaty stipulations, is an absolute condition precedent to the acquisition by persons not parties to the treaty of any rights, whether given notice or not.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Evidence — in court of claims — ex parte affidavits.

8. *Ex parte* affidavits forming exhibits in departmental reports printed as congressional documents were not made evidence in a suit in the court of claims, brought under the act of March 1, 1907 (34 Stat. at L. 1055, chap. 2290), by the provisions of that act that such reports shall be evidence, to be given such weight as the court may determine for them.

[For other cases, see Court of Claims, 12–21, in Digest Sup. Ct. 1908.]

Indian claims — moral obligation.

9. A merely moral claim is not made the foundation of a possible recovery, under the act of March 1, 1907, giving the court of claims "full legal and equitable jurisdiction" to adjudicate "as justice and equity shall require" claims of the Iowa Sacs and Foxes for their alleged proportionate shares of appropriations to fulfil treaty obligations.

[For other cases, see Claims, 157–161, in Digest Sup. Ct. 1908.]

Appeal — harmless error — excluding evidence.

10. The errors, if any, on the part of the court of claims, in excluding *ex parte* affidavits which counsel had agreed might be given the effect of depositions, does not call for the reversal of a judgment dismissing the petition of Indian claimants for their alleged proportionate shares of appropriations to fulfil treaty obligations, where the admission of the evidence could not have changed the result.

[For other cases, see Appeal and Error, 5051–5065, in Digest Sup. Ct. 1908.]

[No. 614.]

Argued December 14 and 15, 1910. Decided April 24, 1911.

APPEAL from the Court of Claims to review a judgment dismissing the petition of the Iowa Sacs and Foxes for their alleged proportionate shares of appropriations to fulfil treaty obligations. Affirmed.

See same case below, 45 Ct. Cl. 287.

The facts are stated in the opinion.

Mr. **Charles H. Merillat** argued the cause, and, with Messrs. Charles J. Kappler, George R. Struble, H. F. Stiger, and William O. Belt, filed a brief for appellants.

Mr. **Barry Mohun** argued the cause, and, with Messrs. A. R. Serven and R. W. Joyce, filed a brief for the Sac and Fox Indians.

Assistant Attorney General **John Q. Thompson** argued the cause, and, with Mr. George M. Anderson, filed a brief for the United States.

482] *Mr. Justice **Holmes** delivered the opinion of the court:

This is a suit brought by the Sac and Fox Indians of the Mississippi in Iowa, against the Sacs and Foxes in Oklahoma, and against the United States, under the act of March 1, 1907, chap. 2290, 34 Stat. at L. 1055. That statute gave "full legal and equitable jurisdiction, without regard to lapse of time," to the court of claims to hear and determine "as justice and equity may require, with right of appeal" to this court, all claims of the plaintiffs against the defendants for their alleged "proportionate shares, according to their numbers," not already paid to or for them, or appropriations for fulfilling treaty stipulations, or arising from the disposal or sale of the tribes' lands, including certain claims to be stated. Reports of Departments printed as congressional documents are made evidence, to "be given such weight as the court may determine for them." The claims made are (1) for annuities between 1855 and 1866, both inclusive; (2) for the difference between the sums paid and those alleged to have been due from 1867 to 1884; (3) for a similar difference from 1884 to date; (4) for a sum alleged to be due for pay of the plaintiffs' chiefs; (5) for the plaintiffs' share of the proceeds of tribal lands disposed of under a treaty of 1859. The case was heard on the evidence furnished by the above-mentioned documents, the petition was dismissed, and the plaintiffs took this appeal. 45 Ct. Cl. 287.

The facts found by the court of claims, abridged, are as follows: Under the treaty of October 11, 1842 (7 Stat. at L. 596), the tribes in question ceded the land then occupied by them in the territory of Iowa, were assigned a tract in what now is Kansas, and removed thither in 1845, 1846; then numbering 2,278, and, in 1851, 2,660 persons. In 1855, and from 1862 to 1866, certain members, number unknown, without permission from the United States, returned *to what had been a part of the Iowa[483 reservation. Their motives are immaterial. On July 15, 1856, the legislature of Iowa passed an act giving the consent of the state that the Indians (Sacs and Foxes) "now residing" in Tama county, but none others, be permitted to remain there; providing for a census, and requesting the governor to inform the Secretary of War and urge the payment to such Indians of their proportion of the annuities due or to become due to the tribe. The number of Indians embraced in the act does not appear. From 1855 to 1866 there was no agent of the United States with the Iowa band, although its existence was known. A special agent took a census on May 31, 1866, which gave the whole number as 264, and he spent on account of annuities for them, $5,359.06. Except this sum, all the annuities and other moneys of the tribe were paid out at the Sac and Fox agency, Kansas. Whether any Indians returned to Kansas and received payments there does not appear. At this time, up to 1867, annuities were paid subject to the act of August 30, 1852, chap. 103, § 3 (10 Stat. at L. 41, 56, U. S. Rev. Stat. § 2086), which forbade payment to be made to any attorney or agent, and required it to be made directly to the Indians themselves or to the tribe *per capita*, "unless the im-

perative interest of the Indian or Indians, or some treaty stipulation, shall require the payment to be made otherwise, under the direction of the President." The policy and practice of the government were to pay no annuities to Indians absent from reservations without leave, as were the Iowa band, and nothing to the contrary is implied by the act of 1852.

We interrupt the recital of facts to dispose at this point of the first claim made by the plaintiffs. The act of 1852 gave no vested rights to individuals. It was not a grant to the Indians, but a direction to agents of the United States, subject to other directions from the President. See Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 387, 48 L. ed. 229, 231, 24 Sup. Ct. Rep. 484]107. *The government did not deal with individuals, but with tribes. Blackfeather v. United States, 190 U. S. 368, 377, 47 L. ed. 1099, 1102, 23 Sup. Ct. Rep. 772. See Fleming v. McCurtain, 215 U. S. 56, 54 L. ed. 88, 30 Sup. Ct. Rep. 16. The promises in the treaties under which the annuities were due were promises to the tribes. Treaties of November 3, 1804, 7 Stat. at L. 84; October 21, 1837, 7 Stat. at L. 540; October 11, 1842, 7 Stat. at L. 596. See treaty of October 1, 1859, 15 Stat. at L. 467. So the treaty of February 18, 1867, in article 21, speaks of "the funds arising from or due the nation under this or previous treaty stipulations," and of payments to bands. 15 Stat. at L. 495, 504. Moreover, when the government decided to pay only at the tribal agency, and then paid the whole amount due, we must presume, at this distance of time, that its decision was made under the direction of the President. The court of claims adds as yet a further reason for rejecting this claim, that it does not appear how many of the Iowa Indians returned to Kansas to receive their annuities, but (therein varying from the statement of facts found) that it does appear that some of them did. The course of the government is sanctioned in principle by the implication of the treaty of October 1, 1859, article 7, 15 Stat. at L. 467, 469. That article recites the anxiety of the Sacs and Foxes that all members of the tribes should share the advantages of the treaty, invites nonresident members to come in and provides for notice to them, but adds the condition that those who do not rejoin and permanently reunite with the tribe within one year shall not have the benefit of any of the stipulations in the treaty contained.

On February 18, 1867, another treaty was made, amended September 2, 1868, proclaimed on October 14, 1868 (15 Stat. at L. 495), by which the tribes sold their lands in Kansas to the United States, and agreed to remove to a reservation in what now is the state of Oklahoma. Article 21 was like article 7 of the treaty of 1859, just mentioned, with a condition that no part of the funds *due to the nation under this or[485 previous treaties should be paid to any bands or parts of bands not permanently residing on the reservation, except those residing in Iowa. 15 Stat. at L. 504. The soon-following Indian appropriation act of March 2, 1867, chap. 173, 14 Stat. at L. 492, 507, provided, as permitted by the treaty of 1859, art. 6, that the band of Sacs and Foxes "now in Tama county, Iowa, shall be paid *pro rata*, according to their numbers, of the annuities, so long as they are peaceful and have the assent of the government of Iowa to reside in that state." This is subject to the same comment as the act of 1852 when relied upon as a foundation for individual rights under it. From 1867 through 1884, the Iowa Indians were paid $11,174.66 as their proportion of the annuities, although they protested, and for a time refused to receive the same. The matter was settled by a clause in the act of May 17, 1882, chap. 163, 22 Stat. at L. 78, "That hereafter the Sacs and Foxes of Iowa shall have apportioned to them from appropriations for fulfilling the stipulations of said treaties no greater sum thereof than that heretofore set apart for them." This by implication ratified the previous estimates, and leaves no more to be said as to the second claim (for the time from 1867 to 1884). It is suggested, to be sure, that the act of 1882 was repealed by the act of 1884, but, as will be seen directly, it was not repealed so far as it affected this claim. After the act of 1882, the Iowa Indians consented to receive the apportioned sum. We may add that there is nothing to show that all the Indians that had the assent of the government of Iowa, given by the act of 1856, to their residing there, were not paid their full share.

By the act of July 4, 1884, chap. 180, 23 Stat. at L. 76, 85, after an appropriation for interest payable under the treaty of 1842, it was provided that thereafter the Iowa Sacs and Foxes should have apportioned to them, from treaty appropriations, "their *per capita* proportion of the amount *appropriated in this act, sub-[486 ject to provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa: *And provided further*, That this shall apply only to original Sacs and Foxes now in Iowa, to be ascertained by the Secretary of the Interior." As to the word "original," we may compare the proviso in the act of March 2, 1867, stated above. The Secretary of the Interior ascer-

tained the number to be 317 and the number on the Oklahoma reservation to be 505 in 1884 and 513 in 1887. He accordingly apportioned the proper fund in the proportion of 317 to 505 in 1885 and 1886, and afterwards, to 1907, in the proportion of 317 to 513. The plaintiffs attempt to go behind this ascertainment by the Secretary. But here for a third time we are dealing, with a statute, not with a treaty. There is no intimation of an intent to change the terms of the treaties, by which the contracts were made not with individuals, but with the tribes. The statute neither changed nor conferred rights. It simply directed the Secretary of Interior how the contracts of the United States should be performed. They were performed as directed, to the seeming satisfaction of the representatives of the contractees, and there is an end of the matter. Here again we may add that although it is argued that the evidence shows that the Secretary's estimate was too small for years after 1887, the evidence does not show that the additional Indians were or represented original Sacs and Foxes "now [i. e., on July 4, 1884] in Iowa." This disposes of the third claim.

However, the Iowa Indians not being satisfied, and having presented a memorial to Congress setting up their present claims except that for pay of their chiefs, the act of March 2, 1895, chap. 188, 28 Stat. at L. 876, 903, directed the Secretary of the Interior to ascertain whether, under any treaties or acts of Congress, any amount was justly due to them from the members of the tribe in Oklahoma by reason of any unequal distribution. The Secretary found 487]*that a certain sum was due from the amount appropriated by act of April 10, 1869, chap. 16, 16 Stat. at L. 13, 35, in payment for the Kansas lands ceded by the treaty of 1867, but nothing more. This sum was paid. Act of June 10, 1896, chap. 398, 29 Stat. at L. 321, 331.

The fourth claim is based upon article 4 of the treaty of 1842, by which it was agreed that each of the principal chiefs should receive $500 annually, "out of the annuities payable to the tribe, to be used and expended by them for such purposes as they may think proper, with the approbation of their agent." This, like the rest of the treaty, was a promise not to the chiefs, but to the tribe; gave the chiefs no vested rights, and was subject to such qualification in its performance as to the parties might seem fit. Whether a payment to Iowa chiefs would have been performance may be doubted; and certainly if the parties saw fit to treat the chiefs on the reservation as the only ones to be paid, no one else has anything to say. The act of May 31, 1900, chap. 598, 31 Stat. at L. 221, 245, directed the Secretary of the Interior to pay a named Iowa head chief $500 a year, during the remainder of his life, beginning with and including the fiscal year 1900, in accordance with the terms of article 4 of the treaty of 1842, but that is not enough to establish that he had been guilty of mistake in not making the same payment before the time that he was ordered to begin.

The fifth and last claim is for a share in proceeds of land ceded by the treaty of 1859. As to this, the court of claims finds it impossible to ascertain what sum, if any, is due, or to whom it would be payable. We do not see how the claim can be supported when the treaty itself provided that, to benefit by it, members must rejoin the tribe, meaning the tribe in Kansas, within one year. It is suggested, to be sure, that the forfeiture, as it is called, was dependent upon notice being given as agreed in article 7, and that there is some evidence that notice was not given. The *con-[488 dition, however, was an absolute condition precedent to the acquisition, by persons not parties to the treaty, of any rights, if rights they can be called, notice or no notice; and furthermore, if the question were open, we should not be prepared to find that there was a failure in that respect. See United States v. Crusell, 14 Wall. 1, 20 L. ed. 821; United States v. Pugh, 99 U. S. 265, 25 L. ed. 322. New York Indians v. United States, 170 U. S. 1, 42 L. ed. 927, 18 Sup. Ct. Rep. 531, has no bearing. There the question was whether grantees in fee simple by treaty had forfeited their rights.

The plaintiffs contend that, as the act authorizing the suit gave the court of claims full legal and equitable jurisdiction, the appeal opens the findings of fact for reconsideration, as was held in United States v. Old Settlers, 148 U. S. 427, 464, 465, 37 L. ed. 509, 523, 13 Sup. Ct. Rep. 650. That, however, was a suit in equity, whereas the present case is more analogous to an action at law, to recover a fund from parties to whom it was paid under mistake of law or fact, or from the original contractor by whom the payment was made. We should hesitate to depart from the ordinary rule that we do not go behind the findings of the court of claims (United States v. Sisseton & W. Indians, 208 U. S. 561, 566, 52 L. ed. 621, 623, 28 Sup. Ct. Rep. 352), if, in our view, the question needed to be decided. It is true that the court below stated a principle of evidence that, if it is to be taken literally, cannot be sustained. It said that counsel could not bind the court to admit evidence not admissible

by law, and partly on that ground seems to have declined to consider *ex parte* affidavits which the counsel for the Iowa and Oklahoma Indians agreed might be given the effect of depositions. The counsel for the United States refused to agree, and this was a further, and possibly adequate, ground for the exclusion, as the agreement may have been understood to be conditional upon all parties joining. But, of course, evidence, hearsay or *ex parte*, for instance, may be admitted by consent, unless, perhaps, as against the United States, and then 489]should be given *whatever weight it would have but for technical rules. Apart from agreement, the depositions were not made evidence by the statute of 1907, as that only dealt with reports of departments, not with every exhibit that such reports might contain.

The question remains whether the error, if error there was, did the plaintiffs any harm. The counsel for the plaintiffs treats the statute giving jurisdiction as intended to open the case from the beginning, without regard to inconsistent statutes, and to provide for an arbitration on the footing of what may seem fair. See United States v. Old Settlers, 148 U. S. 427–429, 473, 37 L. ed. 509, 510, 526, 13 Sup. Ct. Rep. 650; Pam-To-Pee v. United States, 148 U. S. 691, 699, 37 L. ed. 613, 616, 13 Sup. Ct. Rep. 742. In view of the subject-matter an uneasy doubt is natural whether Congress did not mean rather more than it plainly said. But the jurisdiction given is "legal and equitable," and the authority is to "adjudicate as justice and equity shall require" claims for money alleged "to be due to them as their proportionate shares" of appropriations to fulfil treaty obligations, etc. The statute creates no new right beyond excluding the effect of the lapse of time, and, perhaps, the defense of *res judicata* and satisfaction under the acts of 1895 and 1896; it makes no admission, but simply provides for a trial on the merits. See Stewart v. United States, 206 U. S. 185, 194, 51 L. ed. 1017, 1021, 27 Sup. Ct. Rep. 631. A merely moral claim is not made the foundation of a possible recovery. Something must be shown that amounts to a right.

It is apparent from what we have said that no finding as to the number of Indians in Iowa in particular years, without more, could change the result to which the court of claims and this court have come. The treaty contracts on which the plaintiffs' claims are founded gave rights only to the tribe, not to the members. It was an accepted and reasonable rule, especially in the days when Indian wars still were possible and troublesome, that payments to the tribe should be made only at their reservation and *to persons present there. The[490 acts of 1852 and 1867 did not shift the treaty rights from the tribe to the members, create new rights, or enlarge old ones. The payments up to 1884 had the sanction of statute. The act of 1884 no more created individual rights than did the act of 1852 and 1867. It confined its benefits to "original Sacs and Foxes now in Iowa," and made the Secretary of the Interior the judge. There is no evidence to show that he was wrong as to the number of original Sacs and Foxes who had been in Iowa on July 4, 1884. Whether the plaintiffs might get an award in a free arbitration, irrespective of treaty and statute, we cannot say, but in our opinion they have failed to establish such rights as can be recognized by this court. The decision below was according to the long-established construction and practice of the Department,—a fact entitled to much weight in a case like this.

Judgment affirmed.

Mr. Justice **McKenna**, dissenting:

1. On the supposition that the findings of the court of claims are binding on this court, the case should be remanded to that court for further consideration because of its error in refusing to consider evidence made competent by the jurisdictional act and by the stipulation between the contending Indians.

2. If this court may go behind the findings, as I think it may, on the authority of United States v. Old Settlers, 148 U. S. 464, 37 L. ed. 523, 13 Sup. Ct. Rep. 650, and as it is conceded by the contending Indians that it may, in my opinion the Secretary of the Interior, in apportioning the annuities from 1885 to date, committed error in taking the fixed, unvarying sum of 317 for the Sacs and Foxes in Iowa, and 505 for those in Oklahoma, disregarding any increase or decrease of the respective divisions of the tribe. The tribal rights of the claimant Indians had been recognized, and the jurisdictional *act re-[491 quired that they should be given "their proportionate shares according to their numbers . . . of the appropriations made by Congress for fulfilling treaty stipulations with the confederated tribes. . . ." [34 Stat. at L. 1055, chap. 2290.]

I think, therefore, that a fixed, unvarying sum should not have been selected. Annual tests should have been made and the increase or decrease of the Indians ascertained by the Secretary of the Interior.

The court of claims found, it is true, that there was no competent evidence of the increase or decrease of the divisions of the

tribe. But, in so finding, the court disregarded, as I have already said, evidence which the jurisdictional act and the stipulations of the contending Indians made competent, and such evidence, though not strong, established that the claimant Indians had increased. It is pointed out in the opinion that the Secretary of the Interior recognized a small increase of the defendant Indians in 1887.

HENRY C. RIPLEY, Appt.,
v.
UNITED STATES. (No. 887.)

UNITED STATES, Appt.,
v.
HENRY C. RIPLEY. (No. 888.)

(See S. C. Reporter's ed. 491–497.)

Appeal — from court of claims — remanding for additional findings.

The record on cross appeals from an award by the court of claims under a contract for a public work will be remanded for correction, where the court failed to make an explicit finding as to the knowledge and good faith of the government inspector whose action is alleged to have impeded greatly the progress of the work, to the claimant's injury, or to find as a fact whether or not complaint of the inspector's action was made by the claimant to a superior officer, and, if made, as to the date of such complaint, and the action taken upon it.

[For other cases, see Appeal and Error, 3368a–3370, in Digest Sup. Ct. 1908.]

[Nos. 887 and 888.]

Submitted March 10, 1911. Decided April 24, 1911.

CROSS APPEALS from the Court of Claims to review an award under a contract for a public work. Record remanded for additional findings.

See same case below, 45 Ct. Cl. 621.

The facts are stated in the opinion.

Messrs. **William H. Robeson, Benjamin Carter,** and **F. Carter Pope** submitted the cause for Ripley.

Assistant Attorney General **John Q. Thompson** and **Philip M. Ashford** submitted the cause for the United States.

Mr. Chief Justice **White** delivered the opinion of the court:

These are cross appeals from a judgment entered by the court of claims against the United States and in favor of Henry C. Ripley. The claim of Ripley was based upon a written contract between himself and the United States, executed on April 6, 1903, containing numerous stipulations, by which in substance Ripley agreed to furnish materials for and do certain jetty work at Aransas Pass, Texas, authorized by an act approved June 13, 1902 (32 Stat. at L. 340, chap. 1078).

In his amended petition Ripley set forth numerous items of damage, aggregating $45,930, which it was asserted resulted from violations by the United States of the terms of the contract. Judgment was entered against the United States for $14,732.05. 45 Ct. Cl. 621. Ripley prosecuted this appeal in order to obtain an increased allowance *while the United States,[493] by its cross appeal, seeks a reversal of the judgment.

Among other things it was provided in paragraph 61 of the specifications as follows:

"Between Stations 20 and 27, and from the vicinity of Station 55, seawards, the method of construction shall be as follows: A mound of small riprap shall first be built up over and around the existing structure to about one foot elevation. When, in the judgment of the U. S. agent in charge, this mound has become sufficiently consolidated, its gaps and interstices shall be filled and its crest leveled with small riprap, generally one-man stone. Large blocks shall then be bedded in crest of mound in two rows, breaking joints with their longest dimensions parellel to the axis of jetty in such manner that voids under the placed blocks will be at a minimum, and side slopes and remainder of crest shall then be covered with large riprap."

A large sum was demanded by Ripley, upon the contention that the completion of the work was greatly delayed, owing to the fact that "on the portion of the line where no foundation had previously been laid, and where petitioner therefore placed the foundation materials, said Captain Jadwin and the subordinate officers in charge forbade and restrained petitioner from imposing the cap blocks until long after the foundation, in their judgment and, in fact, had become sufficiently consolidated and they had caused the crest to be leveled." On this branch of the case the court of claims found as follows:

"7.

"In the performance of said work it was advantageous to claimant to have his employees operate on the lee side of the structure, where they could be protected from the action of the rough seas, and for this purpose it was desirable that he be allowed to impose the crest block on the top of the core as rapidly as possible, so that the

494]waves *could not pass over it and interfere with the workmen, and thus prevent delay in the completion of the contract. The Aransas Pass Harbor Company had laid the foundation for the entire jetty and for 2,800 feet; that is, between Stations 27 and 55, the entire core of the structure had been built up, and between Stations 27 and 40 the crest blocks had been laid. The foundation and the core thus previously constructed were fully consolidated when the contract with claimant was let.

"When claimant had completed from 100 to 200 feet of the core, he requested from the inspector in charge permission to begin to lay crest blocks, which was refused on the ground that the core had not consolidated. By the end of December, 1903, claimant had completed 400 to 500 feet of the core, and again he requested permission to impose the crest blocks. Said inspector refused and continued to refuse permission to lay said crest blocks until May, 1904, at which time between 1,400 and 1,500 feet of the core had been repaired and completed. Commencing in October, 1903, when about 300 feet of the core had been built up to the required elevation, slope stones were laid on the jetty, which afforded some protection from the action of the waves to the riprap already constructed, but not as much protection as the crest blocks would have afforded. When claimant was thus laying the slope stones, and throughout December, 1903, and January, February, March, and April, 1904, it was manifest that large parts of the work done by him had fully settled and consolidated. If claimant had been permitted to lay the crest blocks from that time on, as the work progressed, there would have resulted an additional protection which would have enabled him to work sixty days more than he did between that time and May 7, 1904, date the first crest blocks were laid. When claimant was seeking permission to lay the crest blocks as aforesaid, the inspector, in refusing same, alleged as a reason that the jetty had not had sufficient time to 495]*consolidate, and it does not appear that any other reason was at any time given by said inspector for so refusing."

In the brief of counsel for Ripley it is said:

"This court will perceive that, with the exception of *two matters* of minor importance, to which we will hereafter briefly refer, the main complaint involved in this appeal is the erroneous application of finding 7 to the judgment. The court of claims in finding 7 has found that as early as October, 1903, claimant was endeavoring to obtain permission to lay the crest blocks on the core of which 'it was *manifest* that large parts . . . had fully settled and consolidated.' 'Manifest,' according to all the dictionaries, means 'clear,' 'plain,' 'evident to the eye and understanding.' So that if it was 'manifest' that the core had fully settled and consolidated, it naturally follows that this was known to the inspector, and that the denial of the permission to lay the crest blocks (which the claimant had the right to do upon the consolidation of the core) was such a fraud as entitles him to recover the damages he has thereby suffered. The claimant's right to recover could not be more complete had the court of claims found in so many words that the decisions of the government's officer were grossly fraudulent and made in bad faith. Apparently the court of claims, with delicate considerations for the feelings of the engineer department, chose to employ different, though just as effective, language. But for the denial of this permission to lay these crest blocks, they would have been laid, and thus substantially all of the delay in the completion of the contract would have been avoided."

We are of opinion, however, that while it may be open to conjecture that the word "manifest" as used by the court in its finding is susceptible of the broad significance which the argument thus imputes to it, we do not think such meaning is so clear and free from doubt as to justify us in concluding that there was bad faith on the part of the government inspector in charge of the work. We say *this be-[496 cause it is certain that we may not draw the inference of bad faith unless the findings are so clear on the subject as to cause such inference to be plain beyond controversy. It follows, therefore, that the finding below on the subject of the knowledge and good faith of the inspector is so incomplete and inconclusive as to render it impossible for us to decide the cause without grave risk of doing wrong to the plaintiff or serious injury to the government. It was the clear duty of the court below, in dealing with the question of bad faith on the part of the government inspector, not to leave that subject dependent upon an ambiguous expression, susceptible of being construed one way or the other, but to explicitly find whether or not that which it states was manifest was or not known to the inspector, and whether that subordinate official acted in good or bad faith in the various refusals recited as having been made to the laying of the crest blocks and the reasons assigned for those refusals. Further, the court should have found as a fact whether or not complaint was made by the claimant, either to the engineer officer in charge or to the chief of engineers, as

to the action of the subordinate inspector in refusing the requested permission, and, if complaint was made, when it was made, and what action was taken thereon.

Following the approved practice (United States v. Adams [United States v. Child] 9 Wall. 661, 19 L. ed. 808), the following order will be made:

Ordered: That the record in this case be remanded to the court of claims, and that said court be instructed to find and certify to this court, as matters of fact, in addition to the facts found and certified in said record:

First. Whether, when the claimant was laying the slope stones, and during the months of December, 1903, and January, February, March, and April, 1904, as recited in finding 7, the inspector in charge knew "that large parts of the work done by the claimant had fully settled and consolidated."

497] *Second. Whether, in the various refusals to permit the laying of crest blocks, stated in finding 7, the inspector in charge acted in good faith.

Third. Whether at any time the claimant notified the engineer officer in charge or the chief of engineers that the inspector in charge wrongfully refused to permit the laying of the crest blocks, and if such notice was given, whether it was oral or written, when the notice or notices were given, and what action, if any, was taken by such superior officer.

And it is further ordered that the said record, with the said additional findings of fact, be returned to this court with all convenient speed.

MARIANO F. SENA, Plff. in Err.,
v.
AMERICAN TURQUOISE COMPANY.

(See S. C. Reporter's ed. 497–501.)

Ejectment — plaintiff's title — Mexican land grant — uncertain boundaries.

1. A Mexican land grant will not support an action in ejectment where the evidence offered to identify the boundaries of such grant is insufficient to show that they included the land in dispute.

[For other cases, see Ejectment, II. b, 3, in Digest Sup. Ct. 1908.]

Appeal — scope of review — verdict directed on request of both parties.

2. A judgment entered on a verdict directed by the court after both parties had moved for such direction must stand unless the court's ruling is wrong as a matter of law.

[For other cases, see Appeal and Error, VIII. m, 6, in Digest Sup. Ct. 1908.]

[No. 73.]

Argued April 18, 1911. Decided May 1, 1911.

IN ERROR to the Supreme Court of the Territory of New Mexico to review a judgment which affirmed a judgment of the District Court of Santa Fe County, in that state, in favor of defendant in an action in ejectment. Affirmed.

See same case below, 14 N. M. 511, 98 Pac. 170.

The facts are stated in the opinion.

Mr. **Frank W. Clancy** argued the cause, and, with Mr. Harry S. Clancy filed a brief for plaintiff in error:

The evidence clearly identifies and locates the boundaries.

Bartlett Land & Lumber Co. v. Saunders, 103 U. S. 318–323, 26 L. ed. 548, 549; Owen v. Bartholomew, 9 Pick. 525; Morris v. Callanan, 105 Mass. 132; Thruston v. Masterson, 9 Dana, 230.

Even if there were doubt about the location of the boundaries, the title would not be thereby affected.

Wilson v. Marvin, 172 Pa. 37, 33 Atl. 275; Bushey v. South Mountain Min. & Iron Co. 136 Pa. 555, 20 Atl. 549; Berry v. Watson, 122 Pa. 210, 15 Atl. 618; Kellum v. Smith, 65 Pa. 86; Greeley v. Thomas, 56 Pa. 43; Brown v. Willey, 42 Pa. 208; Hunt v. McFarland, 38 Pa. 71; Mathers v. Hegarty, 37 Pa. 64; Gratz v. Hoover, 16 Pa. 239; Nourse v. Lloyd, 1 Pa. St. 233; Comegys v. Carley, 3 Watts, 280, 27 Am. Dec. 356; Schlei v. Struck, 109 Wis. 598, 85 N. W. 430; Woodbury v. Venia, 114 Mich. 252, 72 N. W. 189; Brown v. Morrill, 91 Mich. 29, 51 N. W. 700; Tasker v. Cilley, 59 N. H. 575; Ayers v. Watson, 113 U. S. 599–609, 28 L. ed. 1095–1098, 5 Sup. Ct. Rep. 641; Abbott v. Abbott, 51 Me. 575; Cullacott v. Cash Gold & S. Co. 8 Colo. 179, 6 Pac. 214, 15 Mor. Min. Rep. 392; Madden v. Tucker, 46 Me. 376; Carter v. Clark, 92 Me. 226, 42 Atl. 398; Boardman v. Reed, 6 Pet. 345, 8 L. ed. 422; Barclay v. Howell, 6 Pet. 509–510, 8 L. ed. 481, 482; Thruston v. Masterson, 9 Dana, 228; Smith v. Evans, Hughes (Ky.) 169.

Mr. **Matt G. Reynolds** argued the cause, and, with Messrs. Thomas B. Harlan and Stephen B. Davis, Jr., filed a brief for defendant in error:

The findings of fact by the district court will not be reviewed in this court.

Beuttell v. Magone, 157 U. S. 154, 39

NOTE.—As to what title or interest will support an action of ejectment—see note to Hancock v. McAvoy, 18 L.R.A. 781.

L. ed. 654, 15 Sup. Ct. Rep. 566; Empire State Cattle Co. v. Atchison, T. & S. F. R. Co. 210 U. S. 1, 52 L. ed. 931, 28 Sup. Ct. Rep. 607, 15 A. & E. Ann. Cas. 70.

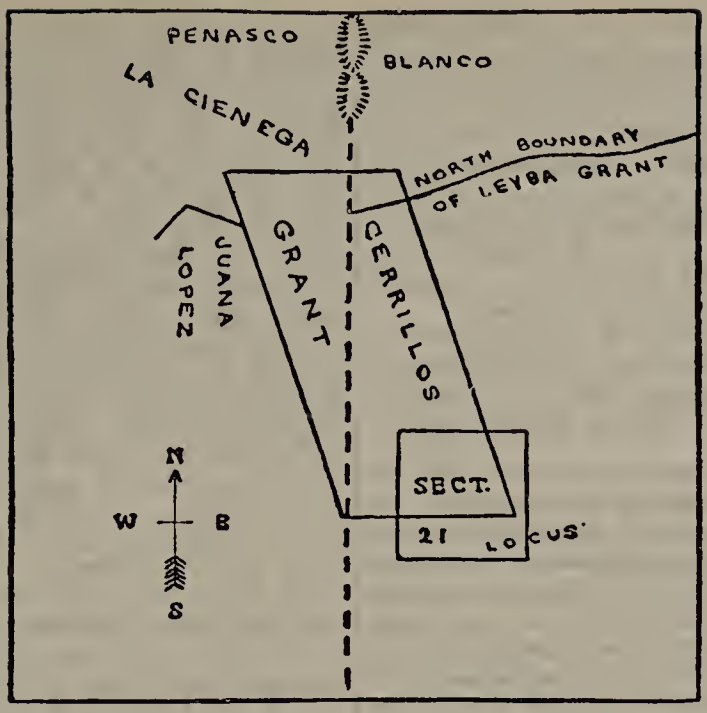
Mr. Justice **Holmes** delivered the opinion of tbe court:

This is an action of ejectment for about 50 acres in section 21,. townsbip 15 north, range 8 east, in the county of Santa Fe, New Mexico, which the defendant holds under mining claims dating from 1885 to 1892, and located under the laws of the United States. It was brought after the plaintiff's failure to establish title, under a Mexican grant, to a large tract of which this land is alleged to be a part, in the court of private land claims, and in this court on appeal. Sena v. United States, 189 U. S. 233, 47 L. ed. 787, 23 Sup. Ct. Rep. 596. Id. 504, 47 L. ed. 792, 23 Sup. Ct. Rep. 857. The decree left open the question whether the plaintiff had a perfect or imperfect title, and was without prejudice of further proceedings, as, in case of a perfect title, the statute establishing the court of private land claims did not require a confirmation by that court. Act of March 3, 1891, chap. 539, § 8; 26 Stat. at L. 854, 857, U. S. Comp. Stat. 1901, pp. 765, 769; Richardson v. Ainsa, 218 U. S. 289, 54 L. ed. 1044, 31 Sup. Ct. Rep. 23. The former decision was put on the ground of laches; but in the present suit the plaintiff offered some little additional evidence of acts indicative of possession later than any proved before. Both parties, however, moved that the court should direct a verdict. Beuttell v. Magone, 157 U. S. 154, 39 L. ed. 654, 15 Sup. Ct. Rep. 566; Empire State Cattle Co. v. Atchison T. & S. F. R. Co. 210 U. S. 1, 52 L. ed. 931, 28 Sup. Ct. Rep. 607, 15 A. & E. Ann. Cas. 70. The court of first instance was of opinion that the boundaries of the grant under which the plaintiff claims were not proved to include the land in dispute, and directed a verdict for the defendant. The judgment was affirmed by the supreme court of the territory on the 499]ground that the *grant did not appear to have been confirmed as required by a Spanish ordinance of October 15, 1752, 2 White's New Recop. 62, 63 [*51], and that the evidence of possession, etc., was too vague to raise a presumption in place of proof. The plaintiff took a writ of error and brings the case here.

The grant under which the plaintiff claims was made to Joseph de Leyba in 1728. Subject to what was said in the former decision (189 U. S. 233, 237, 47 L. ed. 787, 790, 23 Sup. Ct. Rep. 596), the boundaries on the north and east may be assumed to be established, but the others give rise to the trouble. They are "on the south by an arroyo called Cuesta del Oregano; on the west by land of Juan Garcia del las Rivas." To translate these words into things, the plaintiff put in evidence a grant to Miguel Garzia de la Riba of the sitio of the old pueblo the Cienega, dated August 12, 1701, and a grant of the same property from Miguel to his son, Juan Garcia de la Riba, dated March 12, 1704, the latter bounding the property on the east by the Peñasco Blanco de las Golondrinas and on the south by the cañada of Juana Lopez. He also put in the will of a son of Joseph de Leyba, under whom the plaintiff claims, describing the land granted to his father as bounded on the west with lands of the old Pueblo of the Cienega. Peñasco Blanco was shown to be a known natural object. It lies to the north of the north boundary of the Leyba grant, but the plaintiff says that it is to be presumed that the eastern boundary of the Riba grant, and therefore the western boundary of the Leyba grant, was a north and south straight line passing through the Peñasco Blanco, and that such a line would include the land in dispute.

But there are great difficulties in the way of this conclusion. It appears that in 1788 a grant was made of land in or known as Los Cerrillos, title under which was confirmed by the court of private land claims. This tract extends to the east of the line drawn by the plaintiff *through the[500 Peñasco Blanco, the eastern boundary extending southeast and northwest from a point north of the northerly boundary of the Leyba grant to near the eastern boundary of section 21, containing the lands in dispute, as is indicated by the diagram below.† There is nothing adequate to contradict the presumption in favor of this grant, and it at once makes impossible the hypothesis that the Cienega, the land of Juan Garcia given as the western boundary of the Leyba grant, extended to a straight line running south from the Peñasco Blanco through the Cerrillos grant to the west of section 21. Furthermore, the southern boundary of the Cienega was the cañada of Juana Lopez. This seems to have been to the west of Los Cerrillos, and again to exclude the supposed straight line. The southern boundary of Leyba depended on contradictory testimony as to the existence of an arroyo of the Cuesta del Oregano in the neighborhood, and was thought by the

†See opposite page.



trial judge not to be made out. With re-
501]gard to the presumption *as to boundaries, it is to be observed that the northern boundary is supposed to be a more or less irregular road, that the eastern is another road running irregularly northeast and southwest, and the southern, as contended for, continues the same line in a somewhat more northerly direction, so that the outline of the supposed grant resembles the peninsula of Hindustan.

There are other serious questions that would have to be answered before the plaintiff could recover, adverted to in the former decision of this court and in the opinions of the two courts below in the present case. But as it is desirable not to draw into doubt any claim that the plaintiff may have to other land not now in suit, we confine ourselves to the ground taken by the trial court. It seems to us impossible to say that the plaintiff produced evidence sufficient to disturb the defendants' mining claim and the possession that it has held so long under the laws of the United States. As both parties moved for a ruling, and as there was nothing more, according to Beuttell v. Magone, 157 U. S. 154, 39 L. ed. 654, 15 Sup. Ct. Rep. 566, it stood admitted that there was no question of fact sufficient to prevent a ruling being made, and the motions together amounted to a request that the court should find any facts necessary to make it; so that unless the ruling was wrong as matter of law, the judgment must stand. But it hardly is necessary to invoke that principle in this case.

Judgment affirmed.

*SPERRY & HUTCHINSON COM-[502
PANY, Plff. in Err.,
v.
AIDA T. RHODES.

(See S. C. Reporter's ed. 502–505.)

Constitutional law — due process of law — using portrait for advertising purposes.

Property in a photograph taken after N. Y. Laws 1903, chap. 132, went into effect, is not taken without due process of law, by the provisions of that statute making it a misdemeanor to use the name, portrait, or picture of any living person for advertising purposes without the written consent of such person, first obtained, and giving a right of action for damages to the injured person.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

[No. 128.]

Argued April 19 and 20, 1911. Decided May 1, 1911.

NOTE.—On right of action for use of photograph or name for advertising purposes —see note to Henry v. Cherry, 24 L.R.A. (N.S.) 991.

As to what constitutes due process of law —see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

IN ERROR to the Supreme Court of New York to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which affirmed a judgment of the Appellate Division of such Supreme Court, Second Department, which had in turn affirmed a judgment of the Trial Term of the Supreme Court in and for Kings County, in favor of plaintiff in an action brought for the use of a photograph for advertising purposes. Affirmed.

See same case below in appellate division, 120 App. Div. 467, 104 N. Y. Supp. 1102. In court of appeals, 193 N. Y. 223, — L.R.A.(N.S.) —, 127 Am. St. Rep. 945, 85 N. E. 1097.

Mrs. Rhodes, the plaintiff below, sat for her photograph, and accepted and paid for several photographed portraits. Subsequently the photographer made an arrangement with the Sperry & Hutchinson Company, the defendant below, a corporation engaged in the business of issuing and redeeming trading stamps, whereby such corporation was enabled to offer in exchange for a certain number of these stamps an order upon such photographer for photographs. In furtherance of this arrangement, the Sperry & Hutchinson Company, to illustrate the type or style of photograph obtainable for its stamps, displayed in its premium room, among other photographs, several portraits of Mrs. Rhodes. This was done without her consent. The jury assessed the damages at $1,000.

Mr. **John Hall Jones** argued the cause, and filed a brief for plaintiff in error:

Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment, that materially affects its value. Without legal process or compensation, it deprives him of his property, within the meaning of the Constitution.

Forster v. Scott, 136 N. Y. 584, 18 L.R.A. 543, 32 N. E. 976; Railroad Commission Cases, 116 U. S. 307, 331, 29 L. ed. 636, 644, 6 Sup. Ct. Rep. 334, 388, 1191; Vanzant v. Waddel, 2 Yerg. 270; Livestock Dealers' & Butchers' Asso. v. Cresent City L. S. L. & S. H. Co. 1 Abb. (U. S.) 398, Fed. Cas. No. 8,408; Powell v. Pennsylvania, 127 U. S. 678, 692, 32 L. ed. 253, 259, 8 Sup. Ct. Rep. 992, 1257; Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Wright v. Hart, 182 N. Y. 330, 2 L.R.A.(N.S.) 338, 75 N. E. 404, 3 A. & E. Ann. Cas. 263; St. Louis v. Dorr, 145 Mo. 466, 42 L.R.A. 686, 68 Am. St. Rep. 575, 41 S. W. 1094, 46 S. W. 976; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

Unconstitutionality does not depend upon what has been done under a particular statute, but what may be done.

Frank L. Fisher Co. v. Woods, 187 N. Y. 95, 12 L.R.A.(N.S.) 707, 79 N. E. 836; Dexter v. Boston, 176 Mass. 251, 79 Am. St. Rep. 306, 57 N. E. 379; Collins v. New Hampshire, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768.

The court erred in holding that the statute has any reasonable or proper relation to the public health, safety, or morals.

O'Keeffe v. Somerville, 190 Mass. 114, 112 Am. St. Rep. 316, 76 N. E. 457, 5 A. & E. Ann. Cas. 684; Young v. Com. 101 Va. 863, 45 S. E. 327; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; People ex rel. Appel v. Zimmerman, 102 App. Div. 105, 92 N. Y. Supp. 497; Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Lawton v. Steele, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 40, 16 Am. Rep. 611; State v. Loomis, 115 Mo. 313, 21 L.R.A. 789, 22 S. W. 350; Ex parte Drexel, 147 Cal. 767, 2 L.R.A.(N.S.) 588, 82 Pac. 429, 3 A. & E. Ann. Cas. 878; State v. Dalton, 22 R. I. 80, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 12 L.R.A.(N.S.) 707, 79 N. E. 836.

The court declined to hear Mr. **Thomas E. O'Brien** for defendant in error.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action brought by the defendant in error for *using her photographed[505 portrait for advertising purposes without her written consent first obtained. The facts were found against the defendant (the plaintiff in error), an injunction was issued, and damages were awarded; 120 App. Div. 467, 104 N. Y. Supp. 1102; the judgment was affirmed by the court of appeals (193 N. Y. 223, — L.R.A.(N.S.) —, 127 Am St. Rep. 945, 85 N. E. 1097), and thereupon final judgment was entered in the supreme court. The suit was based upon chapter 132 of the New York Statutes of 1903, which makes such use of the name, portrait, or picture of any living person a misdemeanor, and gives this action. The case comes here on the single question of the constitutionality of the act. It is argued that as before the statute a person could not prevent the use of her portrait by one who took and owned it. (Roberson v. Rochester Folding Box Co. 171 N. Y. 538, 59 L.R.A. 478, 89 Am. St. Rep. 828, 64 N. E. 442), to deny that use now is to deprive the owner of his property without due process of law.

The court of appeals held that the statute applied only to photographs taken after it went into effect, as was the photograph of the plaintiff that the defendant used. The property was brought into existence under a law that limited the uses to be made of it, and if otherwise there could have been any question, in such a case there is none. Some comment was made in argument on the distinction between photographs taken before and after the date in 1903, as inconsistent with the 14th Amendment. But the 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.

Judgment affirmed.

506]*UNITED STATES, Plff. in Err.,
v.
PIERRE GRIMAUD and J. P. Carajous. (No. 241.)

UNITED STATES, Plff. in Err.,
v.
ANTONIO INDA. (No. 242.)

(See S. C. Reporter's ed. 506–523.)

Constitutional law — delegation of power.

1. Legislative power was not unconstitutionally delegated to the Secretary of Agriculture by the provisions of the forest reserve acts of June 4, 1897 (30 Stat. at L. 35, chap. 2, U. S. Comp. Stat. 1901, p. 1539), and February 1, 1905 (33 Stat. at L. 628, chap. 288, U. S. Comp. Stat. Supp. 1909, p. 577), making criminal the violation of the rules and regulations covering forest reservations, made and promulgated by him under authority of those statutes.

[For other cases, see Constitutional Law, III. b, in Digest Sup. Ct. 1908.]

Public lands — stock grazing on forest reservation.

2. Grazing stock upon a forest reservation without the permit required by a rule made and promulgated by the Secretary of Agriculture under the authority conferred upon him by the forest reserve acts of June 4, 1897, and February 1, 1905, is made an offense against the United States by the provisions of those acts that violations of such rules and regulations shall be criminally punishable.

[For other cases, see Public Lands, I. b, in Digest Sup. Ct. 1908.]

Executive departments — regulations — stock grazing on forest reservation.

3. A regulation by the Secretary of Agriculture, forbidding stock grazing on a forest reservation without securing a permit, must be regarded as within the authority conferred upon him by Congress in the forest reserve acts of June 4, 1897, and February 1, 1905, to make rules and regulations governing occupancy and use, and for the preservation of the forests, although a fee is charged for such permits,—especially in view of the provisions in the later of the two statutes and in subsequent acts respecting the disposition of forest reservation revenue.

[For other cases, see Executive Departments, I., in Digest Sup. Ct. 1908.]

[Nos. 241, 242.]

Argued February 28, 1910. Affirmed by equally divided court March 14, 1910. Rehearing granted April 18, 1910. Reargued March 3, 1911. Decided May 1, 1911.

TWO WRITS OF ERROR to the District Court of the United States for the Southern District of California, to review judgments sustaining demurrers to indictments for stock grazing on a forest reservation without a permit. Reversed.

See same case below, No. 241, 170 Fed. 205.

Statement by Mr. Justice Lamar:

By the act of March 3, 1891 (26 Stat. at L. 1103, chap. 561, U. S. Comp. Stat. 1901, p. 1537), the President was authorized, from time to time, to set apart and reserve, in any state or territory, public lands, wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public forest reservations. And by the act of June 4, 1897 (30 Stat. at L. 35, chap. 2, U. S. Comp. Stat. 1901, p. 1539), the purposes of these reservations were declared to be "to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States. . . . All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the state wherein such forest reservations are situated, or under the laws of the United States, and the rules and regulations established thereunder." (30 Stat. at L. 36, chap. 2, U. S. Comp. Stat. 1901, p. 1542.)

It is also provided that nothing in the act should "be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, . . . nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, . . . provided that such persons comply with the rules and regulations covering such forest reservations."

There were special provisions as to the sale of timber from any reserve (except

those in the state of California, 30 Stat. at L. 35, chap. 2; 31 Stat. at L. 661, chap. 508]804, and a requirement *that the proceeds thereof and from any other forest source should be covered into the Treasury, the act of February 1st, 1905 (33 Stat. at L. 628, chap. 288, § 5, U. S. Comp. Stat. Supp. 1909, p. 577), providing that "all money received from the sale of any products or the use of any land or resources of said forest reserves shall be covered into the Treasury of the United States, and for a period of five years from the passage of this act shall constitute a special fund available, until expended, as the Secretary of Agriculture may direct, for the protection, administration, improvement, and extension of Federal forest reserves."

The act of 1905, as to receipts arising from the sale of any products or the use of any land, was, in some respects, modified by the act of March 4, 1907. It provided that all moneys received after July 1, 1907, by or on account of forest service timber, or from any other source of forest reservation revenue, shall be covered into the Treasury, provided "that ten per centum of all money received from each forest reserve during any fiscal year, including the year ending June 30th, 1906, shall be paid at the end thereof by the Secretary of the Treasury to the state or territory in which said reserve is situated, to be expended, as the state or territorial legislature may prescribe, for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated." 34 Stat. at L. 1270, chap. 2907.

The jurisdiction, both civil and criminal, over persons within such reservation, was not to be affected by the establishment thereof "except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the state . . . shall not, by reason of the establishment . . . [of the reserve] lose its jurisdiction, nor the inhabitants thereof their rights *and privileges as citizens, or be absolved from their duties as citizens of the state." [30 Stat. at L. 36, chap. 2, U. S. Comp. Stat. 1901, p. 1542.]

The original act provided that the management and regulation of these reserves 509]should be by the Secretary *of the Interior; but in 1905 that power was conferred upon the Secretary of Agriculture (33 Stat. at L. 628, chap. 288, U. S. Comp. Stat. Supp. 1909, p. 576), and by virtue of those various statutes he was authorized to "make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations . . .; and he may make such rules and regulations and establish such service as will insure the objects of such reservations; namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished," as prescribed in Rev. Stat. § 5388, U. S. Comp. Stat. 1901, p. 3649,—which, as amended, provides for a fine of not more than $500 and imprisonment for not more than twelve months, or both, at the discretion of the court. 26 Stat. at L. 1103, chap. 561, U. S. Comp. Stat. 1901, p. 1537; 30 Stat. at L. 34, 35, chap. 2, U. S. Comp. Stat. 1901, p. 1538; 31 Stat. at L. 661, chap. 804; 33 Stat. at L. 36, chap. 160; 7 Fed. Stat. Anno. 310–317, 296, Fed. Stat. Anno. Supp. 1909, p. 664.

Under these acts, the Secretary of Agriculture, on June 12, 1906, promulgated and established certain rules for the purpose of regulating the use and occupancy of the public forest reservations and preserving the forests thereon from destruction, and among those established was the following:

"Regulation 45. All persons must secure permits before grazing any stock in a forest reserve, except the few head in actual use by prospectors, campers, and travelers, and milch or work animals, not exceeding a total of six head, owned by bona fide settlers residing in or near a forest reserve, which are excepted and require no permit."

The defendants were charged with driving and grazing sheep on a reserve, without a permit. The grand jury in the district court for the southern district of California, at the November term, 1907, indicted Pierre Grimaud and J. P. Carajous, charging that on April 26, 1907, after the Sierra Forest Reserve had been established, *and after regulation 45 had been pro-[510 mulgated, "they did knowingly, wilfully, and unlawfully pasture and graze, and cause and procure to be pastured and grazed, certain sheep (the exact number being to the grand jurors unknown) upon certain land within the limits of and a part of said Sierra Forest Reserve, without having theretofore or at any time secured or obtained a permit or any permission for said pasturing or grazing of said sheep or any part of them, as required by the said rules and regulations of the Secretary of Agriculture," the said sheep not being within any of the excepted classes. The indictment concluded, "contrary to the form of the statutes of the United States in such case made and provided, and against the peace and dignity of the said United States."

The defendants demurred, upon the ground "(1) that the facts stated did not consti-

tute a public offense, or a public offense against the United States, and (2) that the acts of Congress making it an offense to violate rules and regulations made and promulgated by the Secretary of Agriculture are unconstitutional, in that they are an attempt by Congress to delegate its legislative power to an administrative officer." The court sustained the demurrers (170 Fed. 205), and made a like ruling on the similar indictment in United States v. Inda, 216 U. S. 614, 54 L. ed. 639, 30 Sup. Ct. Rep. 576. Both judgments were affirmed by a divided court. Afterwards petitions for rehearing were granted.

Solicitor General **Bowers** argued the cause and filed a brief for plaintiff in error on original argument:

The departmental regulation forbidding stock grazing on a forest reservation without a permit from the Department is a valid exercise of administrative power; because Congress itself has fixed the general rule to which the Department regulations must conform, or, in other words, Congress itself has defined the fundamental ends, *viz.*, protection and improvement of the forests on the reservation, to which the regulations must be subordinate means; and the particular regulation as to stock grazing, which is here involved, conforms to the congressional rule, and fairly promotes the designated congressional ends.

Re Kollock, 165 U. S. 526, 533, 536, 41 L. ed. 813, 815, 816, 17 Sup. Ct. Rep. 444; Butterfield v. Stranahan, 192 U. S. 470, 492, 48 L. ed. 525, 534, 24 Sup. Ct. Rep. 349; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367.

In refusing permits to use a forest reservation for stock grazing, except upon stated terms or in stated ways, the Secretary of Agriculture merely asserts and enforces the proprietary right of the United States over land which it owns. The regulation of the Secretary, therefore, is not an exercise of legislative, or even of administrative, power; but is an ordinary and legitimate refusal of the landowner's authorized agent to allow persons having no right in the land to use it as they will. The right of proprietary control is altogether different from governmental authority.

The regulation of the Secretary of Agriculture being a valid restriction upon the use of the forest reservation, which all persons may lawfully be required by Congress to obey, it was permissible for Congress to sanction its requirement of general obedience to that regulation by expressly making disobedience punishable criminally. The crime of violating the regulation is not created by the Secretary of Agriculture, but by Congress itself.

Re Kollock, 165 U. S. 526, 41 L. ed. 813, 17 Sup. Ct. Rep. 444; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Caha v. United States, 152 U. S. 211, 38 L. ed. 415, 14 Sup. Ct. Rep. 513; United States v. Bailey, 9 Pet. 238, 9 L. ed. 113.

Assistant Attorney General **Fowler** argued the cause, and, with Mr. Loring C. Christie, filed a brief for plaintiff in error on reargument:

Congress has power to enact legislation for the protection of its public lands, and has the power, if it deems it advisable, to enact criminal laws to prevent trespasses thereon.

Camfield v. United States, 167 U. S. 518, 525, 42 L. ed. 260, 262, 17 Sup. Ct. Rep. 864.

A violation of the regulations prescribed by the Secretary of Agriculture, upon which, and the statute authorizing its enactment, this indictment is based, constituted an offense, and rendered the offender liable to punishment in accordance with the terms of the statute.

United States v. Bailey, 9 Pet. 238, 252, 254, 256, 257, 9 L. ed. 113, 119–121; Caha v. United States, 152 U. S. 211, 218, 38 L. ed. 415, 417, 14 Sup. Ct. Rep. 513; United States v. Eaton, 144 U. S. 677, 688, 36 L. ed. 591, 594, 12 Sup. Ct. Rep. 764; Re Kollock, 165 U. S. 526, 533, 41 L. ed. 813, 815, 17 Sup. Ct. Rep. 444; United States v. Breen, 40 Fed. 402; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616.

The act of Congress under which the Secretary of Agriculture promulgated the regulation in question did not involve an improper attempt to delegate legislative power to an administrative officer.

Brown v. Turner, 70 N. C. 102; Union Bridge Co. v. United States, 204 U. S. 364, 382, 383, 51 L. ed. 523, 532, 27 Sup. Ct. Rep. 367; Dastervignes v. United States, 58 C. C. A. 346, 122 Fed. 34; Buttfield v. Stranahan, 192 U. S. 470, 492, 48 L. ed. 525, 534, 24 Sup. Ct. Rep. 349; Re Kollock, 165 U. S. 526, 41 L. ed. 813, 17 Sup. Ct. Rep. 444; United States ex rel. West v. Hitchcock, 205 U. S. 80, 51 L. ed. 718, 27 Sup. Ct. Rep. 423; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 54 L. ed. 946, 30 Sup. Ct. Rep. 651; Tilley v. Savannah, F. & W. R. Co. 4 Woods, 427, 5 Fed. 641; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; Interstate Commerce Commission v. Illinois C. R. Co. 215

U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Willoughby, Const. § 781; United States v. Moody, 164 Fed. 269; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 53 L. ed. 1013, 29 Sup. Ct. Rep. 671; Ex parte Reed, 100 U. S. 13, 25 L. ed. 538; Smith v. Whitney, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570; Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 309, 47 L. ed. 1064, 1070, 23 Sup. Ct. Rep. 692; Butte City Water Co. v. Baker, 196 U. S. 119, 125, 126, 49 L. ed. 409, 412, 25 Sup. Ct. Rep. 211; Roughton v. Knight, 219 U. S. 537, ante, 326, 31 Sup. Ct. Rep. 297.

Laying aside other provisions of law, the defendants were clearly guilty of a trespass.

Camfield v. United States, 167 U. S. 518, 525, 42 L. ed. 260, 262, 17 Sup. Ct. Rep. 864; Wilcox v. Jackson, 13 Pet. 498, 512, 513, 10 L. ed. 264, 271.

The general theory of government, that there should be no union between the several departments, has no application to this case.

Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 332, 53 L. ed. 1013, 1019, 29 Sup. Ct. Rep. 691.

Decisions in the lower Federal courts sustaining convictions of crime, and basing civil causes of action on other statutes, and executive rules promulgated thereunder, are in nowise distinguishable from those here attacked.

United States v. Reder, 69 Fed. 965; United States v. Williams, 6 Mont. 379, 12 Pac. 851; United States v. Price Trading Co. 48 C. C. A. 331, 109 Fed. 239; United States v. Ormsbee, 74 Fed. 207; United States v. Moody, 164 Fed. 269; Van Lear v. Eisele, 126 Fed. 823; United States v. Slater, 123 Fed. 115; Stratton v. Oceanic S. S. Co. 72 C. C. A. 241, 140 Fed. 829.

No counsel for defendants in error on original argument.

Mr. **L. M. Hodgson** argued the cause, and with Messrs. Robert P. Stewart and W. W. Kaye, filed a brief for defendants in error on reargument:

The law under which the indictments were found is a void enactment under the Constitution of the United States, for the reason that it does not sufficiently define, or define at all, what acts done or omitted to be done, within the supposed purview of the said act, shall constitute an offense or offenses against the United States.

State v. Mann, 2 Or. 241; State v. Smith, 30 La. Ann. 846; United States v. Eaton, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; United States v. Grimaud, 170 Fed. 206; Cook v. State, 26 Ind. App. 278, 59 N. E. 489; United States v. Reese, 92 U. S. 214–256, 23 L. ed. 563–578; Sarlls v. United States, 152 U. S. 571, 38 L. ed. 556, 14 Sup. Ct. Rep. 720; Todd v. United States, 158 U. S. 278, 39 L. ed. 982, 15 Sup. Ct. Rep. 889; Augustine v. State, 41 Tex. Crim. Rep. 59, 96 Am. St. Rep. 765, 52 S. W. 80; State v. Partlow, 91 N. C. 550, 49 Am. Rep. 652; McGuire v. District of Columbia, 24 App. D. C. 22, 65 L.R.A. 430; Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917; Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129; Drake v. Drake, 15 N. C. (4 Dev. L.) 110; Com. v. Bank of Pennsylvania, 3 Watts & S. 173; 4 Bl. Com. 5; 12 Cye. Law & Proc. p. 129; Ex parte McNulty, 77 Cal. 164, 11 Am. St. Rep. 257, 19 Pac. 237; Peters v. United States, 36 C. C. A. 105, 94 Fed. 127.

It is not within the power of Congress, under the Constitution of the United States, to delegate to the Secretary of the Interior, or the Secretary of Agriculture of the United States, or any other person, authority or power to determine what acts shall be criminal; and the act in question is a delegation of legislative power to an executive officer to define and establish what shall constitute the essential elements of a crime against the United States.

United States v. Matthews, 146 Fed. 306; United States v. Maid, 116 Fed. 650; United States v. Blasingame, 116 Fed. 654; United States v. Eaton, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; United States v. Keokuk & H. Bridge Co. 45 Fed. 178; United States v. Rider, 50 Fed. 406; O'Neil v. American F. Ins. Co. 166 Pa. 72, 26 L.R.A. 715, 45 Am. St. Rep. 650, 30 Atl. 943; State ex rel. Adams v. Burdge, 95 Wis. 390, 37 L.R.A. 157, 60 Am. St. Rep. 123, 70 N. W. 347; Dowling v. Lancashire Ins. Co. 92 Wis. 63, 31 L.R.A. 112, 65 N. W. 741; Anderson v. Manchester F. Assur. Co. 59 Minn. 182, 28 L.R.A. 609, 50 Am. St. Rep. 400, 60 N. W. 1095, 63 N. W. 241; Ex parte Cox, 63 Cal. 21; Harbor Comrs. v. Excelsior Redwood Co. 88 Cal. 491, 22 Am. St. Rep. 321, 26 Pac. 375; Schaezlein v. Cabaniss, 135 Cal. 466, 56 L.R.A. 733, 87 Am. St. Rep. 122, 67 Pac. 755; Kilbourn v. Thompson, 103 U. S. 168–191, 26 L. ed. 377–387; United States v. Wiltberger, 5 Wheat. 85, 5 L. ed. 40.

Mr. Justice **Lamar**, after making the foregoing statement, delivered the opinion of the court:

The defendants were indicted for grazing sheep on the Sierra Forest Reserve without having obtained the permission required by

the regulations adopted by the Secretary of Agriculture. They demurred on the ground that the forest reserve act of 1897 [30 Stat. at L. 35, chap. 2, U. S. Comp. Stat. 1901, p. 1540] was unconstitutional, in so far as it delegated to the Secretary of Agriculture power to make rules and regulations, and made a violation thereof a penal offense. Their several demurrers were sustained. The government brought the case here under the clause of the criminal appeals act (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1909, p. 220) which allows a writ of error where the "decision complained of was based upon the invalidity of the statute."

515] *The Federal courts have been divided on the question as to whether violations of those regulations of the Secretary of Agriculture constitute a crime. The rules were held to be valid for civil purposes in Dastervignes v. United States, 58 C. C. A. 346, 122 Fed. 30; United States v. Dastervignes, 118 Fed. 199; United States v. Shannon, 151 Fed. 863; ibid. 88 C. C. A. 52, 160 Fed. 870. They were also sustained in criminal prosecutions in United States v. Deguirro, 152 Fed. 568; United States v. Domingo, 152 Fed. 566; United States v. Bale, 156 Fed. 687; United States v. Rizzinelli, 182 Fed. 675. But the regulations were held to be invalid in United States v. Blasingame, 116 Fed. 654; United States v. Matthews, 146 Fed. 306; Dent v. United States, 8 Ariz. 138, 71 Pac. 920.

From the various acts relating to the establishment and management of forest reservations, it appears that they were intended "to improve and protect the forest and to secure favorable conditions of water flows." It was declared that the act should not be "construed to prohibit the egress and ingress of actual settlers" residing therein, nor to "prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing mineral resources thereof: provided that such persons comply with the rules and regulations covering such forest reservations." (Act of 1897, 30 Stat. at L. 36, chap. 2, U. S. Comp. Stat. 1901, p. 1540.) It was also declared that the Secretary "may make such rules and regulations and establish such service as will insure the objects of such reservations; namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; *and any violation of the provisions of this act or such rules and regulations shall be punished*" [30 Stat. at L. 35, chap. 2, U. S. Comp. Stat. 1901, p. 1540], as is provided in § 5388 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3649), as amended.

Under these acts, therefore, any use of the reservation for grazing or other lawful purpose was required to be *subject to the[516 rules and regulations established by the Secretary of Agriculture. To pasture sheep and cattle on the reservation, at will and without restraint, might interfere seriously with the accomplishment of the purposes for which they were established. But a limited and regulated use for pasturage might not be inconsistent with the object sought to be attained by the statute. The determination of such questions, however, was a matter of administrative detail. What might be harmless in one forest might be harmful to another. What might be injurious at one stage of timber growth, or at one season of the year, might not be so at another.

In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions, Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power. The authority actually given was much less than what has been granted to municipalities by virtue of which they make by-laws, ordinances, and regulations for the government of towns and cities. Such ordinances do not declare general rules with reference to rights of persons and property, nor do they create or regulate obligations and liabilities, nor declare what shall be crimes, nor fix penalties therefor.

By whatever name they are called, they refer to matters of local management and local police. Brodbine v. Revere, 182 Mass. 599, 66 N. E. 607. They are "not of a legislative character in the highest sense of the term; and as an owner may delegate to his principal agent the right to employ subordinates, giving to them a limited discretion, so it would seem that Congress might rightfully intrust to the local legislature [authorities] the determination of minor matters." Butte City Water Co. v. Baker, 196 U. S. 126, 49 L. ed. 412, 25 Sup. Ct. Rep. 211.

*It must be admitted that it is diffi-[517 cult to define the line which separates legislative power to make laws, from administrative authority to make regulations. This difficulty has often been recognized, and was referred to by Chief Justice Marshall in Wayman v. Southard, 10 Wheat. 42, 6 L. ed. 262, where he was considering the authority of courts to make rules. He there said: "It will not be contended that Congress can delegate to the courts, or to any

other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others powers which the legislature may rightfully exercise itself." What were these nonlegislative powers which Congress *could* exercise, but which might also be delegated to others, was not determined, for he said: "The line has not been exactly drawn which separates those important subjects which *must* be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."

From the beginning of the government, various acts have been passed conferring upon executive officers power to make rules and regulations,—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details" by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress, or measured by the injury done.

Thus it is unlawful to charge unreasonable rates or to discriminate between shippers, and the Interstate Commerce Commission has been given authority to make reasonable rates and to administer the law against discrimination. Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 518]155; *Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 54 L. ed. 946, 30 Sup. Ct. Rep. 651. Congress provided that after a given date, only cars with drawbars of uniform height should be used in interstate commerce, and then constitutionally left to the Commission the administrative duty of fixing a uniform standard. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 287, 52 L. ed. 1064, 28 Sup. Ct. Rep. 616. In Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Re Kollock, 165 U. S. 526, 41 L. ed. 813, 17 Sup. Ct. Rep. 444; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349, it appeared from the statutes involved that Congress had either expressly or by necessary implication made it unlawful, if not criminal, to obstruct navigable streams; to sell unbranded oleomargarine; or to import unwholesome teas. With this unlawfulness as a predicate, the executive officers were authorized to make rules and regulations appropriate to the several matters covered by the various acts. A violation of these rules was then made an offense punishable as prescribed by Congress. But in making these regulations the officers did not legislate. They did not go outside of the circle of that which the act itself had affirmatively required to be done, or treated as unlawful if done. But confining themselves within the field covered by the statute, they could adopt regulations of the nature they had thus been generally authorized to make, in order to administer the law and carry the statute into effect.

The defendants rely on United States v. Eaton, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764, where the act authorized the commissioner to make rules for carrying the statute into effect, but imposed no penalty for failing to observe his regulations. Another section (5) required that the dealer should keep books showing certain facts, and providing that he should conduct his business under such surveillance of officers as the commissioner might by regulation require. Another section declared that if any dealer should knowingly omit to do any of the things "required by law," he should pay a penalty of a thousand dollars. Eaton failed to keep the *books re-[519 quired by the regulations. But there was no charge that he omitted "anything required by law," unless it could be held that the books called for by the regulations were "required by law." The court construed the act as a whole, and proceeded on the theory that while a violation of the regulations might have been punished as an offense if Congress had so enacted, it had, in fact, made no such provision so far as concerned the particular charge then under consideration. Congress required the dealer to keep books rendering return of materials and products, but imposed no penalty for failing so to do. The commissioner went much further, and required the dealer to keep books showing oleomargarine received, from whom received, and to whom the same was sold. It was sought to punish the defendant for failing to keep the books required by the regulations. Manifestly this was putting the regulations above the statute. The court showed that when Congress enacted that a certain sort of book should be kept, the commissioner could not go further and require additional books; or, if he did make such regulation, there was no provision in the statute by which a failure to comply therewith could be punished. It said that, "if Congress intended to make it an offense for wholesale dealers to omit to keep books and render returns required by regulations of the commissioner, it would have done so distinctly,"—implying that if it had done

so distinctly, the violation of the regulations would have been an offense.

But the very thing which was omitted in the oleomargarine act has been distinctly done in the forest reserve act, which, in terms, provides that "any violation of the provisions of this act or such rules and regulations [of the Secretary] shall be punished" as prescribed in § 5388 of the Revised Statutes as amended.

In Union Bridge Co. v. United States, 204 U. S. 386, 51 L. ed. 533, 27 Sup. Ct. Rep. 367, Justice Harlan, speaking for the court, said:

"By the statute in question, Congress de-[520]clared in effect *that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule, and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power."

And again he said in Marshall Field & Co. v. Clark, 143 U. S. 694, 36 L. ed. 310, 12 Sup. Ct. Rep. 495:

"The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must therefore be a subject of inquiry and determination outside of the halls of legislation." See also Caha v. United States, 152 U. S. 211, 38 L. ed. 415, 14 Sup. Ct. Rep. 513; United States v. Bailey, 9 Pet. 238, 9 L. ed. 113; Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 309, 47 L. ed. 1070, 23 Sup. Ct. Rep. 692; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 333, 53 L. ed. 1019, 29 Sup. Ct. Rep. 671; Houghton v. Knight, 219 U. S. 537, ante, 326, 31 Sup. Ct. Rep. 297; Smith v. Whitney, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570; Ex parte Reed, 100 U. S. 22, 25 L. ed. 539; Gratiot v. United States, 4 How. 81, 11 L. ed. 885.

In Brodbine v. Revere, 182 Mass. 599, 66 N. E. 607, a boulevard and park board was given authority to make rules and regulations for the control and government of the roadways under its care. It was there held that the provision in the act that breaches of the rules thus made should be breaches of the peace, punishable in any court having jurisdiction, was not a delegation of legislative power which was unconstitutional. The court called attention to the fact that the punishment was not fixed by the board, saying that the making of the rules was administrative, while *the[521 substantive legislation was in the statute, which provided that they should be punished as breaches of the peace.

That "Congress cannot delegate legislative power is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." Marshall Field & Co. v. Clark, 143 U. S. 692, 36 L. ed. 309, 12 Sup. Ct. Rep. 495. But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense.

It is true that there is no act of Congress which, in express terms, declares that it shall be unlawful to graze sheep on a forest reserve. But the statutes from which we have quoted declare that the privilege of using reserves for "all proper and lawful purposes" is subject to the proviso that the person so using them shall comply "with the rules and regulations covering said forest reservation." The same act makes it an offense to violate those regulations; that is, to use them otherwise than in accordance with the rules established by the Secretary. Thus the implied license under which the United States had suffered its public domain to be used as a pasture for sheep and cattle, mentioned in Buford v. Houtz, 133 U. S. 326, 33 L. ed. 620, 10 Sup. Ct. Rep. 305, was curtailed and qualified by Congress, to the extent that such privilege should not be exercised in contravention of the rules and regulations. Wilcox v. Jackson, 13 Pet. 513, 10 L. ed. 271.

If, after the passage of the act and the promulgation of the rule, the defendants drove and grazed their sheep upon the reserve, in violation of the regulations, they were making an unlawful use of the government's property. In doing so they thereby made themselves liable to the penalty imposed by Congress.

It was argued that, even if the Secretary could establish regulations under which a permit was required, there was *noth-[522 ing in the act to indicate that Congress had intended or authorized him to charge for the privilege of grazing sheep on the reserve. These fees were fixed to prevent excessive grazing, and thereby protect the young growth and native grasses from destruction, and to make a slight income with which to meet the expenses of management. In

addition to the general power in the act of 1897, already quoted, the act of February 1st, 1905 [33 Stat. at L. 628, chap. 288, § 5, U. S. Comp. Stat. Supp. 1909, p. 577], clearly indicates that the Secretary was authorized to make charges out of which a revenue from forest resources was expected to arise. For it declares that "all money received from the sale of any products or the use of any land or resources of said forest reserves" shall be covered into the Treasury, and be applied toward the payment of forest expenses. This act was passed before the promulgation of regulation 45, set out in the indictment.

Subsequent acts also provide that money received from "any source of forest reservation revenue" should be covered into the Treasury, and a part thereof was to be turned over to the Treasurers of the respective states, to be expended for the benefit of the public schools and public roads in the counties in which the forest reserves are situated. (34 Stat. at L. 684, chap. 3913, 1270, chap. 2907.)

The Secretary of Agriculture could not make rules and regulations for any and every purpose. Williamson v. United States, 207 U. S. 462, 52 L. ed. 297, 28 Sup. Ct. Rep. 163. As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provision to protect them from depredations and from harmful uses. He is authorized "to regulate the occupancy and use and to preserve the forests from destruction." A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty.

523] *The indictment charges, and the demurrer admits, that rule 45 was promulgated for the purpose of regulating the occupancy and use of the public forest reservation and preserving the forest. The Secretary did not exercise the legislative power of declaring the penalty or fixing the punishment for grazing sheep without a permit, but the punishment is imposed by the act itself. The offense is not against the Secretary, but, as the indictment properly concludes, "contrary to the laws of the United States and the peace and dignity thereof." The demurrers should have been overruled. The affirmances by a divided court heretofore entered are set aside and the judgments in both cases reversed.

FRED LIGHT, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 523–538.)

Constitutional law — delegation of power.

1. Legislative power was not unconstitutionally delegated to the Secretary of Agriculture by the provisions of the forest reserve acts of June 4, 1897 (30 Stat. at L. 35, chap. 2, U. S. Comp. Stat. 1901, p. 1539), and February 1, 1905 (33 Stat. at L. 628, chap. 288, U. S. Comp. Stat. Supp. 1909, p. 577), making criminal the violation of the rules and regulations covering forest reservations, made and promulgated by him under authority of those statutes.

[For other cases, see Constitutional Law, III. b, in Digest Sup. Ct. 1908.]

Public lands — power of Congress — establishing forest reservations.

2. Congress, in the exercise of its control of the property of the United States, under U. S. Const. art. 4, § 3, could constitutionally enact the act of March 3, 1891 (26 Stat. at L. 1103, chap. 561, U. S. Comp. Stat. 1901, p. 1537), under which public forest reservations may be established on the public domain without the consent of the state where the land lies.

[For other cases, see Public Lands, I. a, in Digest Sup. Ct. 1908.]

Injunction — grazing on forest reservations — fences.

3. The United States is entitled to injunctive relief where a cattle owner who has not secured the requisite stock-grazing permit from the Secretary of Agriculture turns out his cattle under circumstances which show that he expected and intended that they would graze on a forest reservation, although the government may not have complied with the local fence laws,—even assuming that such laws can apply to the United States.

[For other cases, see Injunction, I. e, in Digest Sup. Ct. 1908.]

[No. 360.]

Argued February 27 and 28, 1911. Decided May 1, 1911.

APPEAL from the Circuit Court of the United States for the District of Colorado to review a decree enjoining the grazing of stock on a public forest reservation without a permit. Affirmed.

Statement by Mr. Justice Lamar:

The Holy Cross Forest Reserve was established under the provisions of the Act of March 3, 1891. By that and subsequent statutes the Secretary of Agriculture was authorized to make provisions for the protection against destruction by fire and depredations of the public forest and forest reservations, and to "make such rules and

regulations and establish such service as will insure the objects of such reservations; namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction." 26 Stat. at L. 1103, chap. 561, U. S. Comp. Stat. 1901, p. 1537; 30 Stat. at L. 35, chap. 2, U. S. Comp. Stat. 1901, p. 1540; act of Congress February 1, 1905 [33 Stat. at L. 628, chap. 288, U. S. Comp. Stat. Supp. 1909, p. 577]; 7 Fed. Stat. Anno. 310, 312; and Fed. Stat. Anno. Supp. 1909, page 663. In pursuance of these statutes, regulations were adopted establishing grazing districts on which only a limited number of cattle were allowed. The regulations provided that a few head of cattle of prospectors, campers, and 525]not more than ten *belonging to a settler residing near the forest, might be admitted without permit; but, saving these exceptions, the general rule was that "all persons must secure permits before grazing any stock in a national forest."

On April 7, 1908, the United States, through the district attorney, filed a bill in the circuit court for the district of Colorado, reciting the matters above outlined, and alleging that the defendant, Fred Light, owned a herd of about 500 cattle and a ranch of 540 acres, located 2½ miles to the east, and 5 miles to the north, of the reservation. This herd was turned out to range during the spring and summer, and the ranch then used as a place on which to raise hay for their sustenance.

That between the ranch and the reservation was other public and unoccupied land of the United States; but, owing to the fact that only a limited number of cattle were allowed on the reservation, the grazing there was better than on this public land. For this reason, and because of the superior water facilities and the tendency of the cattle to follow the trails and stream leading from the ranch to the reservation, they naturally went direct to the reservation. The bill charged that the defendant, when turning them loose, knew and expected that they would go upon the reservation, and took no action to prevent them from trespassing. That by thus knowingly and wrongfully permitting them to enter on the reservation he intentionally caused his cattle to make a trespass, in breach of the United States property and administrative rights; and has openly and privately stated his purpose to disregard the regulations, and without permit to allow, and, in the manner stated, to cause, his cattle to enter, feed, and graze thereon.

The bill prayed for an injunction. The defendant's general demurrer was overruled.

His answer denied that the topography of the country around his ranch or the water and grazing conditions were *such[526 as to cause his cattle to go on the reservation; he denied that many of them did go thereon, though admitting that some had grazed on the reservation. He admitted that he had liberated his cattle without having secured or intending to apply for a permit, but denied that he wilfully or intentionally caused them to go on the reservation, submitting that he was not required to obtain any such permit. He admits that it is his intention hereafter, as heretofore, to turn his cattle out on the unreserved public land of the United States adjoining his ranch to the northeast thereof, without securing or applying for any permit for the cattle to graze upon the so-called Holy Cross Reserve; denies that any damage will be done if they do go upon the reserve; and contends that if, because of their straying proclivities, they shall go on the reserve, the complainant is without remedy against the defendant, at law or in equity, so long as complainant fails to fence the reserve, as required by the laws of Colorado. He claims the benefit of the Colorado statute requiring the owner of land to erect and maintain a fence of given height and strength, in default of which the owner is not entitled to recover for damage occasioned by cattle or other animals going thereon.

Evidence was taken, and after hearing, the circuit court found for the government, and entered a decree enjoining the defendant from in any manner causing, or permitting, his stock to go, stray upon, or remain within the said forest or any portion thereof.

The defendant appealed and assigned that the decree against him was erroneous; that the public lands are held in trust for the people of the several states, and the proclamation creating the reserve without the consent of the state of Colorado is contrary to and in violation of said trust; that the decree is void because it, in effect, holds that the United States is exempt from the municipal laws of the state of Colorado relating to fences; that the statute *conferring upon the said Secretary of[527 Agriculture the power to make rules and regulations was an unconstitutional delegation of authority to him, and the rules and regulations therefore void; and that the rules mentioned in the bill are unreasonable, do not tend to insure the object of forest reservation, and constitute an unconstitutional interference by the government of the United States with fence and other statutes of the state of Colorado, enacted through the exercise of the police power of the state.

Mr. **James H. Teller** argued the cause, and, with Mr. John T. Barnett, Attorney General of Colorado, and Messrs. Henry M. Teller, C. S. Thomas, E. C. Stimson, Milton Smith, H. A. Hicks, and Ralph McCrillis, filed a brief for appellant:

The jurisdiction of a state extends over all the territory within its boundaries.

New York v. Miln, 11 Pet. 139, 9 L. ed. 662; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 158, 29 L. ed. 847, 6 Sup. Ct. Rep. 670; Kansas v. Colorado, 206 U. S. 93, 51 L. ed. 973, 27 Sup. Ct. Rep. 655.

The ownership, by the general government, of land within a state, does not carry with it general rights of sovereignty over such lands.

Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; Woodruff v. North Bloomfield Gravel Min. Co. 9 Sawy. 441, 18 Fed. 772; People v. Shearer, 30 Cal. 658; Camp v. Smith, 2 Minn. 155, Gil. 131; Hendricks v. Johnson, 6 Port. (Ala.) 472; United States v. Railroad Bridge Co. 6 McLean, 517, Fed. Cas. No. 16,114; United States v. Chicago, 7 How. 185, 12 L. ed. 660; United States v. Cornell, 2 Mason, 60, Fed. Cas. No. 14,867; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995; Mobile v. Eslava, 16 Pet. 257, 10 L. ed. 956; People v. Godfrey, 17 Johns. 225.

Sovereignty is not to be taken away by implication.

People v. Godfrey, 17 Johns. 225.

The states would have jurisdiction unless relinquished by formal act.

Story, Const. 5th ed. § 1227.

Even in those cases in which there is a cession of jurisdiction by the state subsequent to the adoption of a fence law, the law prevails on such lands until repealed by the general government.

Chicago, R. I. & P. R. Co. v. McGlinn, 114 U. S. 542, 29 L. ed. 270, 5 Sup. Ct. Rep. 1005.

The police power of a state extends over all of its territory and is exclusive.

Prigg v. Pennsylvania, 16 Pet. 639, 10 L. ed. 1098; Slaughter House Cases, 16 Wall. 63, 21 L. ed. 404; Re Rahrer (Wilkinson v. Rahrer) 140 U. S. 554, 35 L. ed. 574, 11 Sup. Ct. Rep. 865; United States v. E. C. Knight Co. 156 U. S. 11, 39 L. ed. 328, 15 Sup. Ct. Rep. 249; L'Hote v. New Orleans, 177 U. S. 597, 44 L. ed. 903, 20 Sup. Ct. Rep. 788.

A statute concerning fences and the trespasses of live stock is proper legislation under the police power of the state.

Bacon v. Walker, 204 U. S. 317, 51 L. ed. 502, 27 Sup. Ct. Rep. 289; Rideout v. Knox, 148 Mass. 368, 2 L.R.A. 81, 12 Am. St. Rep. 560, 19 N. E. 390.

The decree below is contrary not only to the statutes of the state concerning fencing and live stock, but to the law as laid down by the state supreme court prior to the adoption of these laws.

Morris v. Fraker, 5 Colo. 425; Richards v. Sanderson, 39 Colo. 278, 121 Am. St. Rep. 167, 89 Pac. 769. See also Buford v. Houtz, 133 U. S. 320, 33 L. ed. 618, 10 Sup. Ct. Rep. 305.

To limit the jurisdiction of states containing forest reserves is to deny to them that equality with other states to which they are entitled.

Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; Ward v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076.

An act of Congress cannot restrict the sovereignty of a state, except under express constitutional authority therefor.

Withers v. Buckley, 20 How. 84, 15 L. ed. 816.

The government holds public lands in trust for the people, to be disposed of so as to promote the settlement and ultimate prosperity of the states in which they are situated.

Dobbins v. Erie County, 16 Pet. 435, 10 L. ed. 1022; Weber v. State Harbor Comrs. 18 Wall. 57, 21 L. ed. 798; United States v. Beebe, 127 U. S. 348, 32 L. ed. 125, 8 Sup. Ct. Rep. 1083; Shively v. Bowlby, 152 U. S. 49, 38 L. ed. 349, 14 Sup. Ct. Rep. 548; United States v. Trinidad Coal & Coking Co. 137 U. S. 160, 34 L. ed. 640, 11 Sup. Ct. Rep. 57; Pollard v. Hagan, 3 How. 212, 11 L. ed. 565.

Mr. **Ernest Knaebel** argued the cause and filed a brief for appellee:

Fence laws afford no defense to one who put his cattle in such circumstances that they were bound to commit the trespass.

Lazarus v. Phelps, 152 U. S. 81, 38 L. ed. 363, 14 Sup. Ct. Rep. 477; Sabine & E. T. R. Co. v. Johnson, 65 Tex. 389; Delaney v. Errickson, 11 Neb. 533, 10 N. W. 451; Otis v. Morgan, 61 Iowa, 712, 17 N. W. 104; Monroe v. Cannon, 24 Mont. 316, 81 Am. St. Rep. 439, 61 Pac. 863; St. Louis Cattle Co. v. Vaught, 1 Tex. Civ. App. 388, 20 S. W. 855; Larkin v. Taylor, 5 Kan. 446; Union P. R. Co. v. Rollins, 5 Kan. 176.

It has been expressly held by the highest court of Colorado that the wilful and deliberate driving of cattle upon the premises of another is actionable.

Nuckolls v. Gaut, 12 Colo. 362, 21 Pac. 41; Norton v. Young, 6 Colo. App. 187, 40

Pac. 156; Fugate v. Smith, 4 Colo. App. 201, 35 Pac. 283; Sweetman v. Cooper, 20 Colo. App. 5, 76 Pac. 925.

The state has no beneficial right whatsoever in the land; there is neither community of ownership, nor relation of trustee and *cestui que trust.*

United States v. Beebe, 127 U. S. 338, 342, 32 L. ed. 121, 123, 8 Sup. Ct. Rep. 1083; United States v. Trinidad Coal & Coking Co. 137 U. S. 160, 34 L. ed. 640, 11 Sup. Ct. Rep. 57; United States v. Gratiot, 1 McLean, 454, Fed. Cas. No. 15,249; Turner v. American Baptist Missionary Union, 5 McLean, 344, Fed. Cas. No. 14,251; Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151, 159, 29 L. ed. 845, 847, 6 Sup. Ct. Rep. 670; Hartman v. Tresise, 36 Colo. 146, 4 L.R.A. (N.S.) 872, 84 Pac. 685.

The United States enjoys all the rights and remedies under the laws of the state that an individual would have.

United States v. Gear, 3 How. 120, 11 L. ed. 523; Cotton v. United States, 11 How. 229, 13 L. ed. 675; Camfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864.

But when these fail, it may provide its own remedies, and enforce them in its own courts.

Re Debs, 158 U. S. 564, 584, 39 L. ed. 1092, 1102, 15 Sup. Ct. Rep. 900.

Congress has the power to protect the public domain and control its use.

2 Story, Const. ¶ 1325; United States v. Gratiot, 14 Pet. 526, 537, 10 L. ed. 573, 578, affirming 1 McLean, 454, Fed. Cas. No. 15,249; Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264; Jourdan v. Barrett, 4 How. 169, 184, 11 L. ed. 924, 930; Irvine v. Marshall, 20 How. 558, 15 L. ed. 994; Gibson v. Chouteau, 13 Wall. 92, 99, 20 L. ed. 534, 536; McCarthy v. Mann, 19 Wall. 20, 22 L. ed. 49; Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151, 167, 29 L. ed. 845, 850, 6 Sup. Ct. Rep. 670; United States v. Insley, 130 U. S. 263, 32 L. ed. 968, 9 Sup. Ct. Rep. 485; Redfield v. Parks, 132 U. S. 239, 33 L. ed. 327, 10 Sup. Ct. Rep. 83; Camfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864; Shively v. Bowlby, 152 U. S. 1, 50, 52, 38 L. ed. 331, 349, 350, 14 Sup. Ct. Rep. 548; Mann v. Tacoma Land Co. 153 U. S. 273, 38 L. ed. 714, 14 Sup. Ct. Rep. 820; United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 703, 43 L. ed. 1136, 1141, 19 Sup. Ct. Rep. 770; Gutierres v. Albuquerque Land & Irrig. Co. 188 U. S. 545, 47 L. ed. 588, 23 Sup. Ct. Rep. 338; Kansas v. Colorado, 206 U. S. 46, 89, 51 L. ed. 956, 971, 27 Sup. Ct. Rep. 655; Shannon v. United States, 88 C. C. A. 52, 160 Fed. 870; Turner v. American Baptist Missionary Union, 5 McLean, 344, Fed. Cas. No. 14,251; Seymour v. Sanders, 3 Dill. 437, Fed. Cas. No. 12,690; Union Mill & Min. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Mor. Min. Rep. 90; United States v. Cleveland & C. Cattle Co. 33 Fed. 323; Carroll v. Price, 81 Fed. 137; Heckman v. Sutter, 55 C. C. A. 635, 119 Fed. 83, 63 C. C. A. 135, 128 Fed. 393; People ex rel. Atty. Gen. v. Folsom, 5 Cal. 378; Doran v. Central P. R. Co. 24 Cal. 257; Miller v. Little, 47 Cal. 350; Vansickle v. Haines, 7 Nev. 262, 15 Mor. Min. Rep. 201; Fee v. Brown, 17 Colo. 519, 30 Pac. 340, affirmed in 162 U. S. 602, 40 L. ed. 1086, 16 Sup. Ct. Rep. 875; Waters v. Bush, 42 Iowa, 255; David v. Rickabaugh, 32 Iowa, 540; Sorrels v. Self, 43 Ark. 452.

In respect of all the Federal property, Congress, to quote the words of the supreme court of Colorado (Fee v. Brown, 17 Colo. 519, 30 Pac. 340), "is omnipotent."

The disposal must be left to the discretion of Congress.

Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264.

Mr. Justice **Lamar**, after making the foregoing statement, delivered the opinion of the court:

The defendant was enjoined from pasturing his cattle on the Holy Cross Forest Reserve, because he had refused to comply with the regulations adopted by the Secretary of Agriculture, under the authority conferred by the act of June 4, 1897 (30 Stat. 35, chap. 2), to make rules and regulations as to the use, occupancy, and preservation of forests. The validity of the rule is attacked on the ground that Congress could not delegate to the Secretary legislative power. We need not discuss that question, in view of the opinion in United States v. Grimaud (just decided), 220 U. S. 506, ante, 563, 31 Sup. Ct. Rep. 480.

*The bill alleged, and there was evi-[535 dence to support the finding, that the defendant, with the expectation and intention that they would do so, turned his cattle out at a time and place which made it certain that they would leave the open public lands and go at once to the reserve, where there was good water and fine pasturage. When notified to remove the cattle, he declined to do so, and threatened to resist if they should be driven off by a forest officer. He justified this position on the ground that the statute of Colorado provided that a landowner could not recover damages for trespass by animals unless the property was inclosed with a fence of designated size and material. Regardless of any conflict in the

testimony, the defendant claims that unless the government put a fence around the reserve, it had no remedy, either at law or in equity, nor could he be required to prevent his cattle straying upon the reserve from the open public land on which he had a right to turn them loose.

At common law the owner was required to confine his live stock, or else was held liable for any damage done by them upon the land of third persons. That law was not adapted to the situation of those states where there were great plains and vast tracts of uninclosed land, suitable for pasture. And so, without passing a statute, or taking any affirmative action on the subject, the United States suffered its public domain to be used for such purposes. There thus grew up a sort of implied license that these lands, thus left open, might be used so long as the government did not cancel its tacit consent. Buford v. Hout, 133 U. S. 326, 33 L. ed. 620, 10 Sup. Ct. Rep. 305. Its failure to object, however, did not confer any vested right on the complainant, nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes. Steele v. United States, 113 U. S. 130, 28 L. ed. 952, 5 Sup. Ct. Rep. 396; Wilcox v. Jackson, 13 Pet. 513, 10 L. ed. 271.

It is contended, however, that Congress 536]cannot constitutionally *withdraw large bodies of land from settlement without the consent of the state where it is located; and it is then argued that the act of 1891 [26 Stat. at L. 1103, chap. 561, U. S. Comp. Stat. 1901, p. 1537], providing for the establishment of reservations, was void, so that what is nominally a reserve is, in law, to be treated as open and uninclosed land, as to which there still exists the implied license that it may be used for grazing purposes. But "the nation is an owner, and has made Congress the principal agent to dispose of its property. . . . Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of." Butte City Water Co. v. Baker, 196 U. S. 126, 49 L. ed. 412, 25 Sup. Ct. Rep. 211. "The government has, with respect to its own lands, the rights of an ordinary proprietor to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale." Camfield v. United States, 167 U. S. 524, 42 L. ed. 262, 17 Sup. Ct. Rep. 864. And if it may withhold from sale and settlement, it may also, as an owner, object to its property being used for grazing purposes, for "the government is charged with the duty and clothed with the power to protect the public domain from trespass and unlawful appropriation." United States v. Beebe, 127 U. S. 342, 32 L. ed. 123, 8 Sup. Ct. Rep. 1083.

The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land, it can do so indefinitely. Stearns v. Minnesota, 179 U. S. 243, 45 L. ed. 173, 21 Sup. Ct. Rep. 73. It is true that the "United States do not and cannot hold property as a monarch may, for private or personal purposes." Van Brocklin v. Anderson (Van Brocklin v. Tennessee), 117 U. S. 158, 29 L. ed. 847, 6 Sup. Ct. Rep. 670. But that does not lead to the conclusion that it is without the rights incident to ownership, for the Constitution declares, § 3, art. 4, that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or the property belonging to the United States." "The full scope of this *paragraph has never[537 been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property." Kansas v. Colorado, 206 U. S. 89, 51 L. ed. 971, 27 Sup. Ct. Rep. 655.

"All the public lands of the nation are held in trust for the people of the whole country." United States v. Trinidad Coal & Coking Co. 137 U. S. 160, 34 L. ed. 640, 11 Sup. Ct. Rep. 57. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement, or to suffer them to be used for agricultural or grazing purposes, nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose. These are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it. Even a private owner would be entitled to protection against wilful trespasses, and statutes providing that damage done by animals cannot be recovered, unless the land had been inclosed with a fence of the size and material required, do not give permission to the owner of cattle to use his neighbor's land as a pasture. They are intended to condone trespasses by straying cattle; they have no application to cases where they are driven upon unfenced land in order that they may feed there. Lazarus v. Phelps, 152 U. S. 81, 38 L. ed. 363, 14 Sup. Ct. Rep. 477; Monroe v. Cannon, 24 Mont. 324, 81

Am. St. Rep. 439, 61 Pac. 863; St. Louis Cattle Co. v. Vaught, 1 Tex. Civ. App. 388, 20 S. W. 855; Union P. R. Co. v. Rollins, 5 Kan. 176.

Fence laws do not authorize wanton and wilful trespass, nor do they afford immunity to those who, in disregard of property rights, turn loose their cattle under circumstances showing that they were intended to graze upon the lands of another.

This the defendant did, under circumstances equivalent to driving his cattle up-
538]on the forest reserve. He could *have obtained a permit for reasonable pasturage. He not only declined to apply for such license, but there is evidence that he threatened to resist efforts to have his cattle removed from the reserve, and in his answer he declares that he will continue to turn out his cattle, and contends that if they go upon the reserve the government has no remedy at law or in equity. This claim answers itself.

It appears that the defendant turned out his cattle under circumstances which showed that he expected and intended that they would go upon the reserve to graze thereon. Under the facts, the court properly granted an injunction. The judgment was right on the merits, wholly regardless of the question as to whether the government had inclosed its property.

This makes it unnecessary to consider how far the United States is required to fence its property, or the other constitutional questions involved. For, as said in Siler v. Louisville & N. R. Co. 213 U. S. 193, 53 L. ed. 758, 29 Sup. Ct. Rep. 451, "where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued, and is not departed from without important reasons." The decree is therefore affirmed.

539]*EX PARTE: IN THE MATTER OF THE METROPOLITAN WATER COMPANY OF WEST VIRGINIA, Petitioner.

(See S. C. Reporter's ed. 539–546.)

Injunction — against enforcement of state statute — power of single Federal judge.

1. A temporary restraining order suspending, on constitutional grounds, the enforcement of a state statute by restraining the action of a state officer thereunder, cannot be vacated, nor can an application for an interlocutory injunction be denied, by a single Federal judge, since the enactment of the act of June 18, 1910 (36 Stat. at L. 557, chap. 309), § 17, which prohibits the granting of such an application except after a hearing before three judges, two of whom must concur in granting it, and provides that when such an application is made, the judge shall call two other judges to his assistance to hear and determine it, but may grant a temporary restraining order, if of the opinion that irreparable injury will otherwise result, to remain in force only until the hearing and determination of the application, and gives an appeal from the order granting or denying an interlocutory injunction after notice and hearing.

[For other cases, see Injunction, I. j, in Digest Sup. Ct. 1908.]

Mandamus — to review judicial action — enjoining enforcement of state statute.

2. Mandamus is the proper remedy where a single Federal judge, in violation of the act of June 18, 1910, § 17, vacates a temporary restraining order suspending on constitutional grounds the enforcement of a state statute by restraining the action of a state officer thereunder, and denies an application for an interlocutory injunction, since this section makes no provision for any appeal from an order of this character made by a single judge, and a right of appeal is not otherwise given by statute.

[For other cases, see Mandamus, II. c, in Digest Sup. Ct. 1908.]

[No. 19, Original.]

Argued April 24, 1911. Decided May 15, 1911.

PETITION for a writ of mandamus directing the acting circuit judge of the United States for the District of Kansas and the Circuit Court for that District to set aside an order which vacated a restraining order enjoining the enforcement of a state statute, and denied an application for an injunction, and requiring the court to call two other judges to aid in hearing and determining the application. Rule to show cause made absolute.

The facts are stated in the opinion.

NOTE.—As to when mandamus is the proper remedy—see notes to United States ex rel. International Contracting Co. v. Lamont, 39 L. ed. U. S. 160; M'Cluny v. Silliman, 4 L. ed. U. S. 263; Fleming v. Guthrie, 3 L.R.A. 54; Burnsville Turnp. Co. v. State, 3 L.R.A. 265; State ex rel. Charleston, C. & C. R. Co. v. Whitesides, 3 L.R.A. 777; and Ex parte Hurn, 13 L.R.A. 120.

On mandamus to control judicial action—see notes to State ex rel. Bayha v. Kansas City Ct. of Appeals, 3 L.R.A. 476, and Re Morgan, 29 L. ed. U. S. 135.

On superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal—see note to State ex rel. Fourth Nat. Bank v. Johnson, 51 L.R.A. 33.

Mr. **Willard P. Hall** argued the cause, and, with Messrs. C. F. Hutchings and O. L. Miller, filed a brief for petitioner.

Mr. **Lewis W. Keplinger** argued the cause, and, with Mr. Charles W. Trickett, filed a brief for respondents.

540] *Mr. Chief Justice **White** delivered the opinion of the court:

This is a proceeding in mandamus, in which relief is sought against a district judge, acting in a certain cause as a circuit judge for the district of Kansas, and also against the circuit court of the United States for the district of Kansas. To a rule to show cause, a return has been filed and the Kaw Valley Drainage District of Wyandotte County, Kansas, has also, by leave, answered the rule. The matter is now for decision upon a motion to make the rule absolute.

Summarily stated, the facts bearing upon the issue to be decided are as follows:

By § 17 of the act creating the commerce court and amending the act to regulate commerce (act June 18, 1910, chap. 309, 36 Stat. at L. 557), provision was made as to the practice to be pursued in courts of the United States in cases where an interlocutory injunction is applied for to restrain the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute. While proceedings originally instituted in a state court of Kansas to condemn lands of the water company and others for the purpose of widening the Kansas river were pending on appeal in the circuit court of appeals for the eighth circuit, the legislature of Kansas, on January 28, 1911, enacted a statute which, in effect, authorized a summary appropriation of the lands affected by the pending condemnation suits, and directed the bringing by the attorney general of the state of an action, after such appropriation had been consummated, against the owners of the lands appropriated, "to determine the ownership of the property, and to assess the value thereof and other damages for the taking of such portions of it as may belong to parties other than the public." By § 6 it was pro-
541]vided, *among other things, that upon a failure to satisfy the judgment rendered, "the rights of the state to such land shall be devested, and the possession thereof shall revert to the former adjudicated owners, in which event compensation shall be awarded for any loss or damage occasioned by the temporary appropriation, and that the court shall render judgment therefor. . . ." A few days after the passage of this statute, the petitioner, a West Virginia corporation, commenced a suit in the circuit court of the United States for the district of Kansas against the Kaw Valley Drainage District of Wyandotte County Kansas, and the individuals composing the board of directors of said drainage district, all averred to be citizens and residents of the district where the suit was brought. The bill prayed relief by injunction, temporary and permanent, restraining the defendants from a threatened taking possession of the lands of the petitioner under the act of January 28, 1911, upon the ground that the statute was repugnant to the Constitution of the United States. Thereafter, on February 8, 1911, District Judge McPherson, acting as circuit judge, issued a restraining order in the cause. The attention of the judge was called by the defendants to the provisions of § 17 of the act of Congress heretofore referred to, and request was made that two other judges, one of whom should be a circuit judge or a justice of the Supreme Court, should be called to assist in the hearing and determination of an application which was pending for a temporary injunction. It was, however, ruled that the provisions of such section merely deprived a single judge of the power to grant a temporary injunction, and that a court might be held by one judge for the purpose of decreeing the assailed statute to be constitutional, and refusing to enjoin its enforcement. The court then heard argument, Judge McPherson alone sitting, upon the constitutionality of the Kansas statute. At the close of the hearing counsel for the water company made the objection theretofore *urged by[542 opposing counsel, that the matter could only be disposed of by a court consisting of three judges, constituted as provided in the statute. Judge McPherson adhered, however, to his former ruling, and on March 6, 1911, a decree was entered, vacating the temporary restraining order, and denying a temporary injunction. This application for a writ of mandamus was then made.

The right to relief is based upon the contention that, by virtue of the act of Congress, a single judge was without jurisdiction to hear and determine the application for a temporary injunction. The prayer is that an order or rule be issued commanding the annulment and setting aside of the order of March 6, 1911, vacating the restraining order, and denying the application for an injunction, and directing that the application for a temporary injunction be heard anew before a court consisting of three judges, in conformity to the act of Congress.

The question for decision is whether, pursuant to the act of Congress referred to, the circuit court, composed only of one judge,

had power to hear and determine the application for a temporary injunction in the cause pending in the circuit court of Kansas. The legislation to be considered is § 17 of the act of June 18, 1910, chap. 309, 36 Stat. at L. 557, reading as follows:

"That no interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute shall be issued or granted by any justice of the Supreme Court, or by any circuit court of the United States, or by any judge thereof, or by any district judge acting as circuit judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit judge, or to a district judge acting as circuit judge, and shall be heard 543]and determined by *three judges, of whom at least one shall be a justice of the Supreme Court of the United States or a circuit judge, and the other two may be either circuit or district judges, and unless the majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court of the United States, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: Provided, however, that one of such three judges shall be a justice of the Supreme Court of the United States or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the state, and to such other persons as may be defendants in the suit: Provided, that if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court of the United States, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall only remain in force until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited, and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case."

In the opinion delivered by the court below in passing upon the question of the proper construction of the foregoing section, the nature of the suit brought by *the water company was thus concise-[544 ly and accurately stated:

"That these proceedings are for the purpose by injunction of restraining the enforcement of the state statute, I have no doubt. It is alleged that such state statute is absolutely void, as being in conflict with both the state and national Constitutions. The prayers are in effect that the statute be decreed void. Neither have I any doubt that the action is to restrain the action of an officer of the state of Kansas; namely, the governor. This is so because the state statute in question provides that when the governor issues his proclamation, which he has done, he shall at once take possession of the property, either in person, or he may designate the officers of the drainage board to take such possession for him and in his name, but such officers of the drainage board to act as agents of the governor. Therefore, I am of the opinion that the congressional statute is directly involved. And the question remains, Shall this court now halt these proceedings, or shall other judges be called in to take control of the cases?"

The suit being of the nature just stated, we are of opinion that the provisions of the act of Congress which are relied upon applied to the case, and that, as a result of their application, it imperatively follows that the hearing and determination of the request for a temporary injunction should have been had before a court consisting of three judges, constituted in the mode specified in the statute.

We say the hearing should have been had as just stated because it results from the text of the applicable section of the act that limitations are unequivocally imposed upon the power of the single justice or judge to act in the character of case to which the provision refers. They are (a) to receive an application for an interlocutory injunction in the character of case stated in the section; (b) within the period specified in the section to grant a temporary restraining order "if of opinion that irreparable loss or damage would *re-[545 sult to the complainant unless a temporary restraining order is granted;" and (c) to "immediately call to his assistance to hear and determine the application (for an interlocutory injunction) two other judges." It is to the hearing thus provided for that the notice must relate which is to be given to

the governor and to the attorney general of the state and "such other persons as may be defendants in the suit." It is the hearing before the court thus constituted, also, that is required to be expedited; and the appeal authorized by the section to be taken directly to this court "from the order granting or denying, after notice and hearing, an interlocutory injunction," is manifestly an appeal from the expedited hearing had before the court consisting of three judges. We find no expression of or implication anywhere in the section justifying the assumption that there was a intention on the part of Congress that the single justice or judge to whom the application for the interlocutory injunction should be presented need not call to his assistance two other judges to pass upon the application, in the event that he was of opinion that the claim of the unconstitutionality of the statute was untenable. On the contrary, the statute evidences the purpose of Congress that the application for the interlocutory injunction should be heard before the enlarged court, whether the claim of unconstitutionality be or be not meritorious, as the appeal allowed to this court is from an order denying as well as from an order granting an injunction.

Congress having declared that the merits of the application for an interlocutory injunction, such as that applied for in the case with which we are concerned, should be considered and determined by a tribunal consisting of three judges, constituted as provided in the act, it results that a tribunal not so constituted did not possess jurisdiction over the subject-matter of the right to such injunction. It follows, therefore, that in hearing and determining the application for the temporary injunction the 546]single judge *acted without jurisdiction, and that the order entered by him on March 6, 1911, vacating the restraining order theretofore issued, and denying the application for an injunction, was void. This being the case, it necessarily follows that mandamus is the proper remedy, since the section made no provision for an appeal from an order made by a single judge, denying an interlocutory injunction, and a right of appeal is not otherwise given by statute. Ex parte Harding, 219 U. S. 363, ante, 252, 31 Sup. Ct. Rep. 324. While these considerations dispose of the case, we briefly advert to an insistence made in argument that we should not take jurisdiction of the merits of the case as made in the circuit court, and determine whether or not the bill stated a case entitling to relief. Not being vested with original jurisdiction to pass upon the question of the validity of the Kansas statute, and the petitioner being entitled as of right to have the controversy as to the constitutionality of the statute, presented by its bill of complaint, passed upon by a tribunal having such original jurisdiction, it follows that we do not possess a discretion to grant or refuse the writ, dependent upon our conception as to whether the Kansas statute is or is not constitutional.

The rule issued on April 10, 1911, must be made absolute, and an order will be entered that a writ of mandamus issue directing the Honorable Smith McPherson, as Acting Circuit Judge of the United States for the district of Kansas, and the Circuit Court of the United States for the District of Kansas, to annul and set aside the order of March 6, 1911, vacating the restraining order theretofore issued on February 8, 1911, and denying the application for injunction, and that said judge or such other judge of the said Circuit Court as may hear and determine the application for an interlocutory injunction call to his assistance two other judges, as provided by § 17 of chapter 309 of the act of Congress approved June 18, 1910.

Rule to show cause made absolute.

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*UNITED STATES, Petitioner, [547
v.
DANIEL J. RIMER et al.

(See S. C. Reporter's ed. 547, 548.)

Certiorari — to circuit court of appeals — dismissal.

A writ of certiorari to a circuit court of appeals, granted on the application of the United States, upon the ground that the decision below involved a principle of far-reaching importance, will be dismissed where the Federal Supreme Court is convinced, after final hearing, that the action of the court below did not deal with that principle.

[Certiorari to circuit court of appeals, see Certiorari, II., in Digest Sup. Ct. 1908.]

[No. 158.]

Argued April 26, 1911. Decided May 15, 1911.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment which affirmed a judgment of the Cir-

NOTE.—On certiorari from Federal Supreme Court to circuit courts of appeals—see note to United States v. Dickinson, 53 L. ed. U. S. 711.

cuit Court for the Western District of North Carolina, in favor of defendants in an action upon a distiller's bond. Dismissed.

The facts are stated in the opinion.

Solicitor General **Lehmann** argued the cause and filed a brief for petitioner.

No appearance for respondents.

Mr. Chief Justice **White** delivered the opinion of the court:

The petition presented by the United States in this case for the allowance of a writ of certiorari, which was not opposed, proceeded upon the basis that the decision below involved a principle concerning the collection of internal revenue taxes of far-reaching importance, and which, if thereafter applied in accordance with what it was urged was the rule established by the 548]lower court, would overthrow *practices prevailing as to the collection of internal revenue taxes for a long period of time, founded upon a well-settled administrative construction, and thus produce at least great confusion.

As the record at least prima facie tended to sustain these contentions of the government, the writ of certiorari was granted. With candor, in the argument at bar, while perspicuously discussing the legal propositions which it was deemed were involved when the certiorari was petitioned for, the government conceded that a closer scrutiny of the record made it exceedingly doubtful whether the action of the court below, when accurately tested, dealt with the principle which it was deemed rendered the granting of the writ necessary. Coming to consider the record, we conclude that it establishes that the doubt suggested by the government is well founded, and therefore, if we were to consider and decide the case, we would but review the action of the court below in regard to a question as to which, under the judiciary act of 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488], the action of the court was final, and which, neither from its character nor importance, was within the scope of the grant of power to review by certiorari.

After giving the matter most careful consideration because of the precedent as to future cases which must arise from the action we take in this, we have concluded that, under the conditions which we have stated, our duty is not to pass upon the merits of the case, but to dismiss the writ of certiorari. Our order will therefore be, writ of certiorari dismissed.

*HENRY A. WISE, Plff. in Err., [549

v.

LAWRENCE H. MILLS et al.

(See S. C. Reporter's ed. 549-556.)

Appeal — from circuit court — Federal question.

A writ of error will not lie from the Supreme Court of the United States to review an order of a circuit court committing a district attorney for contempt in refusing to obey an order directing him to return to the owner certain books and papers in his possession which the court found had been seized in violation of constitutional rights.

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

[No. 963.]

Argued April 24 and 25, 1911. Decided May 15, 1911.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review an order committing a district attorney for contempt in refusing to obey an order directing him to return to the owners certain books and papers in his possession. Dismissed for want of jurisdiction.

See same case below, 185 Fed. 318.

Statement by Mr. Chief Justice **White**:

On February 20, 1911, an inspector of customs, before a commissioner of a circuit court of the United States, charged Lawrence H. Mills, Charles G. Mourraille, and Emil S. Duflot with conspiring to defraud the United States of a portion of the customs duties upon certain merchandise imported by said parties, who were engaged in business in the city of New York, under the fire name of Mills & Duflot. It was charged that the object of the conspiracy was to be accomplished by presenting to the collector of the port of New York false and fraudulent invoices, and the commission of a specific overt act was alleged. Upon this charge a warrant issued for the arrest of the accused. On the same day a deputy marshal, with an agent of the Department of Justice, proceeded to the place of business of the firm and executed the warrant by arresting *the accused. At[550 the time this was done the officers took possession of and carried away a large number of commercial books and papers, which were found in the store or office of the accused.

NOTE.—On direct review of circuit and district court judgment in Federal Supreme Court—see notes to Gwin v. United States, 46 L. ed. U. S. 741; and Paducah v. East Tennessee Teleph. Co. 106 C. C. A. 333.

On the same day, also, the grand jury presented the accused for conspiracy to defraud the United States of its customs revenues, and they were also arrested under a bench warrant issued upon this indictment, and were arraigned and admitted to bail.

On February 23, 1911, Mills, Mourraille, and Duflot, in a petition filed in the circuit court, recited the taking possession and carrying away by the officers of the books and papers, as heretofore stated, and alleged that such books and papers "constituted substantially all the books and papers with which they are and have been for several years doing business." It was averred upon information and belief that the books and papers in question had been turned over to the United States district attorney, to be placed at the disposal of the grand jury. Averring that the seizure was unlawful and without warrant of authority, it was prayed that the marshal and the district attorney be notified, and after hearing, they be commanded to return the books and papers. The district attorney quite elaborately answered the petition, admitting that the books and papers had been seized and carried away as alleged, traversing the averment that they were all the books, admitting that they were in his possession, that he had used and was intending to use them for the purpose of procuring indictments for violations of the customs laws, and averring that reasonable access to the books and papers had been allowed the parties. The answer, besides, stated other matters which it was deemed sustained the seizure and the retention of the books and papers.

After hearing, the court ordered the return of the books and papers. The reasons for this course were stated in an opinion which substantially, on a review of the decisions of this court, especially Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 551]6 Sup. Ct. Rep. 524, *and Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370, held that the constitutional rights of the parties had been violated by the taking possession of the books and papers as alleged. 185 Fed. 318. Thereupon the district attorney, who is the plaintiff in error, refused to obey the order of the court, and stated his reasons for the refusal in an elaborate paper filed in the circuit court, and styled "Statement of grounds of United States attorney's refusal to obey order." In such paper, after referring to the taking possession of the books and papers, and making certain statements concerning the same, it was declared: "As to the direction of this court to turn over the other books and papers now in his possession and taken into custody at the time of the arrest of the defendants, said United States attorney is unwilling and respectfully refuses to comply with said order, and the grounds of his refusal to obey the said order are as follows: . . ." This was followed by eleven paragraphs, in which were recited the charge against the accused, the taking possession of the books and papers, the return of some of them to the accused, the retention of the balance by the district attorney, their use before the grand jury, and the intention to use them further. Certain papers were annexed as part of the statement.

The district attorney persisting in his refusal, the court entered an order committing him for contempt. Thereupon this writ of error to the judgment of commitment for contempt was allowed by the circuit judge who ordered the commitment, and assigments of error were filed, concluding as follows: "Wherefore the said Henry A. Wise prays that the order and judgment of said circuit court of the United States for the southern district of New York, adjudging him to be in contempt, may be reversed, and that the said court may be directed to enter an order and judgment vacating and setting at naught the said order upon which the commitment and complaint was made."

Solicitor General **Lehman** argued the cause and filed a brief for plaintiff in error.

Mr. **A. Leo Everett** argued the cause and filed a brief for defendant in error.

Mr. Chief Justice **White**, after making the foregoing statement, delivered the opinion of the court:

We have difficulty in understanding upon what theory the writ of error direct from this court was prosecuted, as clearly there was no jurisdiction to allow it, unless the case is within some of the provisions of the judiciary act *of 1891 [26 Stat.[554 at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488], conferring authority to so directly review. The only ground stated in the assignments of error which in the remotest degree refers to a matter which would come within our right to review is the third assignment, which asserts: "The court erred in adjudging that the taking into custody of said books and papers at the time of the lawful arrest of said Lawrence H. Mills, Charles G. Mourrailles, and Emil S. Duflot was in violation of the provisions of the Constitution of the United States." And this, we assume, is the theory upon which it is deemed we have jurisdiction directly to review, since that is the subject elaborately discussed in the argument at bar on behalf of plaintiff in error. But it is ob-

vious on the face of the record that the error thus assigned and the discussion at bar in regard to it concern themselves, not with the order which it is sought to review, that is, the commitment for contempt, but to another and different order, not final in its character,—that is, the order of the court directing the return of the books and papers. Alexander v. United States, 201 U. S. 117, 50 L. ed. 686, 26 Sup. Ct. Rep. 356. Even then, although it be conceded that a question under the Constitution of the United States was involved in the latter, that concession does not establish that a constitutional question was involved in the order committing for contempt. No conceivable constitutional right of the district attorney arose or could have been involved in committing him for contempt for refusing to obey the order of the court, and therefore there is no question presented on this record justifying a direct review of the order committing for contempt.

The case here is not even analogous to Nelson v. United States, 201 U. S. 92, 50 L. ed. 673, 26 Sup. Ct. Rep. 358, since there the facts were these: A person who, as a witness before a special examiner, refused to produce books and papers on the ground that to compel him to do so would invade his constitutional rights, was proceeded against for contempt, and the authority of this court to directly review the 555]final judgment committing for *contempt was rested upon the express ground that the writ of error directly involved the determination of whether the order to produce, and to punish for the refusal to produce, violated the constitutional rights of the witnesses. Even if it were to be conceded, for the sake of argument, that the court below had proceeded upon an erroneous conception of the Constitution when it ordered the return of the books and papers, that concession would not serve to establish that the order was so *dehors* the authority of the court as to cause it to be void, and to justify an officer of the court in refusing to respect and obey it. This is obviously true, since it is apparent that, wholly irrespective of the merits of the view which the court took of the constitutional rights of the parties whose books and papers were directed to be returned, the power to direct the return of the books and papers was equally possessed and might have been exerted upon the conception of the abuse of discretion, which was manifested by the taking possession of the books and papers under the circumstances disclosed. Indeed, the basis upon which the assumption that we have jurisdiction to review rests plainly upon a two-fold misconception. The one, that the right to have a direct review of the final contempt order carries with it the right to have at the same time a review of the interlocutory order returning the books,—a proposition which directly conflicts with the ruling in the Alexander Case, supra. The other, because, under the view taken by the court below, the seizure of the books and papers violated the constitutional rights of the accused, that therefore some constitutional question was involved in the commitment for contempt for refusing to obey the order of the court for the return of the books and papers.

Under the circumstances we are of opinion that the entire want of foundation for the assumption that there was jurisdiction in this court to directly review the order of commitment which caused this writ of error to be prosecuted *is, we think,[556 so obvious as not to afford any possible ground for retaining jurisdiction of the cause. That is to say, we are of opinion that the contention upon which the asserted right to prosecute the error directly to this court was based is so devoid of all foundation as to render it necessary to decline to assume a jurisdiction which we have not; and therefore the writ of error is dismissed.

Writ of error dismissed.

HENRY A. WISE, Individually and as U. S. Attorney for the Southern District of New York, Appt.,

v.

WILLIAM HENKEL, United States Marshal in and for the Southern District of New York.

(See S. C. Reporter's ed. 556–558.)

Appeal — from circuit court — Federal question.

A judgment of a Federal circuit court discharging a writ of habeas corpus to inquire into a detention under an order committing a district attorney for contempt in refusing to obey an order directing him to return to the owners certain books and papers in his possession is not reviewable in the Federal Supreme Court, under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, as involving a Federal question, although the reason assigned for the order for the return of the books and papers was

NOTE.—On direct review of circuit and district court judgments in Federal Supreme Court—see notes to Gwin v. United States, 46 L. ed. U. S. 741; and Paducah v. East Tennessee Teleph. Co. 106 C. C. A. 333.

that they had been seized in violation of constitutional rights.

[For other cases, see Appeal and Error, 938–981, in Digest Sup. Ct. 1908.]

[No. 964.]

Argued April 24 and 25, 1911. Decided May 15, 1911.

APPEAL from the Circuit Court of the United States for the Southern District of New York to review a judgment discharging a writ of habeas corpus to inquire into a detention under an order committing a district attorney for contempt in refusing to obey an order directing him to return to the owners certain books and papers in his possession. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Solicitor General **Lehmann** argued the cause and filed a brief for appellant.

Mr. **A. Leo Everett** argued the cause and filed a brief for appellee.

557] *Mr. Chief Justice **White** delivered the opinion of the court:

This case is disposed of by the opinion delivered in No. 963, just decided. [220 U. S. 549, ante, 579, 31 Sup. Ct. Rep. 597.] It thus arose:

The district attorney, on his committal for contempt in refusing to obey the order directing him to return certain books and papers, on being taken into custody sued out a writ of habeas corpus, and from the judgment discharging the writ prosecuted this appeal. The petition in habeas corpus, after averring the facts as we have stated them in the opinion in No. 963, alleged that the commitment for contempt was based "solely and exclusively on an order of this court made and filed on the 15th day of March," and that the court "was without jurisdiction to compel your petitioner, as United States attorney for this district or in any other capacity, to surrender to the persons now under indictment and awaiting trial . . . books and papers which came into his lawful and official custody as aforesaid, and are necessary to a prosecution still pending against said defendants." It was then averred that "your petitioner verily believes that for the reasons above stated the order adjudging him guilty of contempt, and his commitment pursuant to said order, in the custody of the marshal, were without legal right, authority, or jurisdiction of any kind, and are utterly void and ineffective, and that his detention and imprisonment thereunder are in violation of the Constitution of the United States, and in violation of his rights, privileges, and immunities thereunder."

The right to come directly to this court is controlled by § 5 of the judiciary act of 1891 [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549], which authorizes an appeal in certain cases: It is plain that the only portion of that subdivision which can possibly have application here is that which relates to cases "involving the construction or application of the Constitution of the United States." *But,[558 as we have seen in No. 963, no question as to the construction or application of the Constitution of the United States, in the correct sense of those words, was involved in the order committing for contempt. While it is true that the court, in passing upon the application for the return of the books and papers, expressed the opinion that, as the act of seizing them violated the constitutional rights of the petitioners, they were entitled to an order for return, this did not cause it to come to pass that the order committing for contempt involved the application or construction of the Constitution. In every aspect this is the case, since the authority of the court to consider and decide the application for the return of the books and papers existed wholly irrespective of whether there was a constitutional right to exact the return of the books and papers. That is to say, it was within the power of the court to take jurisdiction of the subject of the return, and pass upon it, as the result of its inherent authority to consider and decide questions arising before it concerning an alleged unreasonable exertion of authority in connection with the execution of the process of the court. The case, therefore, is but an attempt to cause a writ of habeas corpus to serve the functions of a writ of error.

For the reasons stated in case No. 963, we think the contention that a constitutional question was involved in this case upon the existence of which the right to appeal to this court depended is so wholly devoid of merit as to require here, as it did in the other case, a dismissal for want of jurisdiction. The appeal is therefore dismissed for want of jurisdiction.

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*CHICAGO, BURLINGTON, & QUINCY RAILWAY COMPANY, Petitioner, [559

v.

UNITED STATES.

(See S. C. Reporter's ed. 559–579.)

Master and servant — safety appliance act — reasonable care.

1. A carrier using, in moving interstate traffic, cars whose condition does not satisfy

the requirements of the safety appliance acts of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), April 1, 1896 (29 Stat. at L. 85, chap. 87, U. S. Comp. Stat. 1901, p. 3175), and March 2, 1903 (32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 1909, p. 1143), cannot escape the penalty therein prescribed by showing that it exercised reasonable care in equipping its cars with the required safety appliances, and used due diligence to keep them in repair by the usual inspection, but the statutes impose an absolute duty upon the carrier which is not discharged by the exercise of reasonable care or diligence.

[For other cases, see Master and Servant, 36–40, in Digest Sup. Ct. 1908.]

Action — civil or criminal — penalty.

2. An action by the United States to recover from a carrier the penalty prescribed for violations of the safety appliance acts of March 2, 1893, April 1, 1896, and March 2, 1903, is a civil, and not a criminal, action.

[For other cases, see Action or Suit, 7–9, in Digest Sup. Ct. 1908.]

[No. 329.]

Argued March 9, 1911. Decided May 15, 1911.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed judgments of the District Court for the District of Nebraska in favor of the United States in suits to recover penalties from a carrier for violations of the safety appliance acts. Affirmed.

See same case below, 95 C. C. A. 642, 170 Fed. 556.

The facts are stated in the opinion.

Messrs. **Charles J. Greene** and **Ralph W. Breckinridge** argued the cause and filed a brief for petitioner:

This action is a criminal prosecution.

Huntington v. Attrill, 146 U. S. 657, 668, 36 L. ed. 1123, 1128, 13 Sup. Ct. Rep. 224; United States v. Illinois C. R. Co. 156 Fed. 182; Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717; United States v. Reisinger, 128 U. S. 398, 32 L. ed. 480, 9 Sup. Ct. Rep. 99; United States v. Ulrici, 3 Dill. 532, Fed. Cas. No. 16,594; Boyd v. United States, 116 U. S. 616, 634, 29 L. ed. 746, 752, 6 Sup. Ct. Rep. 524; Iowa v. Chicago, B. & Q. R. Co. 3 L.R.A. 554, 37 Fed. 497; Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; Grafton v. United States, 206 U. S. 333, 353, 51 L. ed. 1084, 1091, 27 Sup. Ct. Rep. 749, 11 A. & E. Ann. Cas. 640; Schick v. United States, 195 U. S. 65, 49 L. ed. 99, 24 Sup. Ct. Rep. 826, 1 A. & E. Ann. Cas. 585.

No crime can be established by construction.

United States v. Wiltberger, 5 Wheat. 77, 95, 5 L. ed. 37, 42; United States v. Lacher, 134 U. S. 624, 33 L. ed. 1080, 10 Sup. Ct. Rep. 625; Todd v. United States, 158 U. S. 278, 282, 39 L. ed. 982, 983, 15 Sup. Ct. Rep. 889; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; The Federalist, No. 84.

The construction of the safety appliance act, pursuant to which penalties have been adjudged against the railway company, violates the social compact.

McVeigh v. United States, 11 Wall. 259, 267, 20 L. ed. 80, 81; Legal Tender Cases, 12 Wall. 457, 670, 20 L. ed. 287, 350; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 662, 22 L. ed. 455, 461.

There can be no crime or offense where there is no injury.

2 Wilson's Works, 338–341, 376.

No criminal offense can be committed where the intention to do or permit the wrongful act is wanting.

1 Bishop, Crim. Law, 5th ed. § 345; United States v. Houghton, 14 Fed. 549; People v. White, 34 Cal. 183; State v. Swett, 87 Me. 99, 29 L.R.A. 714, 47 Am. St. Rep. 306, 32 Atl. 806; Furley v. Chicago, M. & St. P. R. Co. 90 Iowa, 146, 23 L.R.A. 73, 57 N. W. 719; Schmidt v. State, 78 Ind. 41; Hunter v. State, 101 Ind. 241, 5 Am. Crim. Rep. 336; McClain, Crim. Law, § 128; United States v. Illinois C. R. Co. 156 Fed. 182; United States v. Illinois C. R. Co. 95 C. C. A. 628, 170 Fed. 542.

This is not a case in which the intent can be inferred from the quality of the act.

Pettibone v. United States, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542; Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244.

In this country it was never the law, until the instant case and some others practically concurrent with it were decided, that one could be convicted of a crime based upon an accidental occurrence.

Barlow v. United States, 7 Pet. 404, 8 L. ed. 728; United States v. Hess, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Davis v. United States, 160 U. S. 469, 484, 40 L. ed. 499, 504, 16 Sup.

NOTE.—On duty and liability under Federal and state railway safety appliance acts —see note to Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A.(N.S.) 473.

On suit for statutory penalty as a civil or criminal prosecution—see note to Hepner v. United States, 27 L.R.A.(N.S.) 739.

On nature and form of actions generally, whether civil or criminal—see note to United States v. Atlantic Coast Line R. Co. 98 C. C. A. 117.

Ct. Rep. 353; Felton v. United States, 96 U. S. 699, 24 L. ed. 875.

Even in cases involving no moral turpitude, there must be an intention to do the act which constitutes a violation of law.

Armour Packing Co. v. United States, 14 L.R.A.(N.S.) 400, 82 C. C. A. 135, 153 Fed. 23, 209 U. S. 56, 85, 52 L. ed. 681, 696, 28 Sup. Ct. Rep. 428.

Assistant Attorney General **Fowler** argued the cause, and, with Mr. Barton Corneau, Special Assistant to the Attorney General, filed a brief for respondent:

A statute may be remedial in part and penal in part, and the remedial provisions will be liberally construed, whereas the penal provisions may be subject to the rule of strict construction.

36 Cyc. Law & Proc. p. 1183; 2 Lewis's Sutherland Stat. Constr. 2d ed. § 337; Endlich, Interpretation of Statutes, § 332.

That the statute was construed in a civil cause affords no reason for saying that the authoritative construction of the statute is not to be applied in a criminal case.

United States v. Keitel, 211 U. S. 370, 392, 53 L. ed. 230, 242, 29 Sup. Ct. Rep. 123.

Though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal, as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature.

United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37; United States v. Lacher, 134 U. S. 624, 628, 33 L. ed. 1080, 1083, 10 Sup. Ct. Rep. 625.

The degree of strictness applied to the construction of a penal statute depends in a great measure on the severity of the statute.

Endlich, Interpretation of Statutes, § 334; 2 Lewis's Sutherland Stat. Constr. § 518.

When the section is remedial in its nature, as well as penal, it is to be liberally construed, to effect the object which Congress had in view when making it.

Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 35, 23 L. ed. 196, 199; Ordway v. Central Nat. Bank, 47 Md. 241, 28 Am. Rep. 455.

This proceeding is a civil one.

Hepner v. United States, 213 U. S. 103, 53 L. ed. 720, 29 Sup. Ct. Rep. 474, 16 A. & E. Ann. Cas. 960; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 53 L. ed. 1013, 29 Sup. Ct. Rep. 671.

Moreover, strictly speaking, this is not a penal statute, in that it does not impose punishment for an offense committed against the state which the Executive has the power to pardon.

Huntington v. Attrill, 146 U. S. 657, 667, 36 L. ed. 1123, 1127, 13 Sup. Ct. Rep. 224.

To hold that the infliction of an injury upon some individual is a necessary element in a criminal offense would be to declare wholly ineffective all laws against the speeding of automobiles and other vehicles, those which prohibit the storing of gunpowder and dynamite in public places, or the carrying of high explosives upon passenger trains, and every law of this character the purpose of which is to guard against the infliction of an injury.

Offenses created by statutes can be committed, though the intention to commit the wrongful act, and the knowledge of such act, be wanting.

Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57, 54 L. ed. 930, 30 Sup. Ct. Rep. 663; Reg. v. Woodrow, 15 Mecs. & W. 403, 2 New Sess. Cas. 346, 16 L. J. Mag. Cas. N. S. 122; Com. v. Emmons, 98 Mass. 8; People v. Snowberger, 113 Mich. 86, 67 Am. St. Rep. 449, 71 N. W. 497; People v. Roby, 52 Mich. 577, 50 Am. Rep. 270, 18 N. W. 365; Edgar v. State, 37 Ark. 223; Crampton v. State, 37 Ark. 108; State v. Sasse, 6 S. D. 212, 55 Am. St. Rep. 834, 60 N. W. 853; State v. Baltimore & S. Steam Co. 13 Md. 187; Halsted v. State, 41 N. J. L. 591, 32 Am. Rep. 247; Wharton, Crim. Law, 8th ed. § 88; United States v. Bayaud, 21 Blatchf. 287, 16 Fed. 384; United States v. Adler, 1 N. Y. Week. Dig. 182, Fed. Cas. No. 14,424.

With the exceptions of the circuit court of appeals sixth circuit, in the case of United States v. Illinois C. R. Co. 95 C. C. A. 628, 170 Fed. 542, of Judge Evans in the trial court in the same case (156 Fed. 182), of Judge Sater in charging the jury in United States v. Baltimore & O. R. Co. (Kent's Digest of Decisions under the Federal safety-appliance act, p. 271 Appx.), and of Judge Cochran in charging the jury in United States v. Baltimore & O. R. Co. Kent's Dig. pp. 277, 282, Appx., all the Federal courts who have had before them actions brought under § 6 of this act to recover penalties have held that the statute imposes absolute liability upon the companies not only to equip the cars with safety appliances, but to keep such appliances in good repair, and that to haul a car with any of its appliances out of repair rendered the company liable for the prescribed penalty.

United States v. Denver & R. G. R. Co. 90 C. C. A. 329, 163 Fed. 519; Chicago,

M. & St. P. R. Co. v. United States, 20 L.R.A.(N.S.) 473, 91 C. C. A. 373, 165 Fed. 423; United States v. Southern P. Co. 94 C. C. A. 629, 169 Fed. 407; Chicago, B. & Q. R. Co. v. United States, 95 C. C. A. 642, 170 Fed. 557; Atchison, T. & S. F. R. Co. v. United States, 96 C. C. A. 664, 172 Fed. 1021; Atlantic Coast Line R. Co. v. United States, 94 C. C. A. 35, 168 Fed. 175; Norfolk & W. R. Co. v. United States, 101 C. C. A. 249, 177 Fed. 623; United States v. Philadelphia & R. R. Co. 162 Fed. 403, 405; United States v. Pennsylvania R. Co. 162 Fed. 408; United States v. Lehigh Valley R. Co. 162 Fed. 410; United States v. Erie R. Co. 166 Fed. 352; United States v. Wheeling & L. E. R. Co. 167 Fed. 198; United States v. Atchison, T. & S. F. R. Co. 167 Fed. 696; United States v. Southern P. Co. 167 Fed. 699; United States v. Baltimore & O. R. Co. 170 Fed. 456; United States v. Southern R. Co. 170 Fed. 1014; United States v. Baltimore & O. R. Co. Kent's Dig. p. 274 Appx.; United States v. Atlantic Coast Line, Kent's Dig. p. 267 Appx.; United States v. Southern R. Co. Kent's Dig. p. 270 Appx.; United States v. Pennsylvania R. Co. Kent's Dig. p. 286 Appx.; United States v. Southern P. Co. Kent's Dig. p. 288 Appx.

There can be liability for an act which cannot, by any possible foresight or the exercise of any degree of care, be avoided.

Coggs v. Bernard, 2 Ld. Raym. 909, 5 Eng. Rul. Cas. 247; Wood, Mast. & S. 2d ed. § 277; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; Jones v. Brim, 165 U. S. 180, 41 L. ed. 677, 17 Sup. Ct. Rep. 282.

Congress has the constitutional power to impose a penalty for violation of the act, without the presence of knowledge of its violation, or the intent to violate the same.

Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57, 64–69, 54 L. ed. 930, 933–935, 30 Sup. Ct. Rep. 663; Wharton, Crim. Law, 8th ed. § 88; St. John v. New York, 201 U. S. 633, 50 L. ed. 896, 26 Sup. Ct. Rep. 554, 5 A. & E. Ann. Cas. 909; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10.

Mr. Justice **Harlan** delivered the opinion of the court:

Two separate actions were brought by the government in the district court of the United States for the district of Nebraska, against the Chicago, Burlington, & Quincy Railroad Company, an Iowa corporation engaged as a common carrier in interstate commerce. The object of each action was to recover certain penalties which, the United States alleged, had been incurred by the company for violations, in several specified instances, of the safety appliance acts of Congress. 27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174; 29 Stat. at L. 85, chap. 87, U. S. Comp. Stat. 1901, p. 3175; 32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 1909, p. 1143. By consent of the parties and by order of court, the two actions were consolidated and tried together. At the trial the court directed a verdict of guilty as to each cause of action, and a judgment for $300 was rendered for the government in one case and for $100 in the other.

By the original act of March 2d, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), it was provided that from and after the 1st day of January, 1898, it should be unlawful for any common carrier engaged in moving interstate *traffic by railroad to use on its line[568 any locomotive engine not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or, after that date, to run any train in such traffic that had not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

The 2d section provided "that on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." The 6th section, as amended April 1st, 1896, provided that any such common carrier using a locomotive engine, running a train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act "shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed. . . . Provided, That nothing in this act contained shall apply to trains composed of four-wheel cars, or to trains composed of eight-wheel standard logging cars, where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs."

The 8th section is in these words: "That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed 569]thereby to have assumed the *risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

After referring to various cases holding that the omission of Congress to make knowledge and diligence on the part of the carrier ingredients of the act condemned, the trial court said: "Its omission was intentional, in order that this statute might induce such a high degree of care and diligence on the part of the railway company as to necessitate a change in the manner of inspecting appliances, and to protect the lives and the safety of its employees, provided the accident occurs from a defective appliance such as is designated in this act. And for these reasons the jury will be peremptorily instructed to return a verdict for the government on each count of the petition." [156 Fed. 182.] In the circuit court of appeals that judgment was affirmed. In the course of its opinion the latter court said: "The cause is simplified by the concession of counsel for the railway company that there was evidence tending to prove the defective condition of each of the four cars as charged, and that they were all being used at the time stated in the several counts in hauling interstate commerce, or as a part of a train containing other cars which were doing so. The sole contention is that, notwithstanding this concession, inasmuch as it appears by the proof that defendant did not know its cars were out of repair, and had no actual intention at the time to violate the law, but, on the contrary, had exercised reasonable care to keep them in repair by the usual inspections, it is not liable in this action. Learned counsel concede, what is undoubtedly true, that sustaining their contention involves a reversal of the doctrine unanimously declared by this court in United States v. Atchison, T. & S. F. R. Co. 90 C. C. A. 327, 163 Fed. 517, and United States v. Denver & R. G. R. Co. 90 C. C. A. 329, 163 Fed. 519, 570]*and a disregard of what they call the *dictum* of the Supreme Court in St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, and they accordingly invite us to enter upon a reconsideration of the questions so decided. It was held by us, and in our opinion it was necessarily held by the Supreme Court in the Taylor Case, that the duty of railroads under the statute in question is an absolute duty, and not one which is discharged by the exercise of reasonable care or diligence. Since those cases were decided, this court, in the case of Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A.(N.S.) 473, 91 C. C. A. 373, 165 Fed. 423, has again approved of their doctrine, and the circuit court of appeals for the fourth circuit in the case of Atlantic Coast Line R. Co. v. United States (decided March 1, 1909) 94 C. C. A. 35, 168 Fed. 175, in considering this question, made a review of pertinent authorities, and particularly of the cases of this court as well as of the Taylor Case, and in an exhaustive opinion reached the same conclusion that we did. . . . The act made it unlawful for railroads to use cars not equipped as therein provided, and thereby imposed a duty upon railroad companies to equip cars accordingly. This was, by clear and unequivocal language of the lawmaker, made an absolute duty, not dependable upon the exercise of diligence or the existence of any wrong intent on the part of the railroad companies. Whether a defendant carrier knew its cars were out of order or not is immaterial. Its duty was to know they were in order and kept in order at all times. Cases supra. A breach of this duty, like the breach of most civil duties, naturally entailed a liability, and Congress fixed that liability, not as a punishment for a criminal offense, but as a civil consequence, so far as the government was concerned, of a failure to perform the duty which, in the opinion of Congress, the public weal demanded should be performed by railroad companies." 95 C. C. A. 642, 170 Fed. 556.

Does the act of Congress in question impose on an interstate *carrier an ab-[571 solute duty to see to it that no car is hauled or permitted to be hauled or used on its line unless it be equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars? Can the carrier engaged in moving interstate traffic escape the penalty prescribed for a violation of the act, in the particulars just mentioned, by showing that it had exercised reasonable care in equipping its cars with the required coupler, and had used due diligence to ascertain, from time to time, whether such cars were properly equipped?

The court below held that an explicit answer to the above questions was to be found in St. Louis, I. M. & S. R. Co. v. Taylor, supra. The government insists that such was the effect of the decision of that case. The defendant contends that the questions here presented were not necessary to be decided in the Taylor Case,

and that an examination of them now is not precluded by anything involved in that case.

Under the circumstances and because of the importance of the questions raised, it seems appropriate, if not necessary, to state the origin of the Taylor Case and the grounds upon which this court proceeded.

Neal, as administrator of the estate of Taylor, brought an action in an Arkansas court against the St. Louis, Iron Mountain, & Southern Railway Company to recover damages for the death of Taylor, one of its employees, whose death, it was alleged, had been caused by the company's failure to provide certain safety appliances required by the act of Congress. Pursuant to the direction of the state court, a verdict was returned for the railway company. The case was taken to the supreme court of Arkansas, and that court decided that the act of Congress departed from or supplanted that general rule obtaining between master and servant, which protected the master, when charged with the failure to 572]have safe machinery for the servant, *if it appeared that the master used reasonable care and diligence in providing suitable and safe appliances. "But," that court said, "it is different where the injury is caused by a violation of a statutory duty on the part of the master. The statute upon which this case is based does not say that the company shall use ordinary care to provide its cars with drawbars of a certain height, but it imposes as a positive duty upon railway companies that they shall do so. . . . The act of Congress requiring railroad companies to equip their cars with drawbars of standard and uniform heights specifically provides that an employee injured by the failure of a company to comply with the act shall not be deemed to have assumed the risk by reason of his knowledge that the company had not complied with the statute, and there is no question of assumed risk presented." The supreme court of the state was therefore of opinion that the trial court had not correctly interpreted the act of Congress in respect of the nature of the duty imposed by the statute on the railroad company, and directed the case to be sent back for a new trial. Neal v. St. Louis, I. M. & S. R. Co. 71 Ark. 445, 450, 78 S. W. 220. The second trial was conducted on the basis of the principles announced by the supreme court of Arkansas in that case. At the second trial the railway company asked the court to instruct, but the court refused to instruct, the jury as follows: "The court tells you that if you find from the evidence in this case the defendant equipped all its cars with uniform and standard height drawbars when such cars are first built and turned out of the shops, then the defendant is only bound *to use ordinary care* to maintain such drawbars at the uniform and standard height spoken of in the testimony." This was designated as instruction No. 23, asked by the railway company. It appears at page 126 of the original record, on file in this court, of the Taylor Case. At the last trial there was a verdict in the state court against the railway company. The company appealed to the supreme *court of Arkansas, [573 where the judgment was affirmed. St. Louis, I. M. & S. R. Co. v. Neal, 83 Ark. 591, 598, 98 S. W. 958.

The railway company prosecuted a writ of error to this court, and the case is reported as St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616. It was assigned by the company for error, and its counsel insisted that the trial court erred in refusing the above instruction, No. 23, and that the supreme court of the state erred in not so ruling. (Original record, p. 154.) The reason assigned in support of that view was that "a reasonable construction of the safety appliance act is that if the railroad company equipped all its cars with uniform and standard height drawbars when such cars were first built and turned out of the shops, then that *thereafter* the defendant is only bound to use *ordinary care* to maintain such drawbars at the uniform and standard height mentioned in the testimony." Counsel for the other side contended in the case in 210 U. S. that "under the safety appliance act it is immaterial whether the defendant had notice of the defect, or had used ordinary care to prevent this and similar defects from arising," and that "the railroad is liable under the act, unconditionally, for any violation of its provisions,"—citing Southern R. Co. v. Carson, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609; United States v. Atlantic Coast Line R. Co. 153 Fed. 918; United States v. Southern R. Co. 135 Fed. 122; United States v. Great Northern R. Co. 150 Fed. 229. It is thus seen that whether the act of Congress imposed an absolute duty upon the carrier in the matter of the required safety appliances, or whether knowledge or diligence on its part was an ingredient in the act condemned, was a question distinctly presented here by the assignments of error and by counsel on both sides. This court regarded the question as properly presented on the record, and that its duty was to meet and decide it. Speaking by Mr. Justice Moody, it said: "It is not, and cannot be, disputed that the questions

574]raised by the errors assigned *were seasonably and properly made in the court below, so as to give this court jurisdiction to consider them; so no time need be spent on that." What, then, was held by this court in the Taylor Case? Among other things, the court said: "On this state of the evidence the defendant was refused instructions, in substance, that if the defendant furnished cars which were constructed with drawbars of a standard height, and furnished shims to competent inspectors and train men, and used reasonable care to keep the drawbars at a reasonable height, it had complied with its statutory duty, and, if the lowering of the drawbar resulted from the failure to use the shims, that was the negligence of a fellow servant, for which the defendant was not responsible. In deciding the questions thus raised, upon which the courts have differed (St. Louis & S. F. R. Co. v. Delk, 86 C. C. A. 95, 158 Fed. 931, 14 A. & E. Ann. Cas. 233), we need not enter into the wilderness of cases upon the common-law duty of the employer to use reasonable care to furnish his employee reasonably safe tools, machinery, and appliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, *not satisfied with the common-law duty and its resulting liability*, has prescribed and defined the *duty by statute*. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was *to supplant the qualified duty of the common law with an absolute duty deemed by it more just*. If the railroad does, in point 575]of fact, *use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. *They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body.* . . . It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words. We see no error in this part of the case." These views were not new, but were in accord with previous judgments in several cases in the Federal courts. In United States v. Philadelphia & R. R. Co. 160 Fed. 696, 698; United States v. Louisville & N. R. Co. 162 Fed. 185, 186; United States v. Chicago G. W. R. Co. 162 Fed. 775, 778.

It cannot then be doubted that this court in the Taylor Case considered the scope and effect of the safety appliance act of Congress as directly involved in the questions raised in that case, and it expressly decided that the provision in the 2d section relating to automatic couplers imposed an absolute duty on each corporation in every case to provide the required couplers on cars used in interstate traffic. It also decided that nonperformance of that duty could not be evaded or excused by proof that the corporation had used ordinary care in the selection of proper couplers or reasonable diligence in using them and *as-[576 certaining their condition from time to time. That the Taylor Case, as decided by this court, has been so interpreted and acted upon by the Federal courts generally, is entirely clear, as appears from the cases cited in the margin.†

In United States v. Atchison, T. & S. F. R. Co. 90 C. C. A. 327, 163 Fed. 517, Mr. Justice Van Devanter, then circuit judge, speaking for the circuit court of appeals, referred to the Taylor Case in this court, saying: "It is now authoritatively settled that the duty of the railway company in situations where the congressional law is applicable is not that of exercising reasonable care in maintaining the prescribed safety appliance in operative condition, but is absolute. In that case the common-law rules in respect of the exercise of reasonable care by the master, and of the nonliability of the master for the negligence of a fellow servant, were invoked by the

†United States v. Philadelphia & R. R. Co. 162 Fed. 403; United States v. Lehigh Valley R. Co. 162 Fed. 410; United States v. Denver & R. G. R. Co. 90 C. C. A. 329, 163 Fed. 519; Chicago, M. & St. P. R. Co.

railway company, and were held by the court to be superseded by the statute; . . . While the defective appliance in that case was a drawbar, and not a coupler, and the action was one to recover damages for the death of an employee, and not a penalty, we perceive nothing in these differences which distinguish that case from this. As respects the nature of the duty 577]placed *upon the railway company, § 5, relating to drawbars, is the same as § 2, relating to couplers; and § 6, relating to the penalty, is expressed in terms which embrace every violation of any provision of the preceding sections. Indeed, a survey of the entire statute leaves no room to doubt that all violations thereof are put in the same category, and that whatever properly would be deemed a violation in an action to recover for personal injuries is to be deemed equally a violation in an action to recover a penalty."

In view of these facts, we are unwilling to regard the question as to the meaning and scope of the safety appliance act, so far as it relates to automatic couplers on trains moving interstate traffic, as open to further discussion here. If the court was wrong in the Taylor Case, the way is open for such an amendment of the statute as Congress may, in its discretion, deem proper. This court ought not now disturb what has been so widely accepted and acted upon by the courts as having been decided in that case. A contrary course would cause infinite uncertainty, if not mischief, in the administration of the law in the Federal courts. To avoid misapprehension, it is appropriate to say that we are not to be understood as questioning the soundness of the interpretation heretofore placed by this court upon the safety appliance act. We only mean to say that until Congress, by an amendment of the statute, changes the rule announced in the Taylor Case, this court will adhere to and apply that rule.

The Taylor Case was a strictly civil proceeding, being an action by an individual to recover damages for a personal injury alleged to have been caused by the negligence of a corporation; whereas, the present action is to recover a penalty. This difference, it is suggested, will justify a re-examination, upon principle, of the rule announced in the Taylor Case. In effect, the contention is that the present action for a penalty is a criminal prosecution, and *that the defendant cannot be held[578 guilty of a crime when it had no thought or purpose to commit a crime, and endeavored with due diligence to obey the act of Congress. This contention is unsound, because the present action is a civil one. It is settled law that "a certain sum, or a sum which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of law, may be recovered by civil action, even if it may also be recovered in a proceeding which is technically criminal." It was so decided, upon full consideration, in Hepner v. United States, 213 U. S. 103, 108, 53 L. ed. 720, 722, 27 L.R.A.(N.S.) 739, 29 Sup. Ct. Rep. 474, 16 A. & E. Ann. Cas. 960. In that case it was also held that it was competent for the trial court, even though the action was for a penalty, to direct a verdict for the government, the court saying that it was "fundamental in the conduct of civil actions, that the court may withdraw a case from the jury, and direct a verdict according to the law, if the evidence is uncontradicted and raises only a question of law." So, in Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 337, 338, 53 L. ed. 1013, 1021, 1022, 29 Sup. Ct. Rep. 671; "The contention that because the exaction which the statute authorizes the Secretary of Commerce and Labor to impose is a penalty, therefore its enforcement is necessarily governed by the rules controlling in the prosecution of criminal offenses, is clearly without merit, and is not open to discussion." If the statute upon which the present action is based had expressly or by implication declared that the penalty prescribed may only be recovered by a criminal proceeding, that direction must have been followed. The power of the legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned. Reg. v. Woodrow, 15 Mees. & W. 404, 417, 2 New Sess. Cas. 346, 16 L. J. Mag. Cas. N. S. 122; People v. Snowberger, 113 Mich. 86, 67 Am. St. Rep. 449, 71 N. W. 497; Com. v. Emmons, 98 Mass. 6, 8;

v. United States, 20 L.R.A.(N.S.) 473, 91 C. C. A. 373, 165 Fed. 423; Donegan v. Baltimore & N. Y. R. Co. 91 C. C. A. 555, 165 Fed. 869; United States v. Erie R. Co. 166 Fed. 352; United States v. Wheeling & L. E. R. Co. 167 Fed. 198, 201; Atlantic Coast Line R. Co. v. United States, 94 C. C. A. 35, 168 Fed. 175, 184; Chicago Junction R. Co. v. King, 94 C. C. A. 652, 169 Fed. 372, 377; United States v. Southern P. Co. 94 C. C. A. 629, 169 Fed. 407, 409; Watson v. St. Louis I. M. & S. R. Co. 169 Fed. 942; Wabash R. Co. v. United States, 97 C. C. A. 284, 172 Fed. 864; Atchison, T. & S. F. R. Co. v. United States, 96 C. C. A. 664, 172 Fed. 1021; Norfolk & W. R. Co. v. United States, 101 C. C. A. 249, 177 Fed. 623; United States v. Illinois C. R. Co. 101 C. C A. 15, 177 Fed. 801; Johnson v. Great Northern R. Co. 102 C. C. A. 89, 178 Fed. 646; Sielgel v. New York C. & H. R. R. Co. 178 Fed. 873.

People v. Roby, 52 Mich. 577, 50 Am. Rep. 270, 18 N. W. 365; Edgar v. State, 37 Ark. 219, 223; State v. Baltimore & S. Steam 579]Co. 13 Md. 181, 187, 188. *In Halsted v. State, 41 N. J. L. 552, 591, 32 Am. Rep. 247, the suggestion was made that, in determining the mind of the legislature, the dictates of natural justice should be the ground of decision, and not simply regarded as a mere circumstance of weight. But that court said: "As there is an undoubted competency in the lawmaker to declare an act criminal, irrespective of the knowledge or motive of the doer of such act, there can be, of necessity, no judicial authority having the power to require, in the enforcement of the law, such knowledge or motive to be shown. In such instances the entire function of the court is to find out the intention of the legislature, and to enforce the law in absolute conformity to such intention." So, in Greenleaf on Evidence: "Where a statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation. Thus, for example, where the law enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owner and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred, notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police, and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law, in these cases, seems to bind the party to know the facts and to obey the law at his peril." 3 Greenl. 16th ed. §§ 21, 26, and notes.

We need say nothing more. The case is plainly covered by the act of Congress. And as it is determined by the rule announced in the Taylor Case, it must be held that no error of law was committed to the prejudice of the defendant, and the judgment must be affirmed.

It is so ordered.

580] *E. M. DELK, Petitioner,

v.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

(See S. C. Reporter's ed. 580-589.)

Master and servant — safety appliance act — cars used in interstate commerce.

1. A freight car loaded with interstate freight, and placed on a side track in the railway yard at destination, to await simple repairs to the automatic coupler, is used in moving interstate commerce within the meaning of the safety appliance act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), when a coupling with another car is thereafter attempted by the carrier's order, during the course of switching operations.

[For other cases, see Master and Servant, 36-40, in Digest Sup. Ct. 1908.]

Master and servant — safety appliance act — reasonable care.

2. An absolute duty to provide every car used in moving interstate traffic with automatic couplers, and to maintain them in proper condition at all times and under all circumstances, is imposed upon interstate carriers by the safety appliance act of March 2, 1893, which was not discharged by properly equipping the car with automatic couplers, and using due diligence to keep them in good working order.

[For other cases, see Master and Servant, 36-40, in Digest Sup. Ct. 1908.]

Trial — directing verdict — discrepancy in testimony.

3. The trial court properly refused to charge as a matter of law that the evidence established the defense of contributory negligence, where the testimony on that question was such as to leave fair ground for difference of opinion.

[For other cases, see Trial, VI. d, 3, in Digest Sup. Ct. 1908.]

Certiorari — disposition of cause.

4. A reversal on certiorari for error in construing the safety appliance act of March 2, 1893, of the judgment of a circuit court of appeals reversing a judgment of a circuit court in favor of an employee in an action against a carrier to recover damages for personal injuries alleged to have been caused by its negligence, furnishes no reason for disturbing the judgment of the trial court, where no error of law appears to have been committed in that court to the prejudice of the carrier.

[For other cases, see Certiorari, 53-56, in Digest Sup. Ct. 1908.]

[No. 88.]

Argued March 9, 1911. Decided May 15, 1911.

Note.—On duty and liability under Federal and state railway safety appliance acts—see note to Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A.(N.S.) 473.

On the province of the court and jury in determining the question of negligence—see notes to Roux v. Blodgett & D. Lumber Co. 13 L.R.A. 728; Emry v. Raleigh & G. R. Co. 15 L.R.A. 332; Fitch v Creighton, 16 L. ed. U. S. 596; and Northern P. R. Co. v. Egeland, 41 L. ed. U. S. 82.

As to when contributory negligence is a question for the jury—see note to Northern P. R. Co. v. Egeland, supra.

On certiorari from Federal Supreme Court to circuit courts of appeals—see note to United States v. Dickinson, 53 L. ed. U. S. 711.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which reversed a judgment of the Circuit Court for the Western District of Tennessee, in favor of an employee in an action to recover damages from a carrier for personal injuries alleged to have been caused by its negligence. Reversed, and judgment of the Circuit Court affirmed.

See same case below, 86 C. C. A. 95, 158 Fed. 931, 14 A. & E. Ann. Cas. 233.

The facts are stated in the opinion.

Messrs. **Luther M. Walter** and **W. A. Percy** argued the cause, and, with Messrs. T. F. Kelley and L. P. Berry, filed a brief for petitioner:

The purpose of the safety appliance statute was to make a railroad company liable unconditionally for its violation.

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616; Johnson v. Southern P. Co. 196 U. S. 19, 49 L. ed. 370, 25 Sup. Ct. Rep. 158; Southern R. Co. v. Carson, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609; Sehlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 11, 51 L. ed. 685, 27 Sup. Ct. Rep. 407; United States v. Atlantic Coast Line R. Co. 153 Fed. 918; United States v. Great Northern R. Co. 150 Fed. 229; United States v. Southern R. Co. 135 Fed. 122; Chicago, M. & St. P. R. Co. v. Voelker, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522; United States v. Southern R. Co. 170 Fed. 1014; Chicago, B. & Q. R. Co. v. United States, 95 C. C. A. 642, 170 Fed. 556, United States v. Chicago, R. I. & P. R. Co. 173 Fed. 684; Wabash R. Co. v. United States, 93 C. C. A. 393, 168 Fed. 1; Chicago & N. W. R. Co. v. United States, 21 L.R.A.(N.S.) 690, 93 C. C. A. 450, 168 Fed. 236; Wabash R. Co. v. United States, 97 C. C. A. 284, 172 Fed. 864; Atlantic Coast Line R. Co. v. United States, 94 C. C. A. 35, 168 Fed. 175; Chicago Junction R. Co. v. King, 94 C. C. A. 652, 169 Fed. 372; Johnson v. Great Northern R. Co. 102 C. C. A. 89, 178 Fed. 643; Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A. (N.S.) 473, 91 C. C. A. 373, 165 Fed. 423; United States v. Southern P. Co. 94 C. C. A. 629, 169 Fed. 407.

The car with the defective coupler was, at the instant of the accident, embraced within the safety appliance act.

Chicago, M. & St. P. R. Co. v. Voelker, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522; Johnson v. Southern P. Co. 54 C. C. A. 508, 117 Fed. 462; United States v. St. Louis, I. M. & S. R. Co. 154 Fed. 518; Chicago Junction R. Co. v. King, 94 C. C. A. 652, 169 Fed. 372; United States v. Southern P. Co. 167 Fed. 699.

Contributory negligence is no defense in a suit of this character.

Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 16, 51 L. ed. 688, 27 Sup. Ct. Rep. 407; Johnson v. Great Northern R. Co. 102 C. C. A. 89, 178 Fed. 643; Elmore v. Seaboard Air Line R. Co. 130 N. C. 506, 41 S. E. 786; Greenlee v. Southern R. Co. 122 N. C. 977, 41 L.R.A. 399, 65 Am. St. Rep. 734, 30 S. E. 115; Carterville Coal Co. v. Abbott, 181 Ill. 495, 55 N. E. 131; Kansas City, M. & B. R. Co. v. Flippo, 138 Ala. 487, 35 So. 457; Troxler v. Southern R. Co. 124 N. C. 191, 44 L.R.A. 313, 70 Am. St. Rep. 580, 32 S. E. 550; Fleming v. Southern R. Co. 131 N. C. 476, 42 S. E. 905; Union P. R. Co. v. McDonald, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; The Pennsylvania, 19 Wall. 125, 22 L. ed. 148; Flint & P. M. R. Co. v. Lull, 28 Mich. 510; Jeffersonville & M. I. R. Co. v. Ross, 37 Ind. 545; Louisville & N. R. Co. v. Burke, 6 Coldw. 46.

Plaintiff had a right to assume that the master had furnished him with a safe and prudent engineer, and some reliance upon his doing his duty could not be contributory negligence.

Norfolk & W. R. Co. v. Ampey, 93 Va. 108, 25 S. E. 226; Richmond & D. R. Co. v. Rudd, 88 Va. 648, 14 S. E. 361; Steele v. Central R. Co. 43 Iowa, 109; Wright v. Southern P. Co. 14 Utah, 383, 46 Pac. 374; Curtis v. Chicago & N. W. R. Co. 95 Wis. 460, 70 N. W. 665.

The defendant could not delegate the duty it owed plaintiff, of keeping these couplers in repair. Nor could it shield itself behind the fact that the negligenee of the engineer or other employee contributed to produce the injury.

Norfolk & W. R. Co. v. Ampey, 93 Va. 130, 25 S. E. 226; 4 Thomp. Neg. §§ 3858, 4856; Northwestern Fuel Co. v. Danielson, 6 C. C. A. 636, 12 U. S. App. 688, 57 Fed. 915; New Jersey & N. Y. R. Co. v. Young, 1 C. C. A. 428, 1 U. S. App. 96, 49 Fed. 723; Louisville & N. R. Co. v. Kenley, 92 Tenn. 207, 21 S. W. 326; Cone v. Delaware, L. & W. R. Co. 81 N. Y. 206, 37 Am. Rep. 491; Cooley, Torts, 560; 1 Shearm. & Redf. Neg. 5th ed. § 188; Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493; Booth v. Boston & A. R. Co. 73 N. Y. 38, 29 Am. Rep. 97; Voelker v. Chicago, M. & St. P. R. Co. 116 Fed. 867; Paulmier v. Erie R. Co. 34 N. J. L. 151; Elmer v. Locke, 135 Mass. 575; Pittsburgh, C. & St. L. R. Co. v. Henderson, 37 Ohio St. 549.

The case was properly submitted to the jury.

Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 11, 51 L. ed. 681, 27 Sup. Ct.

Rep. 407; Elmore v. Seaboard Air Line R. Co. 131 N. C. 569, 42 S. E. 989; Northern P. R. Co. v. Tynan, 56 C. C. A. 192, 119 Fed. 288; Chicago, M. & St. P. R. Co. v. Voelker, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522; Denver & R. G. R. Co. v. Arrighi, 72 C. C. A. 400, 141 Fed. 67; Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; Kane v. Northern C. R. Co. 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16; Texas & P. R. Co. v. Archibald, 170 U. S. 667, 49 L. ed. 1189, 18 Sup. Ct. Rep. 777; Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; Gardner v. Michigan C. R. Co. 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140; St. Louis, I. M. & S. R. Co. v. Leftwich, 54 C. C. A 1, 117 Fed. 128; Choctaw, O. & G. R. Co. v. Tennessee, 53 C. C. A. 497, 116 Fed. 23; Sioux City & P. R. Co. v. Stout, 17 Wall. 665, 21 L. ed. 745.

Additional cases in support of petitioner's contentions are:—

Erie R. Co. v. Russell, 106 C. C. A. 160, 183 Fed. 722; Johnson v. Great Northern R. Co. 102 C. C. A. 89, 178 Fed. 643; Hohenleitner v. Southern P. Co. 177 Fed. 796; Donegan v. Baltimore & N. Y. R. Co. 91 C. C. A. 555, 165 Fed. 870; Chicago Junction R. Co. v. King, 94 C. C. A. 652, 169 Fed. 372.

Assistant Attorney General Fowler and Mr. Barton Corneau, Special Assistant to the Attorney General, filed a brief for the United States as *amici curiæ*:

The car in question was being used in interstate commerce when the accident occurred.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158.

The act prohibits all use of cars in interstate commerce, which are not, at the time of the use, equipped with automatic couplers in working condition.

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616; United States v. Denver & R. G. R. Co. 90 C. C. A. 329, 163 Fed. 519; Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A.(N.S.) 473, 91 C. C. A. 373, 165 Fed. 426; United States v. Southern P. Co. 94 C. C. A. 629, 169 Fed. 409; Chicago, B. & Q. R. Co. v. United States, 95 C. C. A. 642, 170 Fed. 557; Atchison, T. & S. F. R. Co. v. United States, 96 C. C. A. 664, 172 Fed. 1021; Donegan v. Baltimore & N. Y. R. Co. 91 C. C. A. 555, 165 Fed. 871; Atlantic Coast Line R. Co. v. United States, 94 C. C. A. 35, 168 Fed. 186; Norfolk & W. R. Co. v. United States, 101 C. C. A. 249, 177 Fed. 625; United States v. Philadelphia & R. R. Co. 162 Fed. 405; United States v. Pennsylvania R. Co. 162 Fed. 408; United States v. Lehigh Valley R. Co. 162 Fed. 410; United States v. Erie R. Co. 166 Fed. 354; United States v. Wheeling & L. E. R. Co. 167 Fed. 201; United States v. Atchison, T. & S. F. R. Co. 167 Fed. 697; United States v. Southern P. Co. 167 Fed. 699; United States v. Baltimore & O. R. Co. 170 Fed. 458; United States v. Southern R. Co. 170 Fed. 1014; Hohenleitner v. Southern P. Co. 177 Fed. 797; United States v. Baltimore & O. R. Co. Kent's Dig. p. 264, Appx.; United States v. Atlantic C. L. R. Co. Kent's Dig. p. 267, Appx.; United States v. Southern R. Co. Kent's Dig. p. 270, Appx.; United States v. Pennsylvania R. Co. Kent's Dig. pp. 286, 287, Appx.; United States v. Southern Pac. Co. Kent's Dig. pp. 288, 289, Appx.; Carson v. Southern R. Co. 68 S. C. 70, 46 S. E. 525; Brinkmeier v. Missouri P. R. Co. 81 Kan. 107, 105 Pac. 221; Neal v. St. Louis, I. M. & S. R. Co. 71 Ark. 450, 78 S. W. 220.

The act is far more remedial in character than other acts which have been held remedial by this court.

Taylor v. United States, 3 How. 197, 210, 11 L. ed. 559, 564; Rankin v. Hoyt, 4 How. 327, 332, 11 L. ed. 996, 998; United States v. Stowell, 133 U. S. 1, 12, 33 L. ed. 555, 558, 10 Sup. Ct. Rep. 244; Anglo-California Bank v. Secretary of Treasury, 22 C. C. A. 527, 48 U. S. App. 27, 76 Fed. 742, 748; Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 35, 23 L. ed. 196, 199; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272.

The holding that this statute imposes absolute liability is in consonance with many common-law principles and statutory requirements.

Wice v. Chicago & N. W. R. Co. 193 Ill. 351, 56 L.R.A. 268, 61 N. E. 1084; Mills v. Missouri, K. & T. R. Co. 94 Tex. 242, 55 L.R.A. 497, 59 S. W. 874; Donnegan v. Erhardt, 119 N. Y. 473, 7 L.R.A. 527, 23 N. E. 1051; Terre Haute & I. R. Co. v. Williams, 172 Ill. 381, 64 Am. St. Rep. 44, 50 N. E. 116; Dickson v. Omaha & St. L. R. Co. 124 Mo. 148, 25 L.R.A. 320, 46 Am. St. Rep. 429, 27 S. W. 476; Quackenbush v. Wisconsin & M. R. Co. 62 Wis. 414, 22 N. W. 519; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243.

Mr. **Edward T. Miller** argued the cause, and, with Mr. W. F. Evans, filed a brief for respondent:

Was the car upon which the defective

coupler was located, in use in interstate commerce, contrary to law, at the time of the injury?

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; Chicago, M. & St. P. R. Co. v. Voelker, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522.

The defect being shown, and the injury having occurred, was the liability of the railroad company absolute without regard to whether or not it was possible for the company, in the exercise of ordinary care, to have discovered and remedied the defect before the injury occurred?

United States v. Atchison, T. & S. F. R. Co. 150 Fed. 442; Voelker v. Chicago, M. & St. P. R. Co. 116 Fed. 867; United States v. Illinois C. R. Co. 156 Fed. 185; Elmore v. Seaboard Air Line R. Co. 130 N. C. 506, 41 S. E. 786; Missouri P. R. Co. v. Brinkmeier, 77 Kan. 14, 93 Pac. 621; United States v. Illinois C. R. Co. 95 C. C. A. 628, 170 Fed. 542.

Defendant may avail itself of the defense of contributory negligence.

Denver & R. G. R. Co. v. Arrighi, 63 C. C. A. 649, 129 Fed. 348; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 15, 51 L. ed. 681, 687, 27 Sup. Ct. Rep. 407; Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 304.

The record shows that plaintiff was guilty of contributory negligence as a matter of law.

Southern P. Co. v. Pool, 160 U. S. 438, 40 L. ed. 485, 16 Sup. Ct. Rep. 338; Karrer v. Detroit, G. H. & M. R. Co. 76 Mich. 400, 43 N. W. 370; Toledo, St. L. & W. R. Co. v. Gordon, 100 C. C. A. 572, 177 Fed. 152.

Mr. Justice **Harlan** delivered the opinion of the court:

The St. Louis & San Francisco Railroad Company, a Missouri corporation engaged in commerce as a carrier of freight and passengers through Tennessee and other states, was sued in one of the courts of Tennessee by the petitioner, Delk, for damages alleged to have been sustained by him while engaged in the discharge of his duties as an employee of the company. On the petition of the railroad company the case was removed to the circuit court of the United States on the ground of diversity of citizenship.

The declaration contained several counts, but the basis of the plaintiff's claim is the alleged failure of the railroad company to provide proper automatic couplers, as required by the act of Congress of March 2d, 1893, known as the original safety appliance act. 27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174. The company filed a plea, putting in issue the material allegations of the declaration. It also proceeded on the ground that the injuries complained of were caused by the plaintiff's own fault in not observing proper care in doing the work in which he was engaged when injured.

Upon a trial of the case in the Federal court there was a verdict and judgment in favor of the plaintiff for $7,500. The company moved for a new trial, and the trial court *indicated its purpose to grant[582 that motion unless the plaintiff by remittitur reduced the verdict and judgment to $5,000. The plaintiff complied with that condition, and judgment was entered against the company for the sum last mentioned. In the circuit court of appeals the judgment was reversed and the case remanded for a new trial. 86 C. C. A. 95, 158 Fed. 931, 939, 940, 14 A. & E. Ann. Cas. 233. Thereafter this court allowed a writ of certiorari.

The title of the safety appliance statute declared it to be "An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip Their Cars with Automatic Couplers and Continuous Brakes, and Their Locomotives with Driving-wheel Brakes, and for Other Purposes." 27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174.

The provisions of the act, so far as it is material to set them out, appear in the opinion of Chicago, B. & Q. R. Co. v. United States, just decided. [220 U. S. 559, ante, 582, 31 Sup. Ct. Rep. 612.] The circuit court of appeals well said, in the present case, that while the general purpose of the statute was to promote the safety of employees and travelers, its immediate purpose was to provide a particular mode to effect that result; namely, the equipping of each car used in moving interstate traffic with couplers, coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

The material facts out of which the suit arises, and as to which there seems to be no dispute, are these: The defendant company received lumber to be carried from Giles, Arkansas, to Memphis, Tennessee. In order that the consignee might receive the lumber, the car containing it was delivered, October 2d, 1906, to the Union Railway Company, known as the Belt Line. But it was promptly returned the next day to the present defendant because of a defect in the coupling and uncoulping appliance on one end of it. The car in question was in a new *yard of the defend-[583

ant company, and was in a "string" of nine cars on what is known as "the dead track" in that yard. This track was called a team track, because it was so arranged that teams might be loaded and unloaded from alongside it.

On the morning after the return of the car, October 4th, 1906, Delk, acting under instructions of the agent of the defendant company, undertook to switch certain cars out of the string of nine cars, so as to get two empty cars and three coal cars for removal to some other part of the company's line. The remaining facts upon which the circuit court of appeals proceeded cannot, that court said, be better stated than they are in the brief for the Interstate Commerce Commission, in whose behalf special counsel appeared in that court. Those facts are set out in the opinion of the court below as follows: "The cars were on the track, extending in the general direction of east and west, the engine being on the western end of the nine cars. The nine cars were drawn off this team track onto the lead track. The easternmost two cars, being empties, were left on the lead track. The remaining seven cars were then pushed back on the team track. The easternmost two cars of the seven cars, loaded with brick, were left on the team track. The remaining five cars were again drawn onto the lead track, and three cars loaded with coal were left thereon. The engine, with the remaining two cars, again went upon the team track, and defendant in error undertook to couple the eastern end of the two cars attached to the engine to the western end of the two cars just left on the team track, but, owing to a defect in the coupler on the eastern end of the two cars attached to the engine, the coupling could not be made without a man going between the ends of the cars. The defect on car K. C., F. S. & M. No. 21,696, was this: The chain connecting the uncoupling lever to the lock pin or lock block was disconnected, 584]owing to a break in the lock *pin or lock block. The drawbar also had a lateral motion of 4 inches. Defendant in error undertook to hold the drawbar away with his foot from the side upon which he stood, so that the two couplers could couple by impact. In so doing, his foot was badly injured. Plaintiff in error had what is known as a car inspector or light repair man in the new yard. It was his duty to make repairs of the kind necessary on this car whenever found by him. When the car was returned by the Belt Railway on account of the defect in the coupler, plaintiff in error's inspector placed a red card about 3 inches by 6 inches upon the car, and with a blue pencil wrote on said card, 'Out of Order.' This card is what is commonly known as a 'bad order' card. The car had been on this team track from 7:30 A. M., on the 3d, until 10 or 11 o'clock on the 4th, when the accident to defendant in error occurred. There was evidence tending to show that the inspection was made in the latter part of the 3d, and that the inspector thereupon ordered an employee to go to the repair shops which were some 2½ miles distant, and get the material for repairing the coupler, but that the employee did not return until after the accident. The trial court held that the safety appliance act applied to the car with the defective coupler, and that by virtue of § 8 of said act, plaintiff in error was denied the defense of assumption of risk on the part of defendant in error, and stated the language of the act to the jury."

The majority of the circuit court of appeals (Judges Severens and Richards) held that the car, with the defective coupler, was, at the time of the injury in question, and within the meaning of the act, engaged in interstate commerce. Judge Severens said: "The plaintiff in error claims that it was not, and was laid by for repairs. But we are inclined to think otherwise. Its cargo had not reached its destination, and was not then ready for the delivery to the consignee, wherewith the commerce would have ended. *Its stop-[585 page in the yard was an incident to the transportation. The injury to the coupler was one easily repaired without being taken to a repair shop, and the car was being hauled upon the track when the accident occurred,"—citing Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; Chicago, M. & St. P. R. Co. v. Voelker, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522. Judge Richards said: "The car which caused the injury had a defective coupler. It would not couple automatically. As a result, the plaintiff below, under orders, went between it and the car it was to be coupled to, and tried to force a coupling by using his foot. In consequence, his foot was caught in the impact of the cars and seriously injured. . . . After the coupler became defective, and could not be coupled without going between the ends of the cars, it became unlawful for the railroad company to haul it, or permit it to be hauled, or used, on its line. It then became the duty of the railroad company to withdraw the car from use, and have it repaired to conform with the law before using it further. It did not do this, but continued to use the car in its defective condition. It could only do this under the penalty of the law. The car was defect-

ive, liable at any time to cause an accident, and it could not be kept in use at the constant risk of a serious accident, either upon the excuse that it would be inconvenient to withdraw it from the service, or that the company had sent for the required appliance, and would repair the car when it should be received. . . . This is a case peculiarly within the provisions of the act. A car loaded and being used in moving interstate traffic was found with a defective coupler. The car was marked 'in bad order,' and a repair piece sent for. After thus being notified of its condition, the car should have been withdrawn; but it was not, and the company kept on moving it about in connection with other cars, and finally ordered the injured employee to couple it to another car. This he tried to do with the natural result, and he has been 586]crippled *for life. The case amply justifies the verdict, and the judgment should be affirmed." Judge Lurton expressed the view that the car in question was not employed in interstate traffic at the time the plaintiff was injured; and he was also of opinion that that question was, under the evidence, for the jury. We concur with the majority of the court below that the car in question was being used in interstate traffic when the plaintiff was injured.

Nor were the judges of the circuit court of appeals in accord as to the meaning and scope of the safety appliance act,—Judges Lurton and Severens holding that the statute, reasonably construed, did not impose on the carrier an absolute duty to provide automatic couplers of the kind specified by Congress, and did not subject the carrier to the penalties prescribed, if it appeared that due care and diligence were exercised in meeting the requirements of the act. Judge Richards was of opinion that the statute did not make care and diligence on the part of the carrier ingredients in the act condemned, and that, independently of any inquiry as to its care or diligence, the carrier was liable to the penalty, if the coupler used was not, in fact, such a one as the statute required. The circuit court of appeals, in its opinion, said that the trial court gave the law to the jury by stating the language of the statute, *but in such a way as to lead the jury to suppose that the statute imposed an absolute duty on the carrier to keep its cars in good order at all times.* An order was therefore made reversing the judgment of the circuit court, and directing the case to be sent back for a new trial. But this court granted a writ of certiorari, and the case is here primarily for the review of the judgment of the circuit court of appeals.

The construction of the statute, adopted by a majority of the circuit court of appeals, to the effect that the act did not impose upon the carrier an absolute duty to provide and keep proper couplers at all times and under all circumstances, but was bound only to the extent of its *best[587 endeavor to meet the requirements of the statute, has been rejected by this court in Chicago, B. & Q. R. Co. v. United States, just decided, and on the authority of that case, we hold that the circuit court of appeals erred in the particular mentioned.

One other matter requires notice, particularly in view of the decision to-day in Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, post. 596, 31 Sup. Ct. Rep. 561, in which it is held that under the original safety appliance act, and until that act was amended by that of April 22d, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1909, p. 1171), contributory negligence on the part of the party injured, where such negligence was the proximate cause of the injury, was a valid defense for the interstate carrier. It was contended at the trial of this case that the court erred in not instructing the jury, as matter of law, in accordance with the defendant's request, that the plaintiff was guilty of contributory negligence of such a character as to bar him from relief. The rule upon that subject is well settled by the authorities. It is that "when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." Pleasants v. Fant, 22 Wall. 116, 122, 22 L. ed. 780, 783; Randall v. Baltimore & O. R. Co. 109 U. S. 478, 482, 27 L. ed. 1003, 1005, 3 Sup. Ct. Rep. 322; Phœnix Mut. L. Ins. Co. v. Doster, 106 U. S. 30, 32, 27 L. ed. 65, 66, 1 Sup. Ct. Rep. 18; Connecticut Mut. L. Ins. Co. v. Lathrop, 111 U. S. 612, 615, 28 L. ed. 536, 537, 4 Sup. Ct. Rep. 533. In the Doster Case, it was said that where a cause fairly depends upon the weight or effect of the testimony, it is one for the consideration and determination of the jury under proper instructions as to the principles of law involved. These rules being applied in the present case, we are clear that the court would have erred if it had taken the case from the jury and directed a verdict for the company. The evidence in this case was by no means all one way. There was fair ground for difference of opinion, and *the court's refusal to[588 instruct the jury, *as matter of law*, that the evidence established the defense of contributory negligence, was right. We here

give the charge of the trial court on the issue of contributory negligence: "If you conclude that he did that as a reasonably prudent man, with his experience and his observation and the facts and circumstances in the case as I have detailed or undertook to state them here, and if you believe that that was done as a reasonably prudent man would have done it, then he would not be barred in this action; but if you believe that his conduct in the manner in which he attempted to couple that car was such that a reasonably prudent man, situated as he was under all the facts and circumstances that surrounded him there, would not have attempted to do it, and that it was a negligent way to attempt to do it, and such a negligent way as a reasonably prudent man with his experience and observation would not have attempted, then he would be guilty of negligence; and that negligence, if you believe it was the proximate cause of the injury, would be such as to bar him in this action; and that question I leave to you entirely without intimating any opinion about it." It thus appears that the question of contributory negligence was fairly submitted to the jury, and it was decided against the carrier. Upon the effect of the evidence relating to contributory negligence by the plaintiff, the circuit court of appeals declined to express any opinion, saying, "as the case must be remanded for a new trial, we need not express our opinion upon the evidence, which may not assume the same aspect upon the new trial."

In this state of the record, what must be done with the case? As the case is here upon certiorari to review the judgment of the circuit court of appeals, this court has the entire record before it, with the power to review the action of that court, as well as direct such disposition of the case as that court might have done when hearing the writ of error sued out for the review 589]of the action of the *circuit court. Lutcher & M. Lumber Co. v. Knight, 217 U. S. 257, 267, 54 L. ed. 757, 761, 30 Sup. Ct. Rep. 505. In this view, the judgment of the circuit court of appeals must be reversed, because, for the reasons above stated, it erred in not holding that the statute under which the case arose imposed on the carrier an absolute duty to provide its cars, when moving interstate traffic, with the required couplers, and keep them in proper condition, and that, too, without any reference to the care or diligence which might have been exercised in performing its statutory duty. But, on looking further into the record from the circuit court, we find that no error of law was committed by that court; for it proceeded on the construction of the statute which this court has approved in Chicago, B. & Q. R. Co. v. United States, just decided. Nor did the circuit court commit any error in respect to any issue of contributory negligence. It properly submitted that question to the jury. Therefore, the reversal of the judgment of the circuit court of appeals, on the ground we have above stated, constitutes no reason why the judgment of the trial court should be disturbed.

For the reason stated, the judgment of the Circuit Court of Appeals must be reversed; but as we do not perceive that any error of law was committed in the Circuit Court, to the prejudice of the carrier, the judgment of the latter court must be affirmed.

It is so ordered.

Mr. Justice Lurton did not participate in the decision by this court in this case.

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*CATHERINE SCHLEMMER, Now[590 Catherine Craig, Plff. in Err.,

v.

BUFFALO, ROCHESTER, & PITTSBURG RAILWAY COMPANY.

(See S. C. Reporter's ed. 590–599.)

Appeal — second writ of error — compliance with mandate.

1. The action of the highest court of a state in remanding a cause to be retried on the settled principles of law as theretofore declared in its decisions, instead of requiring the further proceedings to conform to the opinion of the Federal Supreme Court, as the mandate of that court, which had reversed a judgment of the state court, required, is not cause for reversing the judgment rendered on the second trial and affirmed by the highest state court, where the change in the form of the mandate has not worked prejudice.

[For other cases, see Appeal and Error, IX. 1; IX. o, in Digest Sup. Ct. 1908.]

Note.—On the relation between the defenses of assumption of risk and contributory negligence—see notes to Rasc v. Minneapolis, St. P. & S. Ste. M. R. Co. 21 L.R.A. (N.S.) 138, and Limberg v. Glenwood Lumber Co. 49 L.R.A. 49.

On contributory negligence as a defense to a servant's action for injuries from a violation of the master's statutory duty, where the statute excludes the defense of assumption of risk—see note to Dunphy v. New York, N. H. & H. R. Co. 13 L.R.A.(N.S.) 1152.

On servant's assumption of risk of the master's breach of a statutory duty—see note to Denver & R. G. R. Co. v. Norgate, 6 L.R.A.(N.S.) 981.

Master and servant — assumption of risk — contributory negligence — safety-appliance act.

2. Contributory negligence on the part of an employee was a defense to an action founded on the safety-appliance act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), although by § 8 of that act the defense of assumption of risk was expressly excluded.

[For other cases, see Master and Servant, II. b; II. c, in Digest Sup. Ct. 1908.]

Master and servant — assumption of risk — contributory negligence — safety-appliance act.

3. The benefit of the provisions of the safety-appliance act of March 2, 1893, § 8, excluding the defense of assumption of risk, was not refused by holding that, as a matter of law, an experienced railway brakeman who persisted in attempting to couple in a dangerous way a car having an automatic coupler to another car not so equipped, when a safer method was called to his attention, and who was killed because he raised his head while making the coupling, in spite of repeated cautions, was guilty of contributory negligence, defeating any recovery.

[For other cases, see Master and Servant, II. b; II. c, in Digest Sup. Ct. 1908.]

[No. 374.]

Argued April 3, 1911. Decided May 15, 1911.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment which, on a second appeal, affirmed a judgment of the Court of Common Pleas of Jefferson County, in that state, in favor of defendant *non obstante veredicto*, in an action for the death of a railway employee, founded on the Federal safety-appliance act. Affirmed.

See same case below, 222 Pa. 470, 71 Atl. 1053.

The facts are stated in the opinion.

Mr. **Frederic D. McKenney** argued the cause, and, with Messrs. John Spalding Flannery, William Hitz, Edward A. Moseley, and A. J. Truitt filed a brief for plaintiff in error:

The court below erred in holding, as a matter of law, that the deceased was guilty of contributory negligence.

Esher v. Mineral Range & Min. Co. 28 Pa. Super. Ct. 387; Millcreek Twp. v. Perry, 8 Sadler (Pa.) 474, 20 W. N. C. 359, 12 Atl. 149; Bitting v. Maxatawny Twp. 180 Pa. 357, 36 Atl. 855; Gates v. Pennsylvania R. Co. 154 Pa. 566, 26 Atl. 598; O'Malley v. Scranton Traction Co. 191 Pa. 410, 43 Atl. 313; Ottersbach v. Philadelphia, 161 Pa. 111, 28 Atl. 991; Philadelphia & R. R. Co. v. Spearen, 47 Pa. 300, 86 Am. Dec. 544; West Chester & P. R. Co. v. McElwee, 67 Pa. 311; Delaware, L. & W. R. Co. v. Cadow, 120 Pa. 559, 6 Am. St. Rep. 730, 14 Atl. 450; Bare v. Pennsylvania R. Co. 135 Pa. 95, 19 Atl. 935; Ely v. Pittsburgh, C. C. & St. L. R. Co. 158 Pa. 233, 27 Atl. 970; Johnson v. Bruner, 61 Pa. 58, 100 Am. Dec. 613; Delaware, L. & W. R. Co. v. Jones, 128 Pa. 308, 18 Atl. 330; Fisher v. Monongahela C. R. Co. 131 Pa. 292, 18 Atl. 1016; Smith v. Baltimore & O. R. Co. 158 Pa. 82, 27 Atl. 847.

Where there is any room for doubt, the evidence must be submitted to the jury.

Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 663, 21 L. ed. 745, 749.

Conceding *arguendo* that there may have been some evidence of negligence on Schlemmer's part, it was for the jury, and not for the court, to say whether the negligence of the defendant, or the supposed negligence of deceased, was the proximate cause of the injury.

Northern P. R. Co. v. Everett, 152 U. S. 107, 38 L. ed. 373, 14 Sup. Ct. Rep. 474; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653.

Contributory negligence cannot be pleaded as a bar to rceovery by a plaintiff, when the proximate cause of plaintiff's injury was the failure of defendant to comply with a statute.

Carterville Coal Co. v. Abbott, 181 Ill. 495, 55 N. E. 131; Kansas City, M. & B. R. Co. v. Flippo, 138 Ala. 487, 35 So. 457; Choctaw, O. & G. R. Co. v. Holloway, 191 U. S. 334, 48 L. ed. 207, 24 Sup. Ct. Rep. 102; Elmore v. Seaboard Air Line R. Co. 130 N. C. 506, 41 S. E. 786; Fleming v. Southern R. Co. 131 N. C. 476, 42 S. E. 905.

Mr. **Marlin E. Olmsted** argued the cause, and, with Messrs. John G. Whitmore and A. C. Stamm filed a brief for defendant in error:

Assumption of risk and contributory negligence are separate and distinct defenses; the act of March 2, 1893, relates to the former only; it does not take away the latter.

Union P. R. Co. v. O'Brien, 161 U. S. 451–456, 40 L. ed. 766–770, 16 Sup. Ct. Rep. 618; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24; Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 304; St. Louis Cordage Co. v. Miller, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495; Hesse v. Columbus, S. & H. R. Co. 58 Ohio St. 167, 50 N. E. 354; Miner v. Connecticut River R. Co. 153 Mass. 398, 26 N. E. 994; Cleveland, C. C. & St. L. R. Co.

v. Baker, 33 C. C. A. 468, 63 U. S. App. 553, 91 Fed. 224.

Where the plaintiff was contributorily negligent, he cannot recover, even though the defendant was disregarding statutory requirements.

Winkler v. Philadelphia & R. R. Co. 4 Penn. (Del.) 80, 53 Atl. 90, 4 Penn. (Del.) 387, 56 Atl. 112; Cleveland, C. C. & St. L. R. Co. v. Baker, 33 C. C. A. 468, 63 U. S. App. 553, 91 Fed. 224; Denver & R. G. R. Co. v. Arrighi, 63 C. C. A. 649, 129 Fed. 347; Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 304; Lake Erie & W. R. Co. v. Craig, 19 C. C. A. 631, 37 U. S. App. 654, 73 Fed. 642; Hodges v. Kimball, 44 C. C. A. 193, 104 Fed. 745; Dixon v. Western U. Teleg. Co. 68 Fed. 630; Kilpatrick v. Grand Trunk R. Co. 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531, 72 Vt. 263, 82 Am. St. Rep. 939, 47 Atl. 827; Mobile, J. & K. C. R. Co. v. Bromberg, 141 Ala. 258, 37 So. 395; Holum v. Chicago, M. & St. P. R. Co. 80 Wis. 299, 50 N. W. 99; Victor Coal Co. v. Muir, 20 Colo. 320, 26 L.R.A. 435, 46 Am. St. Rep. 299, 38 Pac. 378; Taylor v. Carew Mfg. Co. 143 Mass. 470, 10 N. E. 308; Grand v. Michigan C. R. Co. 83 Mich. 564, 11 L.R.A. 402, 47 N. W. 837; Vicksburg & M. R. Co. v. McGowan, 62 Miss. 682, 52 Am. Rep. 205; Mobile & O. R. Co. v. Stroud, 64 Miss. 784, 792, 2 So. 171; New Orleans & N. E. R. Co. v. Brooks, 85 Miss. 269, 38 So. 40; Buckner v. Richmond & D. R. Co. 72 Miss. 873, 18 So. 449.

The doctrine of contributory negligence was correctly applied by the Pennsylvania courts in this case.

Washington & G. R. Co. v. McDade, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; Southern P. Co. v. Seley, 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530.

Mr. Justice **Day** delivered the opinion of the court:

This action was brought in a Pennsylvania court to recover for wrongfully causing the death of Adam M. Schlemmer, plaintiff's intestate, as a result of injuries received while in the employ of the railroad company. The case has been once before in this court, and is reported in 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407. The injury was received while Schlemmer, an employee of the defendant railroad company, was endeavoring to couple a shovel car to the caboose of one of the railroad trains of the defendant company.

Before the case first came here, the supreme court of Pennsylvania had held that the plaintiff could not recover damages because of the contributory negligence of the deceased. 207 Pa. 198, 56 Atl. 417. This court reversed the supreme court of Pennsylvania, and remanded the case for further proceedings in conformity with the opinion of this court.

For a proper understanding of the case a brief statement *of the facts will be[592 necessary. The shovel car was not equipped with an automatic coupler, as required by the act of March 2, 1893, chap. 196, § 2, 27 Stat. at L. 531, U. S. Comp. Stat. 1901, p. 3174, and that fact was the basis of the action for damages. The shovel car had an iron drawbar, weighing somewhere about 80 pounds, protruding beyond the end of the shovel car. The end of this drawbar had a small opening, or eye, into which an iron pin was to be fitted when the coupling was made; this was to be effected by placing the end of the drawbar into the slot of the automatic coupler with which the caboose was equipped. Owing to the difference in the height, the end of the shovel car would pass over the automatic coupler on the caboose in case of an unsuccessful attempt to make the coupling, and the end of the shovel car would come in contact with the end of the caboose.

Plaintiff's intestate was an experienced brakeman, having been in the service fifteen or sixteen years. At the time when he undertook to couple the train with the shovel car to the end of the caboose, he went under the end of the shovel car, and attempted to raise the iron drawbar so as to cause it to fit into the slot of the automatic coupler on the caboose. While so doing, his head was caught between the ends of the shovel car and the caboose, and he was almost instantly killed. This happened between 8 and 9 o'clock on an evening in the month of August, and while dusk had gathered, it was not very dark, and the testimony tends to show that the situation was plainly observable.

When this case was first before the supreme court of Pennsylvania, that court expressed doubt as to whether the act of Congress applied in actions of negligence in the courts of Pennsylvania, and the judgment on the nonsuit in the court below was sustained because of the contributory negligence of the deceased.

This court held that the shovel car was in course of *transportation between[593 points of different states, and therefore was being used in interstate commerce; that the shovel car was a car within contemplation of § 2 of the act of Congress; that § 8 of that act had deprived the company of the defense of assumed risk on the part of an employee; that the ruling in the Pennsylvania court upon contributory negligence was so dependent upon an erroneous construction of the statute that it could not

stand. 205 U. S. 1, 13, 51 L. ed. 681, 686, 27 Sup. Ct. Rep. 407. As the alleged right to recover was under a Federal statute, alleged to have been improperly construed against the plaintiff in error, the case presented a claim of Federal right, a denial of which was reviewable here, and the case, for the reason stated, was reversed by this court, and sent back for further proceedings in conformity with the opinion of this court.

We find no occasion to depart from the former decision, and will proceed to examine the record as now presented, which, in material respects, differs from the one previously before the court. It is first objected by the plaintiff in error that the supreme court of Pennsylvania remanded the case to the lower court for trial contrary to the mandate sent down upon the reversal by this court. The supreme court of Pennsylvania remitted the case, after receipt of the mandate from this court, to the lower court, to be retried "on the settled principles of contributory negligence, as heretofore declared in the decisions of this court," —supreme court of Pennsylvania. The counsel for plaintiff in error moved the supreme court of Pennsylvania to amend its judgment and remittitur so as to conform with the mandate of this court, which motion was overruled.

We are of opinion that the order and remittitur of the supreme court of Pennsylvania, in compliance with the mandate of this court, should have required the further proceedings to conform to the opinion of this court, as its mandate required, and as was within the authority of this 594]*court, the matter involved being a right of Federal creation within the ultimate protection of this court.

If an examination of the record indicated that, by reason of this mandate, the subsequent proceedings in the state court had operated to deprive the plaintiff in error of the benefit of a trial under the Federal statute properly construed, we should be constrained to reverse the case. But an examination of the record discloses that the trial judge regarded the decision of this court as settling the right of the plaintiff in error to rely upon the Federal statute in question, and as conclusive of the fact that the shovel car was being employed in interstate commerce at the time of the injury, and was a car within the meaning of the act, and that assumption of risk was no defense to the action. So, it does not appear that the form of mandate sent down by the supreme court of Pennsylvania, after the case was reversed here, worked to the prejudice of the plaintiff in error.

The trial court submitted the case to the jury upon the issues joined under the Federal statute, including the question whether the plaintiff's intestate, at the time of the injury, had been guilty of contributory negligence. Under these instructions the jury found a verdict for the plaintiff.

The court then granted a rule to show cause why judgment should not be rendered *non obstante veredicto*, which motion was granted, and an opinion delivered, in which the judge held that the testimony did not warrant the conclusion that, in making the coupling, the risk was so obvious that an ordinarily careful and prudent brakeman would not have undertaken it; and therefore, under the statute, assumption of risk was no defense, but reached the conclusion that the deceased was guilty of contributory negligence in failing to exercise care according to the circumstances in making the coupling in the way he attempted to make it, and in not adopting a safer way, which was pointed out to him at the time.

*Upon the second appeal, the su-[595 preme court of Pennsylvania affirmed the judgment of the trial court, saying:

"*Per Curiam:* It is the settled law of Pennsylvania that any negligence of a party injured, which contributed to his injury, bars his recovery of damages without regard to the negligence, either greater or less than his own, of the other party. The present is a clear case of contributory negligence within this rule. The evidence is indisputable that the unfortunate decedent not only attempted to make the coupling in a dangerous way when his attention was directly called to a safer way, but also did it with reckless disregard of his personal safety by raising his head, though twice expressly cautioned at the time as to the danger of so doing." 222 Pa. 470, 71 Atl. 1053.

The case is now here upon a petition in error to reverse this judgment of affirmance. The statute at the time of the injury complained of took away assumption of risk on the part of the employee as a defense to an action for injuries received in the course of the employment. The defense of contributory negligence was not dealt with by the statute.†

When the case was here before, we did not find it necessary to pass upon the question whether contributory negligence on the

†By the 3d section of the act of April 22, 1908, 35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1909, p. 1171, amending the employers' liability act, no employee injured or killed is to be held guilty of contributory negligence in any case where the violation by a common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

part of an injured employee would be a defense to an action under the law as it then stood, for, upon the record as then presented, the court was of opinion that to sustain the defense of contributory negligence would amount to a denial to the plaintiff of all benefit of the statute which made the assumption of risk no longer a defense.

While, as was said in the case when here 596]before, assumption *of risk sometimes shades into negligence as commonly understood, there is, nevertheless, a practical and clear distinction between the two. In the absence of statute taking away the defense, or such obvious dangers that no ordinarily prudent person would incur them, an employee is held to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known, or are so plainly observable that the employee may be presumed to know of them, and if he continues in the master's employ without objection, he takes upon himself the risk of injury from such defects. Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 67, 68, 48 L. ed. 96, 100, 101, 24 Sup. Ct. Rep. 24, and former cases in this court therein cited.

Contributory negligence, on the other hand, is the omission of the employee to use those precautions for his own safety which ordinary prudence requires. (See, in this connection, Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 509, 96 Fed. 298.)

In the present case, the statute of Congress expressly provides that the employee shall not be deemed to have assumed the risk of injury if such is occasioned by his continuing in the employ of the carrier after the unlawful use of the car or train in the failure to provide automatic couplers has been brought to his knowledge. Therefore, when Schlemmer saw that the shovel car was not equipped with an automatic coupler, he would not, from that knowledge alone, take upon himself the risk of injury without liability from his employer

But there is nothing in the statute absolving the employee from the duty of using ordinary care to protect himself from injury in the use of the car with the appliances actually furnished: In other words, notwithstanding the company failed to comply with the statute, the employee was not, for that reason, absolved from the duty of using ordinary care for his own protec-597]tion under the circumstances *as they existed. This has been the holding of the courts in construing statutes enacted to promote the safety of employees. Krause v. Morgan, 53 Ohio St. 26, 40 N. E. 886; Holum v. Chicago, M. & St. P. R. Co. 80 Wis. 299, 50 N. W. 99; Grand v. Michigan C. R. Co. 83 Mich. 564, 11 L.R.A. 402, 47 N. W. 837; Taylor v. Carew Mfg. Co. 143 Mass. 470, 10 N. E. 308. And such was the holding of the court of appeals of the eighth circuit, where the statute now under consideration was before the court. Denver & R. G. R. Co. v. Arrighi, 63 C. C. A. 649, 129 Fed. 347.

In the absence of legislation at the time of the injury complained of, taking away the defense of contributory negligence, it continued to exist, and the Federal question presented upon this record is: Was the ruling of the state court in denying the right of recovery upon the ground of contributory negligence, in view of the circumstances shown, such as to deprive the plaintiff in error of the benefit of the statute which made assumption of risk a defense no longer available to the employer? To answer this question we shall have to look to the testimony adduced at the trial, all of which is contained in the record before us. As we have already said, the testimony shows that the plaintiff's intestate was an experienced brakeman. A witness, who is uncontradicted in the record, testified that just before Schlemmer got out of the caboose, when he saw the train backing up, he was told: "We had better shove that up by hand, the same as we did in Bradford. That is a dangerous coupling to make." (At Bradford the method of making the coupling was by means of pushing the caboose up against the train, instead of backing the train against the caboose.) To this Schlemmer replied, with emphasis, "Back up." He then proceeded to make the coupling, with the result stated.

Another witness, the yard conductor, testified without contradiction, that just before the cars got together he walked up to Schlemmer, and told him they had better shove the caboose on by hand, to which he answered: *"Never mind, I will make[598 this coupling." To which the witness "answered: "Well, you will have to get down." Witness testified that he called to him twice to get down, the last time not more than a second, possibly a couple of seconds, before he was injured. This witness furthermore testified that he had a sufficient crew to push the caboose up by hand, that there was plenty of force to shove the caboose up in that way; that that was a great deal safer way to make the coupling than backing onto the caboose. The testimony further shows that there was plenty of room under the projection of the shovel car to operate the drawbar and raise it up. In fact, in this manner, the coupling was made a few minutes after the unfortunate oc-

currence which resulted in the death of the deceased.

As the record is now presented, there is no proof in the case that the deceased was ordered to make the coupling in the manner he did, and there is testimony to the effect that, just before the injury, the conductor in charge of the train said to the deceased: "Mr. Schlemmer, you be very careful now, and keep your head down low, so as not to get mashed in between those cars." He said he would.

In view of this record we cannot say that the court, in denying a recovery to the plaintiff, upon the ground of contributory negligence of the deceased, denied to her any rights secured by the Federal statute. Entirely apart from the question of assumption of risk, which, under the law, could not be a defense to the plaintiff's action, as the law then stood, there remained the defense of contributory negligence.

After an examination of the record as now presented, containing testimony not adduced at the former trial, we are constrained to the conclusion that there was ample ground for saying, as both the trial court and the supreme court of the state of Pennsylvania did; that the decedent met his death because of his unfortunate attempt to make the coupling in a dangerous 599]way, when a safer way was at *the time called to his attention. Furthermore, he was injured in spite of repeated cautions, made at the time, as to the great danger of being injured if he raised his head in attempting to make the coupling in the manner which he did.

As we have said, the Federal question in the record, and the only one which gives us jurisdiction, is: Did the trial and judgment deprive the plaintiff in error of rights secured by the Federal statute? The views which we have expressed require that the question be answered in the negative.

The judgment of the Supreme Court of Pennsylvania is affirmed.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

601]*MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, Plaintiff in Error, v. C. W. RICHARDSON. [No. 532.]

Constitutional law—equal protection of the laws—validity of abrogation of fellow servant rule.

In error to the Court of Civil Appeals for the Fifth Supreme Judicial District for the State of Texas to review a judgment which affirmed a judgment of the District Court of Grayson County in that state in favor of plaintiff in an action against a railway company by an employee to recover damages for personal injuries, in which was challenged the validity of a provision of the Oklahoma Constitution abrogating the fellow servant rule as between railway companies and their employees.

See same case below, — Tex. Civ. App. —, 125 S. W. 623.

Messrs. Cecil H. Smith, James Hagerman, and Joseph M. Bryson for plaintiff in error.

Messrs. Joseph W. Bailey and Rice Maxey for defendant in error.

March 6, 1911. *Per Curiam:* Judgment affirmed with costs. Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, ante, 178, 31 Sup. Ct. Rep. 136.

VICKSBURG WATER WORKS COMPANY, Plaintiff in Error, v. YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY. [No. 640.]

Error to state court—final judgment.

In error to the Supreme Court of the State of Mississippi to review a decree which affirmed a decree of the Chancery Court for Warren County in that state sustaining a demurrer to a bill by which injunctive relief was sought, and dissolving a preliminary injunction.

See same case below, — Miss. —, 51 So. 915.

J. C. Bryson for plaintiff in error.

Messrs. Charles N. Burch and Edward Mayes for defendant in error.

March 6, 1911. *Per Curiam:* Dismissed for the want of jurisdiction. Great Western Teleg. Co. v. Burnham, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850; Schlosser v. Hemphill, 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654.

ADA ELMIRA HIRST VAN SYCKEL et al., Appellants, v. JUAN JOSÉ ARSUAGA et al., Partners as Sobrinos de Ezquiaga et al. [No. 83.]

Appeal—from Porto Rico district court—final judgment.

Appeal from the District *Court[602 of the United States for Porto Rico to review a decree in a suit for the dissolution of a partnership, which finds a certain lease to be of no force or effect, leaving for future determination the accounting and separation of the property, the case being retained for all necessary purposes.

See same case below, 4 Porto Rico Fed. Rep. 222.

Messrs. N. B. K. Pettingill and George H. Lamar for appellants.

Mr. Charles F. Carusi for respondents.

March 13, 1911. *Per Curiam:* Dismissed for want of jurisdiction. St. Louis, I. M. & S. R. Co. v. Southern Exp. Co. 108 U. S. 24, 28, 27 L. ed. 638, 639, 2 Sup. Ct. Rep. 6; Southern R. Co. v. Postal Teleg. Cable Co. 179 U. S. 641, 644, 45 L. ed. 355, 356, 21 Sup. Ct. Rep. 249; Covington v. First Nat. Bank, 185 U. S. 270, 277, 46 L. ed. 906, 908, 22 Sup. Ct. Rep. 645; Heike v. United States, 217 U. S. 423, 429, 54 L. ed. 821, 824, 30 Sup. Ct. Rep. 539.

Ira Perryman, by O. H. Perryman, His Next Friend, Plaintiff in Error, v. Thomas W. Coleman, Jr., Judge, etc. [No. 90.]

Error to state court—Federal question.

In error to the Supreme Court of the State of Alabama to review a judgment denying a petition for a writ of prohibition to require the court below to proceed under the juvenile delinquent act, which denial is based upon a repeal of such act after the petition was filed and the cause submitted.

See same case below, 156 Ala. 625, 46 So. 866.

Mr. John B. Knox for plaintiff in error.

No appearance for defendant in error.

March 13, 1911. *Per Curiam:* Dismissed for want of jurisdiction. Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 308, 47 L. ed. 480, 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 100, 50 L. ed. 107, 25 Sup. Ct. Rep. 727; David Kaufman & Sons Co. v. Smith, 216 U. S. 610, 54 L. ed. 636, 30 Sup. Ct. Rep. 419.

Jesse Nichols, Plaintiff in Error, v. City of Cleveland. [No. 91.]

Error to state court—final judgment.

In error to the Supreme Court of the State of Ohio to review a judgment which affirmed a judgment below sustaining a demurrer to an application to assess compensation for land appropriated in eminent domain proceedings.

See same case below, 77 Ohio St. 641, 84 N. E. 1130.

Messrs. Andrew Squire and William B. Sanders for plaintiff in error.

Mr. Newton D. Baker for defendant in error.

March 13, 1911. *Per Curiam:* Dismissed for want of jurisdiction. Great Western Teleg. Co. v. Burnham, 162 U. S. 339, 341, 40 L. ed. 991, 992, 16 Sup. Ct. Rep. 850; Schlosser v. Hemphill, 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654.

603]*Box Elder Power & Light Company, Plaintiff in Error, v. Brigham City. [No. 94.]

Error to state court—Federal question.

In error to the Supreme Court of the State of Utah to review a judgment which affirmed a judgment of the District Court of Box Elder County in that state condemning for a public use land included in the Utah enabling act, over the objection that the legal title was in the United States when the proceedings were begun.

See same case below, 34 Utah, 130, 97 Pac. 220.

Messrs. E. A. Walton and Charles C. Dey for plaintiff in error.

Messrs. Wiliam H. King, Edward B. Critchlow, and Henry P. Henderson for defendant in error.

March 13, 1911. *Per Curiam:* Dismissed for want of jurisdiction. Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 308, 47 L. ed. 480, 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 100, 50 L. ed. 107, 25 Sup. Ct. Rep. 727; David Kaufman & Sons Co. v. Smith, 216 U. S. 610, 54 L. ed. 636, 30 Sup. Ct. Rep. 419.

Home for Destitute Children et al., Appellants, v. Peter Bent Brigham Hospital et al. [No. 862.]

Appeal from circuit court—frivolousness of Federal question.

Appeal from the Circuit Court of the United States for the District of Massachusetts to review a decree sustaining a demurrer to and dismissing a bill to have a charitable bequest declared void on the ground that a subsequent state statute increasing the amount of the value of the property which the corporate beneficiary might hold was invalid as taking property without due process of law.

Messrs. Charles A. Snow and Joseph H. Knight for appellants.

Mr. J. L. Thorndike for appellees.

March 13, 1911. *Per Curiam:* Dismissed for want of jurisdiction. Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 100, 50 L. ed. 107, 25 Sup. Ct. Rep. 727; David Kaufman & Sons Co. v. Smith, 216 U. S. 610, 54 L. ed. 636, 30 Sup. Ct. Rep. 419.

Globe Printing Company of St. Louis, Plaintiff in Error, v. Samuel B. Cook. [No. 596.]

Error to state court—Federal question.

In error to the Supreme Court of the State of Missouri to review a judgment which affirmed, after ordering a remission of part of the damages, a judgment of the Circuit Court of Chariton County in that state in favor of plaintiff in an action for libel in which the corporate defendant asserted the invalidity, under the due process of law and the equal protection of the laws clauses of the 14th Amendment to the Federal Constitution, of a state statute providing that suits against corporations may be commenced either in the county where the cause of action accrued, or in any county where such corporation shall have or usually keep an office or agent for the transaction of their usual or customary business.

See same case below, 227 Mo. 471, 127 S. W. 332.

Messrs. Edward C. Crow and Hannis Taylor for plaintiff in error.

Mr. John H. Atwood for defendant in error.

March 20, 1911. *Per Curiam:* Dismissed for want of jurisdiction. Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 100, 50 L. ed. 107, 25 Sup. Ct. Rep. 727; David Kaufman & Sons Co. v. Smith, 216 U. S. 610, 54 L. ed. 636, 30 Sup. Ct. Rep. 419; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 116, 53 L. ed. 431, 433, 29 Sup. Ct. Rep. 227, and cases cited; Kansas City Star 604]Co. *v. Julian, 215 U. S. 589, 590, 54 L. ed. 340, 30 Sup. Ct. Rep. 406, and cases cited in last paragraph.

GEORGE BIRD et al., Individually and as Trustees, etc., Appellants, v. JAMES M. ASHTON et al. [No. 328.]

Appeal—from circuit court—Federal question—title to land between high and low water mark.

Appeal from the Circuit Court of the United States for the Western District of Washington to review a decree upholding the title of the vendees of the state to land between high and low water mark on the shores of Puget sound.

See same case below, 170 Fed. 509.

Mr. Benjamin S. Grosscup for appellants.

Messrs. Frederic D. McKenney, W. P. Bell, James M. Ashton, and W. H. Doolittle for appellees.

April 10, 1911. *Per Curiam:* Dismissed for want of jurisdiction. McGilvra v. Ross, 215 U. S. 70, 54 L. ed. 95, 30 Sup. Ct. Rep. 27; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; Goodrich v. Ferris, 214 U. S. 71, 81, 53 L. ed. 914, 919, 29 Sup. Ct. Rep. 580; Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 50 L. ed. 101, 25 Sup. Ct. Rep. 727; United States Fidelity & G. Co. v. United States, 204 U. S. 349, 51 L. ed. 516, 27 Sup. Ct. Rep. 381, and cases cited.

EX PARTE: IN THE MATTER OF HOWARD B. MANINGTON et al., Petitioners. [No. — Original.]

Mandamus—to review judicial action—remand of cause to state court.

Petition for mandamus to compel the Circuit Court of the United States for the Southern District of Ohio, Eastern Division, to remand a civil cause to the state court whence it had been removed.

Messrs. R. W. McCoy and Smith W. Bennett for petitioners.

April 10, 1911. Denied. See Ex parte Harding, 219 U. S. 363, ante, 252, 31 Sup. Ct. Rep. 324.

HARRY L. BURGOYNE, Trustee, et al., Appellants, v. PATRICK E. MCKILLIP et al. [No. 828.]

Appeal—from circuit courts of appeals—jurisdiction below depending entirely on citizenship—bankruptcy.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Nebraska dismissing the bill in a suit by a secured creditor to enforce his security as against the trustee in bankruptcy.

See same case below, 104 C. C. A. 590, 182 Fed. 452.

Messrs. C. C. Flansburg and Robert Ramsey for appellants.

Mr. Francis A. Brogan for appellees.

*April 17, 1911. *Per Curiam* Dis-[605 missed for want of jurisdiction. First. Nat. Bank v. Estherville, 215 U. S. 341, 346, 54 L. ed. 223, 227, 30 Sup. Ct. Rep. 152; Rogers v. Clark Iron Co. 217 U. S. 589, 54 L. ed. 595, 30 Sup. Ct. Rep. 693. Petition for a Writ of Certiorari denied.

WILLIAM P. DEVOU, Executor of Sarah O. Devou, Deceased, Plaintiff in Error, v. CINCINNATI, COVINGTON, & ERLANGER RAILWAY COMPANY. [No. 123.]

Error to state court—Federal question—statutory construction.

In error to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Kenton Circuit Court condemning certain lands for street railway purposes in proceedings in which the contention was made that the statute erroneously construed a state statute as conferring the power of eminent domain upon a suburban electric railway company, and by such erroneous construction deprived the landowner of her property without due process of law and denied her the equal protection of the laws.

See same case below, 128 Ky. 768, 109 S. W. 361.

Mr. Herbert Jackson for plaintiff in error.

Messrs. Alfred C. Cassatt, Richard P. Ernst, and Frank Wright Cottle for defendant in error.

April 17, 1911. *Per Curiam:* Dismissed for want of jurisdiction. First Nat. Bank v. Estherville, 215 U. S. 341, 346, 54 L. ed. 223, 227, 30 Sup. Ct. Rep. 152; Rogers v. Clark Iron Co. 217 U. S. 589, 54 L. ed. 595, 30 Sup. Ct. Rep. 693; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 116, 117, 53 L. ed. 431, 433, 434, 29 Sup. Ct. Rep. 227, and cases cited; Cincinnati, N. O. & T. P. R. Co. v. Slade, 216 U. S. 78, 83, 54 L. ed. 390, 392, 30 Sup. Ct. Rep. 230.

Benjamin W. Hubbard, Plaintiff in Error, v. Worcester Art Museum. [No. 919.]

Error to circuit court—Federal question.

In error to the Circuit Court of the United States for the District of Massachusetts to review a judgment for the tenant in a writ of entry which sought to invalidate a charitable bequest on the ground that a subsequent state statute increasing the value of the property which the corporate beneficiary might hold contravened the 14th Amendment to the Federal Constitution.

See same case below, 179 Fed. 406.

Messrs. Charles A. Snow and Joseph H. Knight for plaintiff in error.

Messrs. John Chipman Gray and Roland Gray for defendant in error.

April 17, 1911. *Per Curiam:* Dismissed for want of jurisdiction. First Nat. Bank v. Estherville, 215 U. S. 341, 346, 54 L. ed. 223, 227, 30 Sup. Ct. Rep. 152; Rogers v. Clark Iron Co. 217 U. S. 589, 54 L. ed. 595, 30 Sup. Ct. Rep. 693; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 116, 117, 53 L. ed. 431, 433, 434, 29 Sup. Ct. Rep. 227, and cases cited; Cincinnati, N. O. & T. P. R. Co. v. Slade, 216 U. S. 78, 83, 54 L. ed. 390, 392, 30 Sup. Ct. Rep. 230. See Home for Destitute Children v. Peter 606]*Bent Brigham Hospital (decided at this term) 220 U. S. 603, ante, 604, 31 Sup. Ct. Rep. 716.

Rat Portage Lumber Company, Plaintiff in Error, v. State of Minnesota. [No. 120]; Lesure Lumber Company, Plaintiff in Error, v. State of Minnesota [No. 121].

Error to state court—Federal question.

Two writs of error to the Supreme Court of the State of Minnesota to review judgments which, reversing judgments of the District Court for the County of St. Louis in that state, awarded damages to the state for removing timber from state lands after the expiration of a permit. It was contended upon rehearing that such judgments violated the due process of law, equal protection of the laws, and contract clauses of the Federal Constitution, and took property without compensation, but the court adhered to its original conclusion.

See same case below, No. 120, 106 Minn. 1, 115 N. W. 162, 117 N. W. 922; No. 121, 106 Minn. 534, 115 N. W. 167, 117 N. W. 923.

Messrs. M. H. Stanford and R. R. Briggs for plaintiffs in error.

Messrs. George T. Simpson, Clifford L. Hilton, and C. S. Jelley for defendant in error.

April 17, 1911. *Per Curiam:* Dismissed for want of jurisdiction. First Nat. Bank v. Estherville, 215 U. S. 341, 346, 54 L. ed. 223, 227, 30 Sup. Ct. Rep. 152; Rogers v. Clark Iron Co. 217 U. S. 589, 54 L. ed. 595, 30 Sup. Ct. Rep. 693; Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 100, 50 L. ed. 107, 25 Sup. Ct. Rep. 727; Griffith v. Connecticut, 218 U. S. 563, 571, 54 L. ed. 1151, 1154, 31 Sup. Ct. Rep. 132; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 151, 45 L. ed. 788, 793, 21 Sup. Ct. Rep. 575.

New York Central & Hudson River Railroad Company, Plaintiff in Error, v. William Schradin, as Administrator, etc. [No. 155.]

Constitutional law—validity of statute modifying fellow servant rule—due process of law—equal protection of the laws.

In error to the Supreme Court of the State of New York in and for the County of New York to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which had affirmed a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of the Trial Term of the Supreme Court in favor of plaintiff in an action to recover damages from a railway company for the death of an employee in which a state statute modifying the fellow servant doctrine as to railway employees was upheld over objections founded upon the due process of law and equal protection of the laws clauses of the Federal Constitution.

See same case below, in court of appeals, 194 N. Y. 534, 565, 87 N. E. 1126, 88 N. C. 1131; in appellate division, 124 App. Div. 705, 109 N. Y. Supp. 428.

Messrs. Charles F. Brown, Charles C. Paulding, and Thomas Emery for plaintiff in error.

Mr. G. V. Smith for defendant in error.

May 15, 1911. *Per Curiam:* Judgment affirmed with costs. Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676.

Henry Melville Walker, Appellant, v. Mary W. Harriman, Executrix of Edward H. Harriman, *Deceased. [No.[607 147.]

Appeals—final judgment.

Appeal from the Circuit Court of the United States for the Southern District of New York to review an order vacating an order which directed that certain nonresident defendants be served wherever they might be found.

Mr. B. C. Chetwood for appellant.

Mr. Maxwell Evarts for appellee.

May 15, 1911. *Per Curiam:* Dismissed for want of jurisdiction. Southern R. Co. v. Postal Teleg. Cable Co. 179 U. S. 641, 45 L. ed. 355, 21 Sup. Ct. Rep. 249.

JESSIE B. THOMAS, Plaintiff in Error, v. JOHN R. THOMAS. [No. 942.]

Error to state court—Federal question.

In error to the Supreme Court of the State of Oklahoma to review a decree which on rehearing affirmed a decree of the United States Court for the Western District of the Indian Territory establishing a resulting trust in favor of the husband in lands awarded to the wife by the Muskogee Townsite Commission.

Messrs. Frank Dale and A. G. C. Bierer for plaintiff in error.

Messrs. W. J. Hughes, Horace Speed, W. T. Hutchings, and Preston C. West for defendant in error.

May 15, 1911. Dismissed for the want of jurisdiction.

ERIE RAILROAD COMPANY, Plaintiff in Error, v. BLANCHE RUSSELL, Administratrix, etc. [No. 853.]

Error to circuit court of appeals—jurisdiction below depending entirely upon citizenship.

In error to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of New York in favor of plaintiff in an action for the death of a railway employee alleged to have been caused by defective coupling. Also

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 183 Fed. 722.

Mr. Frederic B. Jennings for plaintiff in error and petitioner.

Mr. George A. Clement for defendant in error and respondent.

May 15, 1911. Writ of Error dismissed for the want of jurisdiction. Petition for Writ of Certiorari denied.

UNITED RAILWAYS COMPANY OF ST. LOUIS et al., Appellants, v. CITY OF ST. LOUIS. [No. 807.]

Second appeal—when does not lie.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri to review an order refusing to modify a decree of dismissal of a bill to enjoin the enforcement of a municipal ordinance, entered pursuant to the mandate of the Supreme Court on a former appeal, so as to make the dismissal without prejudice.

Mr. H. S. Priest for appellants.

Lambert E. Walther for respondent.

*May 15, 1911. Dismissed for the [608 want of jurisdiction.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY OF TEXAS, Plaintiff in Error, v. HARRY C. BAILEY. [No. 205.]

Constitutional law—equal protection of the laws—modifying rules as to fellow servants and assumed risk.

In error to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of the District court of Grayson County in that state in favor of plaintiff in an action against a railway company to recover damages for personal injuries sustained by an employee, in which the state statutes modifying, as between railway companies and their employees, the common-law doctrine as to fellow servants and assumed risk, were asserted to deny the equal protection of the laws.

See same case below, — Tex. Civ. App. —, 115 S. W. 601.

Messrs. James Hagerman, Joseph M. Bryson, and Cecil H. Smith for plaintiff in error.

Messrs. Joseph W. Bailey, J. A. L. Wolfe, B. F. Looney, and Rice Maxey for defendant in error.

May 29, 1911. *Per Curiam:* The judgment is affirmed, with costs. Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 564, ante, 328, 337, 31 Sup. Ct. Rep. 259.

PHILADELPHIA, BALTIMORE, & WASHINGTON RAILROAD COMPANY, Plaintiff in Error, v. LILLIAN TUCKER, Administratrix of the Estate of Sydney R. Tucker, Deceased. [No. 521.]

Constitutional law—freedom to contract—equal protection of the laws—railway relief—acceptance of benefits.

In error to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District in favor of plaintiff in an action against a railway company to recover damages for the death of an em-

ployee, in which the constitutionality of the provision of the Federal employers' liability act precluding any defense founded on the acceptance of benefits from a railway relief fund was attacked.

See same case below, 35 App. D. C. 123

Messrs. Frederic D. McKenney, John S. Flannery, and William Hitz, for plaintiff in error.

Messrs. Levi H. David and Alvin L. Newmyer for defendant in error.

May 29, 1911. *Per Curiam:* The judgment is affirmed with costs. El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, ante, 328, 31 Sup. Ct. Rep. 259.

609]*John Hart, Petitioner, v. United States. [No. 879.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 183 Fed. 368.

Thomas W. Fitzsimons for petitioner.

The Solicitor General and Assistant Attorney General Harr for respondent.

February 27, 1911. Denicd.

Atlantic City Railroad Company, Petitioner, v. Mary S. Clegg, Administratrix. [No. 880.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 183 Fed. 216.

Clarence L. Cole for petitioner.

Mr. W. Holt Atgar for respondent.

February 27, 1911. Denied.

John J. Sesnon Company, Petitioner, v. United States of America. [No. 884.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 182 Fed. 573.

Messrs. William H. Gorham and George H. Lamar for petitioner.

The Attorney General and the Solicitor General for respondent.

February 27, 1911. Denied.

American Manufacturing Company, Petitioner, v. Valenti Zulkowski. [No. 886.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 185 Fed. 42.

610] *Mr Thomas F. Magner for petitioner.

Messrs. Charles Dushkind and Abram J. Rose for respondent.

February 27, 1911. Denied.

A. J. Preston, Petitioner, v. Sturgis Milling Company [No. 893]; A. J. Preston, Petitioner, v. Chicago, St. Louis, & New Orleans Railroad Company [No. 894]; A. J. Preston, Petitioner, v. T. W. Calloway et al. [No. 895].

Petitions for a Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, No. 893, — L.R.A. (N.S.) —, 183 Fed. 1; No. 894, 183 Fed. 20; No. 895, 183 Fed. 19.

Messrs. Helm Bruce and Kennedy Helm for petitioner.

Mr. James F. Fairleigh for respondents in Nos. 893 and 895.

Messrs. Edmund F. Trabue, John C. Doolan, Attilla Cox, Jr., and Blewett Lee for respondent in No. 894.

February 27, 1911. Denied.

Patrick K. Connolly, Petitioner, v. Francis E. Bouck, Administrator, etc., et al. [No. 903.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 98 C. C. A. 184, 174 Fed. 312.

Mr. Hugh Butler for petitioner.

No appearance for respondents.

February 27, 1911. Denied.

Michigan Trust Company, Petitioner, v. Edward P. Ferry. [Nos. 850, 851.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Willard F. Keeney, E. D. Critchlow, and C. S. Thomas for petitioner.

Mr. Franklin S. Richards for respondent.

March 6, 1911. Granted.

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*Frances A. Becker, Petitioner, v. Ex-[611 change Mutual Fire Insurance Company of Pennsylvania. [No. 878.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 101 C. C. A. 198, 177 Fed. 918.

Edmund Bayly Seymour, Jr., for petitioner.

No appearance for respondent.

March 6, 1911. Denied.

MONTANA MINING COMPANY, LIMITED, Petitioner, v. ST. LOUIS MINING & MILLING COMPANY OF MONTANA. [No. 883.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 183 Fed. 51.

Messrs. E. C. Day, L. O. Evans, A. B. Browne, Alexander Britton, and Evans Browne for petitioner.

Messrs. T. J. Walsh and M. S. Gunn for respondent.

March 6, 1911. Denied.

FRANK W. FLETCHER et al., Petitioners, v. ALBERT W. BROWN. [No. 892.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 182 Fed. 963.

Messrs. Henry M. Campbell and Henry Ledyard for petitioners.

Messrs. Harrison Geer and Walter B. Grant for respondent.

March 6, 1911. Denied.

FOSTER HOSE SUPPORTER COMPANY, Petitioner, v. THOMAS P. TAYLOR. [No. 900.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 184 Fed. 71.

Mr. James J. Kennedy for petitioner.

Messrs. Morris W. Seymour and David S. Day for respondent.

March 6, 1911. Denied.

612]*CHARLES F. NEUREUTHER, Petitioner, v. MINERAL POINT ZINC COMPANY. [No. 922.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 103 C. C. A. 336, 179 Fed. 850.

Mr. Thomas F. Sheridan for petitioner.

Mr. Edward Reetor for respondent.

March 6, 1911. Denied.

CARL ADAMSON, Petitioner, v. UNITED STATES. [No. 885.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 184 Fed. 714.

Mr. William C. Reid for petitioner.

The Attorney General, the Solicitor General, and Assistant Attorney General Harr for respondent.

March 13, 1911. Denied.

MALINDA TANNER, Petitioner, v. WILLIAM H. MURPHY et al. [No. 897]; WILLIAM H. SHEA et al., Petitioners, v. WILLIAM H. MURPHY et al. [No. 898].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 100 C. C. A. 132, 176 Fed. 544.

Messrs. J. B. Middleeoff and R. Sleight for petitioners.

Mr. M. H. Stanford for respondents.

March 13, 1911. Denied.

BAKER TRANSPORTATION COMPANY, Petitioner, v. STEAM TUG "JOHN A. HUGHES," etc. [No. 952.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 184 Fed. 308.

Messrs. DeLagnel Berier and James J. Maeklin for petitioner.

Messrs. James Emerson Carpenter and Samuel Park for respondent.

March 20, 1911. Denied.

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*CORPORATION OF ST. ANTHONY IN NEW[613 BEDFORD. Petitioner, v. MICHAEL J. HOULIHAN. [No. 924.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 184 Fed. 252.

Mr. James E. Cotter for petitioner.

Mr. Franklin P. Hammond for respondent.

April 3, 1911. Denied.

CHESAPEAKE & OHIO RAILWAY COMPANY, Petitioner, v. JEAN D. McKELL, Administratrix, etc. [No. 946.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 99 C. C. A. 109, 175 Fed. 321.

Messrs. Judson Harmon, Edward Colston, and F. B. Enslow for petitioner.

Messrs. John H. Holt, James F. Brown, and Murray Seasongood for respondent.

April 10, 1911. Denied.

D. H. HALLOCK, Petitioner, v. UNITED STATES. [No. 959.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 185 Fed. 417.

Messrs. A. G. C. Bierer, Frank Dale, Earl W. Evans, and R. R. Vermilion for petitioner.

The Attorney General and the Solicitor General for respondent.

April 10, 1911. Denied.

JAMES H. BURTON, Petitioner, v. CURTIS M. JENNINGS, Sole Surviving Partner, etc. [No. 960.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 185 Fed. 382.

Messrs. George H. Taylor, Jr., and Charles R. Carruth for petitioner.

Mr. Nelson Zabriskie for respondent.

April 10, 1911. Denied.

614] *WORTH, Maison La Ferriere, and Guillot & Cie., Petitioners, v. CHARLES A. CHASE, Trustee, etc. [No. 966.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 186 Fed. 91.

Mr. Samuel W. Cooper for petitioners.

No appearance for respondent.

April 10, 1911. Denied.

LUCIEN B. WILSON, Petitioner, v. UNITED STATES. [No. 979.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. T. A. Brown and James S. McCluer for petitioner.

The Attorney General, the Solicitor General, and Assistant Attorney General Harr for respondent.

April 10, 1911. Denied.

CHICAGO, ST. PAUL, MINNEAPOLIS, & OMAHA RAILWAY COMPANY, Petitioner, v. BUD R. LATTA. [No. 928.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Carl C. Wright and B. T. White for petitioner.

Mr. H. C. Brome for respondent.

April 17, 1911. Granted.

THOMAS J. LYNCH, Executor, etc., Petitioner, v. TRAVELERS INSURANCE COMPANY. [No. 814.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, — L.R.A.(N.S.), —, 103 C. C. A. 436, 180 Fed. 82.

Mr. George W. Heselton for petitioner.

Messrs. R. Ross Perry and R. Ross Perry, Jr., for respondent.

April 17, 1911. Denied.

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*EAGLE WHITE LEAD COMPANY, Pe-[615 titioner, v. ALBERT PFLUGH et al. [No. 976.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 185 Fed. 769.

Messrs. W. H. Singleton, Charles E. Riordon, and Murray Seasongood for petitioner.

Messrs. Robert Watson and Clifton V. Edwards for respondents.

April 17, 1911. Denied.

METROPOLITAN WATER COMPANY OF WEST VIRGINIA, Petitioner, v. KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANS., et al. [No. 983.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 186 Fed. 315.

Messrs. C. F. Hutchings, Willard P. Hall, and O. L. Miller for petitioner.

No appearance for respondents.

April 17, 1911. Denied.

JOHN H. WIKLE, as Trustee, etc., Petitioner, v. MRS. M. C. JONES et al. [No. 986.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. J. T. Norris for petitioner.

Mr. Barry Wright for respondents.

April 17, 1911. Denied.

EGBERT H. GOLD, Petitioner, v. WILLIAM P. COSPER et al. [No. 991]; EGBERT H. GOLD, Petitioner, v. WILLIAM P. COSPER [No. 992].

Petitions for Writs of Certiorari and Writs of Error to the Court of Appeals of the District of Columbia.

Mr. Otto Raymond Barnett for petitioner.

Mr. Charles Neave for respondents.

April 17, 1911. Denied.

616]*Boisé Artesian Hot & Cold Water Company, Limited, Petitioner, v. Boisé City, Idaho. [No. 970.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 186 Fed. 705.

Messrs. W. B. Heyburn and Richard H. Johnson for petitioner.

Mr. Oliver O. Haga for respondent.

April 24, 1911. Denied.

Guaranty Trust Company of New York, Petitioner, v. Chicago Railways Company et al. [No. 977]; Julian T. Davies et al., Petitioners, v. Chicago Railways Company et al. [No. 978].

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 185 Fed. 411.

Messrs. John C. Spooner, John Barton Payne, and Julien T. Davies for petitioners.

Messrs. W. W. Gurley, Henry S. Robbins, and Martin H. Foss for respondents.

April 24, 1911. Denied.

Mattie B. Duffer, Petitioner, v. Herbert G. Seefeld. [No. 980.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 103 C. C. A. 32, 179 Fed. 214.

Messrs. Winchester Kelso and Nathaniel Williams for petitioner.

No appearance for respondent.

April 24, 1911. Denied.

Ina Law Robertson, Petitioner, v. United States. [No. 995.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 183 Fed. 711.

Mr. Edwin M. Ashcraft for petitioner.

The Attorney General, the Solicitor General, and Assistant Attorney General Harr for respondent.

April 24, 1911. Denied.

617]*W. T. Day, Petitioner, v. Atlantic Coast Line Railroad Company. [No. 996.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 102 C. C. A. 654, 179 Fed. 26.

Messrs. A. J. Montague and Frederick S. Tyler for petitioner.

Mr. William B. McIlwaine for respondent.

April 24, 1911. Denied.

Merritt & Chapman Derrick & Wrecking Company, Petitioner, v. Cornell Steamboat Company. [No. 1001.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 185 Fed. 261.

Messrs. Eugene P. Carver and G. Philip Wardner for petitioner.

J. Parker Kirlin for respondent.

April 24, 1911. Denied.

John Stirlen, Petitioner, v. United States. [No. 1005.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 183 Fed. 302.

Tracy L. Jeffords for petitioner.

The Attorney General, the Solicitor General, and Assistant Attorney General Harr for respondent.

April 24, 1911. Denied.

Alabama & Georgia Manufacturing Company of the State of Alabama, Petitioner, v. West Point Manufacturing Company of the State of Alabama et al. [No. 742.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. John M. Thurston, R. B. Brown, and C. A. Mountjoy for *petitioner.[618

Messrs. Louis D. Brandeis and William H. Dunbar for respondents.

May 1, 1911. Denied.

William V. Snyder et al., Petitioners, v. American Pneumatic Service Company et al. [No. 1007.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 104 C. C. A. 78, 180 Fed. 712.

Messrs. Hector T. Fenton and James H. Griffin for petitioners.

Mr. M. B. Philipp for respondents.

May 1, 1911. Denied.

CHARLES WEST, Attorney General, etc., et al., Petitioners, v. ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY et al. [No. 1009]; CHARLES WEST, Attorney General, etc., et al., Petitioners, v. GULF, COLORADO, & SANTA FE RAILWAY COMPANY et al. [No. 1010]; CHARLES WEST, Attorney General, etc., et al., Petitioners, v. MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY [No. 1011]; CHARLES WEST, Attorney General, etc., et al., Petitioners, v. MIDLAND VALLEY RAILROAD COMPANY [No. 1012]; CHARLES WEST, Attorney General, etc., et al., Petitioners, v. KANSAS CITY SOUTHERN RAILWAY COMPANY [No. 1013]; CHARLES WEST, Attorney General, etc., et al., Petitioners, v. CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY [No. 1014]; and CHARLES WEST, Attorney General, etc., et al., Petitioners, v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY [No. 1015].

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 185 Fed. 321.

Messrs. Frederick N. Judson and Charles West for petitioners.

Mr. Frank Hagerman for respondents.

May 1, 1911. Denied.

619]*WILLIAM S. INGRAHAM, doing business as Illinois Fuel Co., Petitioner, v. COMMERCIAL LEAD COMPANY et al. [No. 999.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 101 C. C. A. 317, 177 Fed. 341.

Messrs. William B. Thompson and Ford W. Thompson for petitioner.

No appearance for respondents.

May 1, 1911. Denied.

MARY VIRGINIA MILLER, Petitioner, v. WEST VIRGINIA PULP & PAPER COMPANY et al. [No. 1003.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 100 C. C. A. 176, 176 Fed. 284.

Messrs. Maynard F. Stiles and J. Kemp Bartlett for petitioner.

Messrs. W. Calvin Chesnut and John W. Davis for respondents.

May 1, 1911. Denied.

FOURTEENTH STREET SAVINGS BANK, Petitioner, v. SIGMUND DERNFELD. [No. 1004.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 39 Wash. L. Rep. 277.

Mr. H. Winship Wheatley for petitioner.

No appearance for respondent.

May 1, 1911. Denied.

AMERICAN BANK PROTECTION COMPANY, Petitioner, v. ELECTRIC PROTECTION COMPANY. [No. 899.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 184 Fed. 916.

Messrs. A. C. Paul and Arthur P. Greeley for petitioner.

Mr. John E. Stryker for respondent.

May 15, 1911. Denied.

CHARLES S. LESTER, Petitioner, v. EDWARD G. BENEDICT, Trustee, etc., [No. 958.]

Petition *for a Writ of Certiorari[620 to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 102 C. C. A. 644, 179 Fed. 366.

Mr. Harold Remington for petitioner.

Mr. Daniel P. Hays for respondent.

May 15, 1911. Denied.

UNITED STATES, Petitioner, v. WONG YOU et al. [No. 1051.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The Attorney General, the Solicitor General, and Assistant Attorney General Harr for petitioner.

No appearance for respondents.

May 29, 1911. Granted.

STANLEY FRANCIS, Petitioner, v. J. HECTOR MCNEAL, Trustee, etc. [No. 1052.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Charles L. Frailey for petitioner.

No appearance for respondent.

May 29, 1911. Granted.

WILLIAM JENKINS et al., Petitioners, v. CHARLES DILLINGHAM, Receiver, etc. [No. 953.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 99 C. C. A. 666, 175 Fed. 1021.

Messrs. W. D. Gordon and Jack Beall for petitioners.

No appearance for respondent.

May 29, 1911. Denied.

TITLE GUARANTEE & TRUST COMPANY et al., Executors, Petitioners, v. JOHN G. WARD, as United States Collector, etc. [No. 1020.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals
621]*for the Second Circuit.

See same case below, 184 Fed. 447.

Messrs. H. T. Newcomb and Morris F. Frey for Petitioners.

The Attorney General, the Solicitor General, and Assistant Attorney General Harr for respondent.

May 29, 1911. Denied.

A. K. ATKINSON, Petitioner, v. UNITED STATES. [No. 1021.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. J. R. Saussy and Robert T. Hough for petitioner.

The Attorney General and the Solicitor General for respondent.

May 29, 1911. Denied.

FRED G. AUSTIN, as Trustee, etc., Petitioner, v. NEW YORK STOCK EXCHANGE et al. [No. 1022.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Henry M. Campbell, Henry Ledyard, and Frederick Geller for petitioner.

Messrs. Walter F. Taylor and K. R. Babbitt for respondents.

May 29, 1911. Denied.

FRANCES E. WATERMAN, Wife of Charles A. Crane, Petitioner, v. CANAL-LOUISIANA BANK & TRUST COMPANY, Executor, etc., et al. [No. 1025.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 186 Fed. 71.

Mr. E. Howard McCaleb for petitioner.

No appearance for respondents.

May 29, 1911. Denied.

JOSEPH M. BALEY, United States Marshal, etc., Petitioner, v. RICHARD J. WOOLLEY et al. [No. 1029.]

*Petition for a Writ of Certiorari[622 to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 183 Fed. 1021.

Messrs. Theodore F. Davidson, Louis M. Bourne, and Lee S. Overman for petitioner.

No appearance for respondents.

May 29, 1911. Denied.

AMERICAN DISAPPEARING BED COMPANY, Petitioner, v. EDWARD ARNAELSTEEN. [No. 1039.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 182 Fed. 324.

Mr. Melville Church for petitioner.

No appearance for respondent.

May 29, 1911. Denied.

NORMAN MARSHALL, Petitioner, v. BRYANT ELECTRIC COMPANY. [No. 1040.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 185 Fed. 499.

Mr. William R. Sears for petitioner.

Messrs. Charles Howson and Hubert Howson for respondent.

May 29, 1911. Denied.

BRITISH & FOREIGN MARINE INSURANCE COMPANY, LIMITED, Petitioner, v. MALDONADO & COMPANY, Incorporated. [No. 1042.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 182 Fed. 744.

Mr. Archibald G. Thacher for petitioner.

Messrs. Charles Page, Edward J. McCutchen, and Samuel Knight for respondent.

May 29, 1911. Denied.

EDWARD A. KUEHMSTED, Petitioner, v. FARBENFABRIKEN OF ELBERFELD COMPANY. [No. 1045.]

*Petition for a Writ of Certiorari[623 to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 103 C. C. A. 243, 179 Fed. 701.

Mr. John G. Elliott for petitioner.

Messrs. Livingston Gifford and Anthony Gref for respondent.

May 29, 1911. Denied.

MARX & RAWOLLE, Petitioners, v. UNITED STATES. [No. 1048.]

Petition for a Writ of Certiorari to the United States Court of Customs Appeals.

Mr. Benjamin A. Levett for petitioners

The Attorney General, the Solicitor General, and Assistant Attorney General Lloyd for respondent.

May 29, 1911. Denied.

MATTHIAS RADIN et al., Petitioners, v. UNITED STATES. [No. 1049.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Harry Levor for petitioners.

The Attorney General and the Solicitor General for the United States.

May 29, 1911. Denied.

CINCINNATI EQUIPMENT COMPANY, Petitioner, v. JOSEPH P. DEGNAN, Receiver, etc. [No. 1050.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 184 Fed. 834.

Messrs. Alexander L. Smith and J. H. Ralston for petitioner.

No appearance for respondent.

May 29, 1911. Denied.

COLWELL LEAD COMPANY, Petitioner, v. FRANCIS J. TORRANCE et al. [No. 1053.]

624] Petition *for a Writ of Certiorari to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. A. Parker Smith for petitioner.

The Attorney General, the Solicitor General, and E. P. Grosvenor for respondents.

May 29, 1911. Denied.

UNITED STATES, Plaintiff in Error, v. THOMAS FRANKLIN. [No. 352.]

In Error to the Circuit Court of the United States for the Southern District of New York.

The Attorney General for plaintiff in error.

S. T. Ansell for defendant in error.

February 27, 1911. Dismissed on motion of Mr. Solicitor General Lehmann for the plaintiff in error.

M. G. SAMUELS, Appellant, v. CHARLES A. READ, Trustee in Bankruptcy of A. Landsberger, Bankrupt. [No. 926.]

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. E. C. Brandenburg for appellee.

February 27, 1911. Docketed and dismissed with costs, on motion of Mr. E. C Brandenburg for the appellee.

CITY OF POND CREEK et al., Plaintiffs in Error, v. C. N. HASKELL, Governor of the State of Oklahoma, et al. [No. 86.]

In Error to the Supreme Court of the State of Oklahoma.

Mr. W. A. Ledbetter *for plaintiffs[625 in error.

Messrs. Frank Dale and A. G. C. Bierer for defendants in error.

March 3, 1911. Dismissed with costs, pursuant to the Tenth Rule.

JOHN M. WATERBURY and Chauncey Marshall, Plaintiffs in Error, v. PHENIX NAT. BANK. [No. 449.]

In Error to the Supreme Court of the State of New York.

Mr. Charles L. Atterbury for plaintiffs in error.

Mr. George Coffing Warner for defendant in error.

March 3, 1911. Dismissed per stipulation of counsel.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff in Error, v. MICHAEL GOLDEN. [No. 461.]

In error to the Supreme Court of the State of Montana.

Messrs. Charles W. Bunn and W. Wallace, Jr., for plaintiff in error.

No appearance for defendant in error.

March 20, 1911. Dismissed with costs on motion of Mr. Evans Browne for the plaintiff in error.

UNITED STATES EX REL. WILLIAM H. BOYER, Plaintiff in Error, v. EDWARD B. MOORE, Commissioner of Patents. [No. 146.]

In Error to the Court of Appeals of the District of Columbia.

See same case below, 32 App. D. C. 243.

Mr. Charles L. Sturtevant for plaintiff in error.

The Attorney General for defendant in error.

April 3, 1911. Dismissed with costs per stipulation, on motion of Mr. Solicitor General Lehmann for the defendant in error.

J. C. WEBBER, Plaintiff in Error, v. *STATE OF MISSOURI. [No. 156.] [626

In Error to the Supreme Court of the State of Missouri.

See same case below, 214 Mo. 272, 113 S. W. 1054, 15 A. & E. Ann. Cas. 983.

Messrs. O. H. Dean and William Warner for plaintiff in error.

Mr. Elliott W. Major for defendant in error.

April 3, 1911. Dismissed with costs on motion of counsel for the plaintiff in error.

UNITED STATES, Plaintiff in Error, v. FRED A. BROOKE et al., etc. [No. 830.]

In Error to the District Court of the United States for the Southern District of New York.

See same case below, 184 Fed. 341.

The Attorney General for plaintiff in error.

Mr. W. Wickham Smith for defendants in error.

April 17, 1911. Dismissed per stipulation of counsel, on motion of Mr. Solicitor General Lehmann for the plaintiff in error.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error, v. ABE COHN. [No. 153.]

In Error to the Supreme Court of Appeals of the State of Virginia.

Messrs. Addison L. Holladay, Rush Taggart, George H. Fearons, Henry D. Estabrook, and Francis Raymond Stark for plaintiff in error.

No appearance for defendant in error.

April 18, 1911. Dismissed with costs on motion of counsel for the plaintiff in error.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error, v. ABE COHN. [No. 157.]

In Error to the Circuit Court of the City of Richmond, State of Virginia.

Messrs. Addison L. Holladay, Rush Taggart, George H. Fearons, Henry D. Estabrook, and Francis Raymond Stark
627] for plaintiff in error.

No appearance for defendant in error.

April 18, 1911. Dismissed with costs on motion of counsel for the plaintiff in error.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error, v. GEORGE J. TAMER. [No. 168.]

In Error to the Circuit Court of Wise County, State of Virginia.

Messrs. George H. Fearons, Rush Taggart, Henry D. Estabrook, and Francis Raymond Stark for plaintiff in error.

No appearance for defendant in error.

April 18, 1911. Dismissed with costs on motion of counsel for the plaintiff in error.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error, v. GEORGE J. TAMER. [No. 169.]

In Error to the Supreme Court of Appeals of the State of Virginia.

Messrs. George H. Fearons, Rush Taggart, Henry D. Estabrook, and Francis Raymond Stark for plaintiff in error.

No appearance for defendant in error.

April 18, 1911. Dismissed with costs on motion of counsel for the plaintiff in error.

BELLE BURDETT et al., Plaintiffs in Error, v. SUDIE M. BURDETT et al. [No. 648.]

In Error to the Supreme Court of the State of Oklahoma.

Mr. Amos L. Beaty for plaintiffs in error.

Mr. William A. Collier for defendants in error.

April 18, 1911. Dismissed with costs on motion of counsel for the plaintiffs in error.

COMMONWEALTH OF PENNSYLVANIA EX REL. BUELL N. BURLINGAME, Plaintiff in Error, v. *A. L. HARE, Sheriff, and the
628] State of Illinois. [No. 143.]

In Error to the Superior Court of the State of Pennsylvania.

Messrs. L. Cabell Williamson and Henry A. Davis for plaintiff in error.

No appearance for defendants in error.

April 21, 1911. Dismissed with costs pursuant to the Tenth Rule.

R. M. MACKENZIE, Trustee, etc., Plaintiff in Error, v. LAWRENCE C. WOODS. [No. 154.]

In Error to the Supreme Court of the State of Pennsylvania.

Mr. Lowrie C. Barton for plaintiff in error.

Mr. A. Leo Weil for defendant in error.

April 25, 1911. Dismissed with costs, pursuant to the Tenth Rule.

MASON WILLIAMS, Trustee, etc., Appellant, v. NATIONAL BANK OF COMMERCE OF ST. LOUIS, MO. [No. 163.]

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Mason Williams for appellant.

No appearance for appellee.

April 26, 1911. Dismissed with costs, pursuant to the Tenth Rule.

JENNIE M. TUTTLE, Plaintiff in Error, v. IOWA STATE TRAVELING MEN'S ASSOCIATION. [No. 161.]

In Error to the Supreme Court of the State of Iowa.

Alfred H. McVey for plaintiff in error.

Albert B. Cummins for defendant in error.

April 27, 1911. Dismissed with costs, pursuant to the Tenth Rule.

CHARLES MAUK, Plaintiff in Error, v. 629] *CHICAGO, BURLINGTON, & QUINCY RAILWAY COMPANY. [No. 171.]

In Error to the Circuit Court of the United States for the Southern District of Iowa.

Mr. C. C. Cole for plaintiff in error.

Mr. N. T. Guernsey for defendant in error.

April 27, 1911. Dismissed with costs. pursuant to the Tenth Rule.

CHIN YING DON et al., Appellants, v. GEORGE B. BILLINGS, United States Commissioner, etc. [No. 715.]

Appeal from the District Court of the United States for the District Court of Massachusetts.

Mr. Warren Ozro Kyle for appellants.

The Attorney General, the Solicitor General, and Assistant Attorney General Harr for appellee.

May 1, 1911. Dismissed with costs, on authority of counsel for the appellant, on motion of Mr. Solicitor General Lehmann for the appellee.

BRADFORD KENNEDY COMPANY et al., Plaintiffs in Error, v. ARTHUR C. MORBECK et al. [No. 921.]

In Error to the Supreme Court of the State of Idaho.

Messrs. Miles Poindexter, W. T. Stoll, and O. C. Moore for plaintiffs in error.

Messrs. Robert Early McFarland and Robert H. Elder for defendants in error.

May 1, 1911. Dismissed per stipulation of counsel.

SAMUEL R. COLHOUN, Appellant, v. UNITED STATES. [No. 250.]

Appeal from the Court of Claims.

Mr. George A. King for appellant.

The Attorney General for appellee.

May 15, 1911. Dismissed on motion of Mr. Archibald King for the appellant.

630]*LAWRENCE G. BOGGS, Appellant, v. UNITED STATES. [No. 268.]

Appeal from the Court of Claims.

Messrs. George A. King and William B. King for appellant.

The Attorney General for appellee.

May 15, 1911. Dismissed on motion of Mr. Archibald King for the appellant.

STATE OF MISSOURI EX REL. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Plaintiff in Error, v. WILLIAM D. VANDIVER, Superintendent of Insurance, etc. [No. 305]; STATE OF MISSOURI EX REL. METROPOLITAN LIFE INSURANCE COMPANY, Plaintiff in Error, v. WILLIAM D. VANDIVER, Superintendent of Insurance, etc. [No. 306]; and STATE OF MISSOURI EX REL. PRUDENTIAL INSURANCE COMPANY OF AMERICA, Plaintiff in Error, v. WILLIAM D. VANDIVER, Superintendent of Insurance, etc. [No. 307].

In Error to the Supreme Court of the State of Missouri.

Messrs. O. M. Spencer and Frank Hagerman for plaintiffs in error.

Mr. Elliott W. Major for defendant in error.

May 15, 1911. Dismissed by stipulation of counsel.

DENNIS C. SHEA, Appellant, v. CUNO H. RUDOLPH et al., Commissioners of the District of Columbia et al. [No. 140.]

Appeal from the Court of Appeals of the District of Columbia.

Messrs. Samuel Maddox and H. Prescott Gatley for appellant.

Mr. Edward H. Thomas for appellees.

May 29, 1911. Decree affirmed with costs, per stipulation to abide decision in No. 141, Briscoe v. Rudolph, 221 U. S. 547, post, 848, 31 Sup. Ct. Rep. 679.

DAVID H. EDINGTON, Trustee, etc., Appellant, *v. FRANCES D. MASSON et al.[631 [No. 795.]

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Charles Payne Fenner and H. Snowden Marshall for appellant.

Harry T. Smith for appellees.

May 29, 1911. Dismissed with costs on motion of counsel for the appellant.

JOHN A. BENSON, Appellant, v. L. J. DOLAN, Sheriff, etc. [No. 430.]

Appeal from the Circuit Court of the United States for the Northern District of California.

Mr. Joseph C. Campbell for appellant.

No appearance for appellee.

May 29, 1911. Dismissed on motion of Mr. Solicitor General Lehmann in behalf of counsel for the appellant, the cause having abated by reason of the death of appellant.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1910.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1910.

1]*STANDARD OIL COMPANY OF NEW JERSEY et al. Appts.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 1–106.)

Federal courts — jurisdiction — defendants of several districts.

1. The presence of one of the defendants in the Federal district in which suit by the United States under the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3201), § 4, is brought to restrain violations of that act, gives the circuit court jurisdiction, and justifies it in making an order under § 5 for the service of process upon all the other defendants, wherever they may be found.

[For other cases, see Courts, V. c, 7, in Digest Sup. Ct. 1908.]

Appeal — prejudicial error — exceptions to pleadings.

2. The overruling of the exceptions taken on the ground of impertinence to so much of the bill filed by the United States under the act of July 2, 1890, § 4, to restrain violations of that act, as counted upon facts occurring prior to its enactment, cannot be regarded as prejudicial error, where the court gave no weight to the testimony adduced under the averments complained of, except in so far as it tended to throw light upon the acts done after the passage of the statute, the results of which, it was charged, were being participated in and enjoyed by the alleged combination at the time of the filing of the bill.

[For other cases, see Appeal and Error, VIII. m, 2, in Digest Sup. Ct. 1908.]

Statutes — construction — congressional debates.

3. The rule that congressional debates may not be used as a means to an interpretation of an act of Congress is not violated by resorting to them to ascertain the history of the period when the statute was adopted.

[For other cases, see Statutes, II. a, in Digest Sup. Ct. 1908.]

Monopoly — under anti-trust act — undue restraint.

4. Only undue restraints of interstate or foreign trade or commerce are prohibited by the provisions of the act of July 2, 1890, §§ 1, 2, declaring illegal every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of such trade or commerce, and making guilty of a misdemeanor every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of such trade or commerce.

[For other cases, see Monopolies, II., in Digest Sup. Ct. 1908.]

Monopolies — undue restraints of trade or commerce — reason as criterion.

5. The standard of reason which had theretofore been applied at the common law and in the United States in dealing with subjects of the character embraced by the prohibitions of the act of July 2, 1890, §§ 1, 2, against combinations in restraint of interstate or foreign trade or commerce, or monopolization or attempts to monopolize any part of such trade or commerce, was intended to be the measure used for the

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NOTE.—On illegal trusts under modern anti trust laws—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

As to what relation a contract or combination must bear to interstate commerce in order to bring it within the scope of the Federal anti-trust act—see notes to Pocahontas Coke Co. v. Powhatan Coal & Coke Co. 10 L.R.A. (N.S.) 268, and Loewe v. Lawlor, 52 L. ed. U. S. 488.

On legislative journals and views of individual legislators as aid in construction of statute—see note to Blake v. National City Bank, 23 L. ed. U. S. 119.

On history and passage of statutes and contemporary circumstances as aid to construction—see note to Mosle v. Bidwell, 65 C. C. A. 535.

purpose of determining whether, in a given case, a particular act had, or had not, brought about the wrong against which the statute provided.

[For other cases, see Monopolies, II., in Digest Sup. Ct. 1908.]

Commerce — power of Congress — validity of anti-trust act.

6. The prohibitions of the anti-trust act of July 2, 1890, §§ 1, 2, against restraints or monopolization of trade or commerce, do not exceed the authority of Congress to regulate commerce, as applied to undue restraints of interstate or foreign commerce in petroleum and its products, by contract, combination, or conspiracy, or monopolization, or attempts to monopolize any part of such commerce.

[For other cases, see Commerce, I.; Monopolies, II., in Digest Sup. Ct. 1908.]

Constitutional law — delegation of legislative power.

7. Legislative power is not unconstitutionally delegated to the courts by the provisions of the act of July 2, 1890, §§ 1, 2, prohibiting combinations in restraint of interstate or foreign trade or commerce, or the monopolization or attempt to monopolize any part of such commerce, because the general language of these provisions leaves it to the judiciary to decide whether, in a given case, the particular acts come within the condemnation of the statute.

[For other cases, see Constitutional Law, III. b, 2.]

Evidence — presumption — intent.

8. The unification of power and control over the oil industry which results from combining in the hands of a holding company the capital stock of the various corporations trading in petroleum and its products raises a presumption of an intent to exclude others from the trade, and thus centralize in the combination a perpetual control of the movement of these commodities in the channels of interstate and foreign commerce, in violation of the prohibitions of the act of July 2, 1890, §§ 1, 2, against combinations in restraint of interstate or foreign trade or commerce, or monopolization or attempt to monopolize any part of such trade or commerce.

[For other cases, see Evidence, II. e, 5, in Digest Sup. Ct. 1908.]

Monopolies — anti-trust act — holding company.

9. The combination of the stocks of the various corporations trading in petroleum and its products in the hands of a holding company, with the intent to exclude others from the trade, and thus centralize in the combination the perpetual control of the movement of these commodities in the channels of interstate and foreign commerce, constitutes a violation of the prohibitions of the act of July 2, 1890, §§ 1, 2, against combinations in restraint of interstate or foreign commerce, or the monopolization or attempt to monopolize any part of such trade or commerce.

[For other cases, see Monopolies, II. b, in Digest Sup. Ct. 1908.]

Judgment — dissolution of monopoly — effect.

10. Power to make normal and lawful contracts or agreements is not taken from the stockholders of the subsidiary corporations, or the corporations themselves, by a decree for the dissolution of a holding company found to offend against the anti-trust act of July 2, 1890, which enjoins such stockholders and corporations from in any way conspiring to violate the statute, or from monopolizing or attempting to monopolize, in virtue of their stock ownership, and prohibits all agreements between them tending to produce or bring about further violations of the statute, but such decree merely restrains them from, by any device whatever, recreating, directly or indirectly, the illegal combination which the decree dissolves.

[For other cases, see Judgment, III. a, 2, in Digest Sup. Ct. 1908.]

Judgment — dissolution of monopoly — time for compliance.

11. The magnitude of the interests involved and their complexity require that six months be given in which to execute a decree for the dissolution of a holding company controlling the oil industry in violation of the anti-trust act of July 2, 1890, and for the transfer back to the stockholders of the subsidiary corporations of the stock which had been turned over to the holding company in exchange for its own stock.

[For other cases, see Judgment, II. a, in Digest Sup. Ct. 1908.]

Injunction — against violating anti-trust act — extent of relief.

12. The possible serious injury to the public from an absolute cessation of interstate commerce in petroleum and its products by the agencies embraced in a holding company controlling the oil industry, in violation of the anti-trust act of July 2, 1890, requires that upon dissolving the holding company, the subsidiary corporations should not be enjoined from carrying on interstate commerce until the dissolution of the combination should be effected, in accordance with the decree, by the transfer back to the stockholders of the subsidiary corporations of the stock which had been turned over to the holding company in exchange for its own stock.

[For other cases, see Injunction, II. b, in Digest Sup. Ct. 1908.]

[No. 398.]

Argued March 14, 15, and 16, 1910. Ordered for reargument April 11, 1910. Reargued January 12, 13, 16, and 17, 1911. Decided May 15, 1911.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri to review a decree dissolving a holding company as existing in violation of the anti-trust act. Modified in a few mi-

nor particulars, and as so modified, affirmed.

See same case below, 173 Fed. 177.

The facts are stated in the opinion.

Messrs. **John G. Milburn** and **John G. Johnson** argued the cause, and, with Messrs. Frank L. Crawford, M. F. Elliott, and Martin Carey, filed a brief for appellants:

The plants and properties of the Standard companies have always been in a common ownership since their acquisition or creation.

The acquisition of the stocks of the manufacturing and producing corporations is not a transaction subject to national control or regulation, or within the Sherman act.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

The contracts, combinations, and conspiracies of § 1 of the Sherman act are contracts and combinations which contractually restrict the freedom of one or more of the parties to them in the conduct of his or their trade, and combinations or conspiracies which restrict the freedom of others than the parties to them in the conduct of their business, when these restrictions directly affect interstate or foreign trade. Purchases or acquisitions of property are not in any sense such contracts, combinations, or conspiracies.

Pollock, Contr. 7th ed. p. 352; Oregon Steam Nav. Co. v. Winsor, 20 Wall. 68, 22 L. ed. 315; Alger v. Thacher, 19 Pick. 54, 31 Am. Dec. 119; Hilton v. Eckersley, 6 El. & Bl. 47, 25 L. J. Q. B. N. S. 199, 2 Jur. N. S. 587, 4 Week. Rep. 326; Morris Run Coal Co. v. Barclay Coal Co. 68 Pa. 173, 8 Am. Rep. 159; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; Arnot v. Pittston & E. Coal Co. 68 N. Y. 558, 23 Am. Rep. 190; Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; India Bagging Asso. v. Kock, 14 La. Ann. 164; Vulcan Powder Co. v. Hercules Powder Co. 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581; Texas Standard Oil Co. v. Adoue, 83 Tex. 650, 15 L.R.A. 598, 29 Am. St. Rep. 690, 19 S. W. 274; Chapin v. Brown Bros. 83 Iowa, 156, 12 L.R.A. 428, 32 Am. St. Rep. 297, 48 N. W. 1074; People v. North River Sugar Ref. Co. 54 Hun, 354, 5 L.R.A. 386, 7 N. Y. Supp. 406, 121 N. Y. 582, 9 L.R.A. 33, 18 Am. St. Rep. 843, 24 N. E. 834; State v. Nebraska Distilling Co. 29 Neb. 700, 46 N. W. 155; Pocahontas Coke Co. v. Powhatan Coal & Coke Co. 60 W. Va. 508, 10 L.R.A.(N.S.) 268, 116 Am. St. Rep. 901, 56 S. E. 264, 9 A. & E. Ann. Cas. 667; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280.

The acquisition of the stocks of the subsidiary companies by the Standard Oil Company of New Jersey in 1899 was not such a combination or conspiracy in restraint of trade.

Monopolizing is the exclusion of others from a trade by illegal means.

4 Bl. Com. p. 160; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 756, 28 L. ed. 590, 4 Sup. Ct. Rep. 652; Re Greene, 52 Fed. 116.

Price cutting and rebating, collecting information of the trade of competitors, the operation of companies under other names to obviate prejudice or secure an advantage or for whatever reason, are all legal methods of competition, whatever moral criticism they may justify.

Pollock, Torts, 8th ed. p. 152.

There is no rule of fairness or reasonableness which regulates competition.

Mogul S. S. Co. v. McGregor, L. R. 23 Q. B. Div. 615 [1892] A. C. 51, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101.

The foundation stone of our contention is that the acquisition of existing plants or properties, however extensive, though made to obtain their trade and eliminate their competition, is not a monopoly at common law, or monopolizing under the Sherman act, in the absence of the exclusion of others from the trade by conspiracies to that end, or contracts in restraint of trade on an elaborate and effective scale, or other systematic, wrongful, tortious, or illegal acts; and that when such monopolizing is present the remedy of the act is to prohibit the offending conspiracies, contracts, and illegal acts or means of exclusion, leaving the individual or corporation to pursue his or its business with the properties and plants that have been acquired or created, shorn of the monopolizing elements in the conduct of the business.

Re Greene, 52 Fed. 104; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507,

46 L.R.A. 255, 78 Am. St. Rep. 612, 43 Atl. 723; Oakdale Mfg. Co. v. Garst. 18 R. I. 484, 23 L.R.A. 639, 49 Am. St. Rep. 784, 28 Atl. 973; State ex rel. Crow v. Continental Tobacco Co. 177 Mo. 1, 75 S. W. 737; Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; Davis v. A. Booth & Co. 65 C. C. A. 269, 131 Fed. 31; Robinson v. Suburban Brick Co. 62 C. C. A. 484, 127 Fed. 804.

To sum up the argument: The 1st section of the Sherman act deals with contracts and combinations which by executory agreements restrict the freedom of contractors in the carrying on of their trade in their own way, and with combinations and conspiracies to restrict the freedom of others in the conduct of their trade, and which are therefore contracts, combinations, and conspiracies in restraint of trade. It declares illegal every such contract, combination, and conspiracy, and sweeps within its condemnation not only such contracts and eonspiracies, but every industrial trust composed of separately owned and independent concerns, and every trade agreement between competitive concerns, whether reasonable or unreasonable, according to Peckham, J., in the Trans-Missouri Case, but only if unreasonable. according to Brewer, J., in his opinion in Northern Securities Co. v. United States. 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436. This gives the 1st section a tremendous operation.

The 2d section deals directly with monopolizing, attempts to monopolize, and combinations to monopolize. It is not concerned with acquisitions of property, or size, or aggregated capital, or the structure of the business of an individual or a corporation, but denounces as criminal the acts and conduct of the individual or corporation, alone or in conjunction with others, which illegally excludes others from the trade. This construction gives this section a tremendous operation, but it saves it from being an unnecessary weapon of destruction merely because of unlawful conduct which can be stopped. Supplementing these substantive provisions is the remedial provision of injunction reaching every contract, combination, and conspiracy in restraint of trade, and every feature of monopolizing conduct, and the remedial provision of treble damages in favor of any party injured by a violation of the act. With this scope and operation it accomplishes all the purposes for which it was enacted. Had it been intended to limit size, or the aggregation of capital necessary to the conduct of trade on a great scale and a place in the markets of the world, or to destroy business organisms simply because of unlawful conduct, and thus to reconstruct the industrial and commercial system of the country, it would have explicitly said so. And to accomplish the purpose we have assigned to it is about the limit of reasonable legislation.

No one can tell what the exigencies of the future will be. It is not the function of a decree to forecast them, or to enjoin possible future breaches of the law, or to operate as a sweeping command to the parties to obey the law under penalty of punishment for contempt.

Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 404, 50 L. ed. 515, 526, 26 Sup. Ct. Rep. 272.

In determining questions of jurisdiction, the court will look at the real controversy, disregarding allegations which are mere conclusions or inferences from facts specifically pleaded, or which patently are inserted only to give color to the claim of jurisdiction.

Great Southern Fire Proof Hotel Co v. Jones, 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690; Geer v. Mathieson Alkali Works, 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807; Wecker v. National Enameling & Stamping Co. 204 U. S. 176, 51 L. ed. 430, 27 Sup. Ct. Rep. 184, 9 A. & E. Ann. Cas. 757; Lockard v. St. Louis & S. F. R. Co. 167 Fed. 675; Gustafson v. Chicago, R. I. & P. R. Co. 128 Fed. 85; Arrowsmith v. Nashville & D. R. Co. 57 Fed. 165.

The power of Congress to confer jurisdiction on the circuit court of any district over parties not residing or found within the district, and to authorize the service of process upon such parties wherever they may be found, is not questioned. In exceptional cases this power has been exercised.

United States v. Union P. R. Co. 98 U. S. 569, 25 L. ed. 143.

Except in so far as special power has been conferred by Congress, the jurisdiction of a circuit court is limited to its own district; its process does not run outside of its district; and it has authority only over persons and property found therein.

Toland v. Sprague, 12 Pet. 300, 9 L. ed. 1093; Herndon v. Ridgway, 17 How. 424, 15 L. ed. 100; Chaffee v. Hayward, 20 How. 208, 15 L. ed. 804; Mississippi & M. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311; Butterworth v. Hill, 114 U. S. 128, 29 L. ed. 119, 5 Sup. Ct. Rep. 796; Re Hohorst, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221; Clark v. Wells, 203 U. S. 164, 51 L. ed. 138, 27 Sup. Ct. Rep. 43; Laborde v. Ubarri, 214 U. S. 173, 53 L. ed. 955, 29 Sup. Ct. Rep. 552; United States v. Amer-

ican Lumber Co. 29 C. C. A. 431, 56 U. S. App. 655, 85 Fed. 827.

Proceedings are not pending in a circuit court unless the defendant in such proceedings is subject to the process of the court.

Bisbee v. Evans, 17 Fed. 474; United States v. American Lumber Co. 80 Fed. 309, 29 C. C. A. 431, 56 U. S. App. 655, 85 Fed. 827; Herndon v. Ridgway, 17 How. 424, 15 L. ed. 100; Laborde v. Ubarri, 214 U. S. 173, 53 L. ed. 955, 29 Sup. Ct. Rep. 552.

A proceeding is pending in a circuit court only in so far as it involves a controversy between the plaintiff and defendants subject to the jurisdiction of the court.

McHenry v. New York, P. & O. R. Co. 25 Fed. 65; Berry v. St. Louis & S. F. R. Co. 118 Fed. 911; Vattier v. Hinde, 7 Pet. 252, 8 L. ed. 675; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204.

The ends of justice require the presence of other parties in a proceeding only in so far as their presence is necessary to the full determination of the controversy between the existing parties to the proceeding.

Moser v. Marsden [1892] 1 Ch. 487, 61 L. J. Ch. N. S. 319, 66 L. T. N. S. 570, 40 Week. Rep. 520; Peck v. Ward, 3 Duer, 647; Geer v. Mathieson Alkali Works, 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807; Barney v. Latham, 103 U. S. 205, 26 L. ed. 514.

A plaintiff having a cause of action against two joint tort feasors makes the controversy inseparable by electing to bring a joint suit.

Louisville & N. R. Co. v. Wangelin, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203.

The proceeding was not brought, and cannot be sustained, as one against the Waters Pierce Oil Company, but was a proceeding brought to determine a single inseparable controversy between the petitioner on the one side and the individual defendants and the Standard Oil Company on the other, to which the allegations made and the relief asked in respect to the Waters Pierce Oil Company were incidental and subsidiary.

Fidelity Ins. Trust & S. D. Co. v. Huntington, 117 U. S. 280, 29 L. ed. 898, 6 Sup. Ct. Rep. 733; Graves v. Corbin, 132 U. S. 571, 33 L. ed. 462, 10 Sup. Ct. Rep. 196.

Mr. D. T. Watson also argued the cause, and, with Messrs. John M. Freeman and Ernest C. Irwin, filed a brief for appellants:

There is nothing in this case to show, and the court did not pretend, that after 1899 the combination did unlawfully compete, did unlawfully restrict interstate trade, did by unlawful means seek to monopolize the interstate trade; yet such evidence was indispensable to prove that the combination was, in 1906, when the bill was filed, violating the Sherman act.

Bigelow v. Calumet & H. Min. Co. 167 Fed. 715, 94 C. C. A. 13, 167 Fed. 728; United States v. Reading Co. 183 Fed. 427.

The lower court's theory of "potential" competition is without foundation.

Fairbank v. Leary, 40 Wis. 642; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; United States v. Joint Traffic Asso. 171 U. S. 505, 567, 43 L. ed. 259, 286, 19 Sup. Ct. Rep. 25; State ex rel. Cascade R. Co. v. Superior Ct. 51 Wash. 346, 98 Pac. 739; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Northern Securities Co. v. United States, 193 U. S. 407, 48 L. ed. 728, 24 Sup. Ct. Rep. 436.

The lower court ignored the distinction between private trading and quasi public corporations.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 320, 321, 41 L. ed. 1007, 1020, 1021, 17 Sup. Ct. Rep. 540.

The Sherman act does not prohibit the method of holding property by stock ownership.

Northern Securities Co. v. United States, 193 U. S. 335, 48 L. ed. 699, 24 Sup. Ct. Rep. 436.

The lower court erred in holding that the transfer to the corporation, in 1899, created a combination having greater power and permanency than the trust which existed prior thereto.

Congress did not attempt by the Sherman act to assert the power to deal with a monopoly directly as such; or to limit and restrict the rights of corporations created by the states, or the citizens of the states, in the acquisition, control, or disposition of property; or to make criminal the acts of persons in the acquisition and control of property, which the states of their residence or creation sanctioned or permitted.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Northern Securities Co. v. United States, 193 U. S. 197, 346, 48 L. ed. 679, 704, 24 Sup. Ct. Rep. 436; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6.

The decree authorized by the Sherman act is one that merely enjoins, stops, an illegal thing in operation when the petition is filed, or which then is foreseen.

Lacassagne v. Chapuis, 144 U. S. 124, 36 L. ed. 370, 12 Sup. Ct. Rep. 659; United States v. E. C. Knight Co. 156 U. S. 1, 17,

39 L. ed. 325, 331, 15 Sup. Ct. Rep. 249; Harriman v. Northern Securities Co. 197 U. S. 244, 289, 49 L. ed. 739, 761, 25 Sup. Ct. Rep. 493; Swift & Co. v. United States, 196 U. S. 375, 402, 49 L. ed. 518, 527, 25 Sup. Ct. Rep. 276; United States v. Reading Co. 183 Fed. 427.

The modes of relief authorized by the act are exclusive of all others.

Noyes, Intercorporate Relations, 1909, 2d ed. § 406; Greer, M. & Co. v. Stoller, 77 Fed. 3; Minnesota v. Northern Securities Co. 194 U. S. 48, 71, 48 L. ed. 870, 881, 24 Sup. Ct. Rep. 598; Barnet v. Muncie Nat. Bank, 98 U. S. 555, 558, 25 L. ed. 212, 213; East Tennessee, V. & G. R. Co. v. Southern Telcg. Co. 112 U. S. 306, 310, 28 L. ed. 746, 747, 5 Sup. Ct. Rep. 168; Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 35, 23 L. ed. 196, 199; United States v. Union P. R. Co. 98 U. S. 569, 25 L. ed. 143.

The decree itself must be plain, defining exactly the things which the appellants are prohibited from doing.

Swift & Co. v. United States, 196 U. S. 375, 396, 402, 49 L. ed. 518, 524, 527, 25 Sup. Ct. Rep. 276; Addyston Pipe & Steel Co. v. United States, 175 U. S. 247, 44 L. ed. 149, 20 Sup. Ct. Rep. 96; Lyon v. Botchford, 25 Hun, 57; Laurie v. Laurie, 9 Paige, 234; Robinson v. Clapp, 65 Conn. 396, 29 L.R.A. 582, 32 Atl. 939; Moat v. Holbein, 2 Edw. Ch. 188; Sullivan v. Judah, 4 Paige, 444.

The decree is indefinite in not defining "potentially competitive party," or "like agreement."

Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

The decree hampers and greatly injures the value of the stock of the stockholders, though they are not parties to the bill.

Taylor v. Southern P. Co. 122 Fed. 153; Brown v. Pacific Mail S. S. Co. 5 Blatchf. 525, Fed. Cas. No. 2,025; Morse v. Bay State Gas Co. 91 Fed. 946; Harriman v. Northern Securities Co. 197 U. S. 244, 288–290, 49 L. ed. 739, 760, 761, 25 Sup. Ct. Rep. 493.

Past unlawful competition does not deprive parties of their right to conduct lawful competition.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 404, 50 L. ed. 515, 526, 26 Sup. Ct. Rep. 272.

The Sherman act does not authorize a decree which destroys or disintegrates businesses.

Ibid; State v. Omaha Elevator Co. 75 Neb. 637, 106 N. W. 979, 110 N. W. 874.

Continuance at the time of filing the bill is a condition precedent to the exercise of the chancellor's power as to an act which began before the bill was filed. If that act has ceased, an injunction would be useless.

State v. Omaha Elevator Co. 75 Neb. 637, 106 N. W. 979, 110 N. W. 874; United States v. Jellico Mountain Coal & Coke Co. 12 L.R.A. 753, 3 Inters. Com. Rep. 626, 46 Fed. 437.

The Sherman act does not make the mere organization of properties a violation of the act, and, if it did so provide, as such an organization was not of itself interstate commerce, and only after its products went into interstate commerce the commerce clause would attach, its constitutionality would be doubtful.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

The mere existence of the power to restrain trade by a grouping of private trading plants does not of itself constitute a violation of the Sherman act.

Bigelow v. Calumet & H. Min. Co. 167 Fed. 704, 94 C. C. A. 13, 167 Fed. 721, overruling 155 Fed. 869.

A party cannot complain of a finding from which he has taken no appeal.

McGourkey v. Toledo & O. C. R. Co. 146 U. S. 536, 569, 36 L. ed. 1079, 1091, 13 Sup. Ct. Rep. 170; Chittenden v. Brewster, 2 Wall. 191, 196, 17 L. ed. 839, 841; Carey v. Brown, 92 U. S. 175, 23 L. ed. 470; The Stephen Morgan, 94 U. S. 604, 24 L. ed. 268; Mt. Pleasant v. Beckwith, 100 U. S. 527, 25 L. ed. 702; Loudon v. Taxing Dist. 104 U. S. 774, 26 L. ed. 924; Landram v. Jordan, 203 U. S. 62, 51 L. ed. 90, 27 Sup. Ct. Rep. 17; 2 Dan. Ch. Pl. & Pr. *1488.

No matter what violations there may or may not have been, of state laws or of the common law of any one of the states as to restraint of trade or monopoly, such are now and here wholly unimportant.

United States v. E. C. Knight Co. 156 U. S. 10, 16, 39 L. ed. 328, 330, 15 Sup. Ct. Rep. 249; Lottery Case (Champion v. Ames) 188 U. S. 321, 364, 47 L. ed. 492, 504, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Douglas v. Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199.

The Sherman act is a criminal statute. The proof of the government must be plain, clear, and convincing.

United States v. Trans-Missouri Freight Asso. 24 L.R.A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 77; Northern Securities Co. v. United States, 193 U. S. 197, 401, 48 L. ed. 679, 726, 24 Sup. Ct. Rep. 436; United States v. Reading Co. 183 Fed. 427; State ex rel. Crow v. Continental Tobacco Co. 177 Mo. 1, 75 S. W. 737.

The Sherman act has no retroactive effect, but is prospective only.

United States v. Trans-Missouri Freight Asso. 166 U. S. 342, 41 L. ed. 1028, 17 Sup. Ct. Rep. 540; Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co. 14 C. C. A. 14, 35 U. S. App. 16, 66 Fed. 641.

The case involves the Sherman act only, and not some supposed Federal common law, and is governed and must be determined solely by the act.

United States v. Addyston Pipe & Steel Co. 78 Fed. 712; Hopkins v. United States, 171 U. S. 578, 586, 43 L. ed. 290, 293, 19 Sup. Ct. Rep. 40.

The size or magnitude of a business is not controlled by the Sherman act, and therefore the size of the Standard Oil Company, its large properties, resources, and power, are just as lawful under the Sherman act as if it owned one refinery instead of eighteen, or one mile of pipe line instead of thousands.

Northern Securities Co. v. United States, 193 U. S. 407, 48 L. ed. 728, 24 Sup. Ct. Rep. 436; United States v. American Tobacco Co. 164 Fed. 709; United States v. American Naval Stores Co. 172 Fed. 458; Re Greene, 52 Fed. 115; Re Corning, 51 Fed. 211; Eddy, Combinations, § 177; Coquard v. National Linseed Oil Co. 171 Ill. 484, 49 N. E. 563; Mogul S. S. Co. v. McGregor, L. R. 23 Q. B. Div. 618.

The Sherman act does not prohibit, but recognizes as lawful, in private trade, the association of individuals as joint owners, partners, or as corporations or trusts, to hold and use properties and engage in interstate trade and commerce.

United States v. Joint Traffic Asso. 171 U. S. 505, 567, 43 L. ed. 259, 286, 19 Sup. Ct. Rep. 25; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 620; Northern Securities Co. v. United States, 193 U. S. 197, 410, 48 L. ed. 679, 730, 24 Sup. Ct. Rep. 436; Oakdale Mfg. Co. v. Garst, 18 R. I. 484, 23 L.R.A. 639, 49 Am. St. Rep. 784, 28 Atl. 973; Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co. 14 C. C. A. 14, 35 U. S. App. 16, 66 Fed. 643; Re Greene, 52 Fed. 104; Re Grice, 79 Fed. 642; Smiley v. Kansas, 196 U. S. 447, 456, 457, 49 L. ed. 546, 551, 25 Sup. Ct. Rep. 289.

It is not illegal under the Sherman act for individuals to buy up the properties and business of competitors.

Northern Securities Co. v. United States, 193 U. S. 361, 409, 48 L. ed. 710, 729, 24 Sup. Ct. Rep. 436; Smiley v. Kansas, 196 U. S. 457, 49 L. ed. 551, 25 Sup. Ct. Rep. 289; Re Greene, 52 Fed. 104; Davis v. A. Booth & Co. 65 C. C. A. 269, 131 Fed. 31; Robinson v. Suburban Brick Co. 62 C. C. A. 484, 127 Fed. 804; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208; United States v. Joint Traffic Asso. 171 U. S. 505, 567, 43 L. ed. 259, 286, 19 Sup. Ct. Rep. 25; United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; Dolph v. Troy Laundry Machinery Co. 26 Fed. 555; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; National Ben. Co. v. Union Hospital Co. 45 Minn. 272, 11 L.R.A. 440, 47 N. W. 806; Diamond Match Co. v. Roeber, 106 N. Y. 483, 60 Am. Rep. 464, 13 N. E. 419; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 46 L.R.A. 263, 78 Am. St. Rep. 612, 43 Atl. 723; Bigelow v. Calumet & H. Min. Co. 167 Fed. 704, 94 C. C. A. 13, 167 Fed. 721, overruling 155 Fed. 869.

A lawful monopoly may be gained under the Sherman act.

Northern Securities Co. v. United States, 193 U. S. 401, 408, 48 L. ed. 726, 729, 24 Sup. Ct. Rep. 436; United States v. Patterson, 4 Inters. Com. Rep. 775, 55 Fed. 640; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; National Cotton Oil Co. v. Texas, 197 U. S. 129, 49 L. ed. 694, 25 Sup. Ct. Rep. 379; United States v. Trans-Missouri Freight Asso. 24 L.R.A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 82; 2 Wharton, Crim. Law, p. 219, § 1369; United States v. American Naval Stores Co. 172 Fed. 458; Fonotipia Limited v. Bradley, 171 Fed. 959; United States v. American Tobacco Co. 164 Fed. 722; West Virginia Transp. Co. v. Standard Oil Co. 50 W. Va. 617, 56 L.R.A. 804, 88 Am. St. Rep. 895, 40 S. E. 591; Phillips v. Iola Portland Cement Co. 61 C. C. A. 19, 125 Fed. 594.

Monopoly is exclusion.

1 Russell, Crimes, p. 252; 4 Bl. Com. *159; 1 Hawk. P. C. 8th ed. p. 624; Bacon, Abr. title, Monopoly, p. 22; Slaughter-House Cases, 16 Wall. 101, 102, 21 L. ed. 416, 417; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 755, 28 L. ed. 590, 4 Sup. Ct. Rep. 652; Charles River Bridge v. Warren Bridge, 11 Pet. 607, 9 L. ed. 847; National Cotton Oil Co. v. Texas, 197 U. S. 129, 49 L. ed. 694, 25 Sup. Ct. Rep. 379.

The courts of the United States resort to the common law for the definition of terms by which offenses are designated.

Pettibone v. United States, 148 U. S. 197, 203, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542; Ex parte Wells, 18 How. 307, 321, 15 L. ed. 421, 428.

A lawful thing that one may do is not made unlawful or criminal because several join in so doing.

Mogul S. S. Co. v. McGregor [1892] A. C. 50, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101; Macauley Bros. v. Tierney, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) 54 Minn. 233, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; State v. Duluth Bd. of Trade, 107 Minn. 545, 23 L.R.A.(N.S.) 1260, 121 N. W. 395; Martens v. Reilly, 109 Wis. 472, 84 N. W. 840; National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L.R.A. 138, 88 Am. St. Rep. 648, 63 N. E. 369; Collins v. American News Co. 34 Misc. 263, 69 N. Y. Supp. 638; Jacobs v. Cohen, 183 N. Y. 207, 2 L.R.A.(N.S.) 294, 111 Am. St. Rep. 730, 76 N. E. 5, 5 A. & E. Ann. Cas. 280; John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 54 App. Div. 227, 66 N. Y. Supp. 615; Bilafsky v. Conveyancers' Title Ins. Co. 192 Mass. 506, 78 N. E. 534; Vegelahn v. Guntner, 167 Mass. 92, 35 L.R.A. 727, 57 Am. St. Rep. 443, 44 N. E. 1077.

Competition knows no limit except that the means used must be lawful.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 337, 41 L. ed. 1007, 1026, 17 Sup. Ct. Rep. 540; Allen v. Flood [1898] A. C. 166, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, 62 J. P. 595, 17 Eng. Rul. Cas. 285; Com. v. Hunt, 4 Met. 134, 38 Am. Dec. 346; Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; Citizens' Light, Heat, & P. Co. v. Montgomery Light & Water Power Co. 171 Fed. 553; Continental Ins. Co. v. Fire Underwriters, 67 Fed. 322; Montgomery Ward & Co. v. South Dakota Retail Merchants' & H. Dealers' Asso. 150 Fed. 417; United States v. Atchison, T. & S. F. R. Co. 142 Fed. 184; Mogul S. S. Co. v. McGregor, L. R. 21 Q. B. Div. 544, affirmed in L. R. 23 Q. B. Div. 598; Ajello v. Worsley [1898] 1 Ch. 280, 67 L. J. Ch. N. S. 172, 77 L. T. N. S. 783, 46 Week. Rep. 245; Pollock, Torts, 8th ed. p. 152; National Protective Asso. v. Cumming, 170 N. Y. 315, 58 L.R.A. 142, 88 Am. St. Rep. 648, 63 N. E. 369; Lough v. Outerbridge, 143 N. Y. 283, 25 L.R.A. 674, 42 Am. St. Rep. 712, 38 N. E. 292; Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) 54 Minn. 223, 21 L.R.A. 339, 40 Am. St. Rep. 319, 55 N. W. 1119; Macauley Bros. v. Tierney, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; West Virginia Transp. Co. v. Standard Oil Co. 50 W. Va. 611, 56 L.R.A. 804, 88 Am. St. Rep. 895, 40 S. E. 591; Vegelahn v. Guntner, 167 Mass. 92, 35 L.R.A. 726, 57 Am. St. Rep. 443, 44 N. E. 1077; Bowen v. Matheson, 14 Allen, 499.

It is the right of every citizen of the United States to engage in interstate commerce, and to use all lawful and legitimate means to gain as much of that interstate trade as he or his partnership or corporation can. It is one of the natural, indefeasible rights of an American citizen so to do.

Gibbons v. Ogden, 9 Wheat. 211, 6 L. ed. 73; Gilman v. Philadelphia, 3 Wall. 713, 737, 18 L. ed. 96, 103; Slaughter-House Cases, 16 Wall. 36, 116, 21 L. ed. 394, 421; Thomas v. Cincinnati, N. O. & T. P. R. Co. 4 Inters. Com. Rep. 788, 62 Fed. 819; Conner v. Elliott, 18 How. 591, 15 L. ed. 497; Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449; Cooley, Const. Lim. p. 37 and notes; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622.

Congress cannot constitutionally prohibit, and in the Sherman act has not attempted to prohibit, individuals from uniting to secure community of interest in carrying on business.

Re Greene, 52 Fed. 115; Northern Securities Co. v. United States, 193 U. S. 197, 361, 48 L. ed. 679, 710, 24 Sup. Ct. Rep. 436; Smiley v. Kansas, 196 U. S. 447, 456, 457, 49 L. ed. 546, 551, 25 Sup. Ct. Rep. 289; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 762, 28 L. ed. 588, 4 Sup. Ct. Rep. 652; Cooley, Const. Lim. p. 231; Munn v. Illinois, 94 U. S. 142, 24 L. ed. 90; Allgeyer v. Louisiana, 165 U. S. 578–589, 41 L. ed. 832–836, 17 Sup. Ct. Rep. 427; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 21, 54 L. ed. 355, 363, 30 Sup. Ct. Rep. 190.

Not only does not the Sherman act prohibit corporations or trusts or combinations, but it really authorizes their existence and participation in trade.

United States v. Joint Traffic Asso. 171 U. S. 567, 43 L. ed. 286, 19 Sup. Ct. Rep. 25; Smiley v. Kansas, 196 U. S. 447, 456, 457, 49 L. ed. 546, 551, 25 Sup. Ct. Rep. 289; National Cotton Oil Co. v. Texas, 197 U. S. 115, 128, 49 L. ed. 689, 693, 25 Sup. Ct. Rep. 379; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 620; Northern Securities Co. v. United States, 193 U. S. 197, 410, 48 L. ed. 679, 730, 24 Sup. Ct. Rep. 436.

Section 1 of the Sherman act declares to be unlawful a contract, a combination, or a conspiracy when, and only when, it is in restraint of trade or commerce among the several states.

Hopkins v. United States, 171 U. S. 592, 43 L. ed. 296, 19 Sup. Ct. Rep. 40; United

States v. Joint Traffic Asso. 171 U. S. 568, 43 L. ed. 287, 19 Sup. Ct. Rep. 25.

A monopoly, or an attempt to monopolize, by a single person or corporation, is forbidden by § 2, whereas a combination or contract in restraint of trade requires at least two parties.

Northern Securities Co. v. United States, 193 U. S. 404, 48 L. ed. 727, 24 Sup. Ct. Rep. 436; United States v. Patterson, 4 Inters. Com. Rep. 775, 55 Fed. 640; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 462; United States v. American Tobacco Co. 164 Fed. 727; Monarch Tobacco Works v. American Tobacco Co. 165 Fed. 776.

The power of the private trader to control the trade, fix its prices, etc., if lawfully won,—as by internal growth and development, and as the result of legitimate competition,—is not denounced by the Sherman act, but is permitted, and indeed encouraged by it.

Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 462.

The purpose of the Sherman act is to further free competition in interstate trade.

Northern Securities Co. v. United States, 193 U. S. 331, 48 L. ed. 697, 24 Sup. Ct. Rep. 436; United States v. Joint Traffic Asso. 171 U. S. 569, 43 L. ed. 287, 19 Sup. Ct. Rep. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Swift & Co. v. United States, 196 U. S. 375, 392, 394, 49 L. ed. 518, 522, 523, 25 Sup. Ct. Rep. 276; United States v. Trans-Missouri Freight Asso. 166 U. S. 337, 41 L. ed. 1026, 17 Sup. Ct. Rep. 540; United States v. E. C. Knight Co. 156 U. S. 1, 16, 39 L. ed. 325, .330, 15 Sup. Ct. Rep. 249; Hopkins v. United States, 171 U. S. 587, 43 L. ed. 294, 19 Sup. Ct. Rep. 40; Anderson v. United States, 171 U. S. 604, 617, 43 L. ed. 300, 306, 19 Sup. Ct. Rep. 50; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 46, 48 L. ed. 608, 611, 24 Sup. Ct. Rep. 307; Harriman v. Northern Securities Co. 197 U. S. 244, 291, 49 L. ed. 739, 761, 25 Sup. Ct. Rep. 493; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 435, 52 L. ed. 865, 875, 28 Sup. Ct. Rep. 572; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 110, 53 L. ed. 417, 430, 29 Sup. Ct. Rep. 220; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 94, 46 L. ed. 1058, 1070, 22 Sup. Ct. Rep. 747; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 256, 53 L. ed. 486, 503, 29 Sup. Ct. Rep. 280; Chattanooga Foundry & Pipe Works v. Atlanta, 203 U. S. 390, 396, 51 L. ed. 241, 244, 27 Sup. Ct. Rep. 65.

The government must rely solely on Federal laws, and cannot enforce or punish or use for its own purposes the laws of the state.

United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Northern Securities Co. v. United States, 193 U. S. 409, 48 L. ed. 729, 24 Sup. Ct. Rep. 436; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; United States v. Fox, 94 U. S. 315, 24 L. ed. 192; Logan v. United States, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; Huntington v. Attrill, 146 U. S. 657, 672, 36 L. ed. 1123, 1129, 13 Sup. Ct. Rep. 224; 8 Ops. Atty. Gen. 11; Houston v. Moore, 5 Wheat. 1, 42, 5 L. ed. 19, 29; Pettibone v. United States, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542; Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; Re Loney (Thomas v. Loney) 134 U. S. 372, 33 L. ed. 949, 10 Sup. Ct. Rep. 584; Logan v. United States, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; Virginia v. Paul, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536; Gwin v. Breedlove, 2 How. 29, 36, 37, 11 L. ed. 167, 170.

There was no Federal common law in existence prior to 1890, under which the acts of the appellants in the acquisition of their property, and the control of the same, could be condemned as unlawful.

Wheaton v. Peters, 8 Pet. 591, 658, 8 L. ed. 1055, 1079; Holmes v. Jennison, 14 Pet. 540, 10 L. ed. 579; Smith v. Alabama, 124 U. S. 465, 477, 478, 31 L. ed. 508, 512, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Bucher v. Cheshire R. Co. 125 U. S. 555, 583, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. Rep. 561.

There are no common-law offenses against the United States; no Federal crimes except those expressly declared by act of Congress.

United States v. Britton, 108 U. S. 199, 206, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531; Manchester v. Massachusetts, 139 U. S. 240, 262, 35 L. ed. 159, 166, 11 Sup. Ct. Rep. 559; United States v. Eaton, 144 U. S. 677, 687, 36 L. ed. 591, 594, 12 Sup. Ct. Rep. 764; Pettibone v. United States, 148 U. S. 197, 203, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542; Cooley, Const. Lim. p. 47; Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 8, 31 L. ed. 629, 631, 8 Sup. Ct. Rep. 811; North Shore Boom & Driving Co. v. Nicomen Boom Co. 212 U. S. 406, 412, 53 L. ed. 574, 576, 29 Sup. Ct. Rep. 355; Smith v. Alabama, 124 U. S. 465, 477, 479, 31 L. ed. 508, 512, 513, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564.

The Federal courts have no jurisdiction

except that which is conferred by the Constitution or the acts of Congress.

Ex parte Bollman, 4 Cranch, 75, 93, 2 L. ed. 554, 560; Kentucky v. Powers, 201 U. S. 1, 24, 50 L. ed. 633, 644, 26 Sup. Ct. Rep. 387, 5 A. & E. Ann. Cas. 692; Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 563, 14 L. ed. 249, 268; Missouri v. Illinois, 200 U. S. 496, 518, 50 L. ed. 572, 577, 26 Sup. Ct. Rep. 268.

Defendants cannot now be punished indirectly for acts done prior to the passage of the Sherman act.

Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Duncan v. Missouri, 152 U. S. 377, 382, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570; Re Greene, 52 Fed. 112.

The prohibition against an *ex post facto* law includes not only criminal laws in the strict sense, but also laws which provide for the forfeiture of property or the deprivation of private rights.

McGehee, Due Process of Law, p. 148; Ex parte Garland, 4 Wall. 333, 377, 18 L. ed. 366, 369; Fletcher v. Peck, 6 Cranch, 87, 138, 3 L. ed. 162, 178; Cummings v. Missouri, 4 Wall. 277, 18 L. ed. 356.

A statute which punishes a future act because of some other conduct prior to its passage is an *ex post facto* law.

Cummings v. Missouri, 4 Wall. 277, 18 L. ed. 356.

Where property has been acquired by illegal means, and title has vested in the grantee, subsequent dealings with the property will be judged on their merits, without regard to the prior illegal acts.

Brooks v. Martin, 2 Wall. 70, 80, 17 L. ed. 732, 735; Dent v. Ferguson, 132 U. S. 50, 66, 33 L. ed. 242, 248, 10 Sup. Ct. Rep. 13; Armstrong v. Toler, 11 Wheat. 258, 270, 6 L. ed. 468, 472; State ex rel. Crow v. Continental Tobacco Co. 177 Mo. 34, 75 S. W. 737; Planters' Bank v. Union Bank, 16 Wall. 483, 499, 21 L. ed. 473, 479; Union P. R. Co. v. Durant, 95 U. S. 576, 24 L. ed. 391.

The common law placed no restrictions on the right of individuals to hold their properties jointly, or on the aggregate amount of the properties so held.

Mogul S. S. Co. v. McGregor, L. R. 23 Q. B. Div. 618; Ontario Salt Co. v. Merchants' Salt Co. 18 Grant, Ch. (U. C.) 540; Collins v. Locke, L. R. 4 App. Cas. 685, 48 L. J. P. C. N. S. 68, 41 L. T. N. S. 292, 28 Week. Rep. 189; Wickens v. Evans, 3 Younge & J. 329.

The joint owners of several parcels of property are under no duty to compete.

National Cotton Oil Co. v. Texas, 197 U. S. 115, 128, 49 L. ed. 689, 693, 25 Sup. Ct. Rep. 379; Atcheson v. Mallon, 43 N. Y. 151, 3 Am. Rep. 678; Cooke, Combinations, 1909 2d ed. § 129; Fairbank v. Leary, 40 Wis. 642; Marsh v. Russell, 66 N. Y. 291; Stanton v. Allen, 5 Denio, 442, 49 Am. Dec. 282; Dolph v. Troy Laundry Machinery Co. 28 Fed. 555; Union Pacific Coal Co. v. United States, 97 C. C. A. 578, 173 Fed. 737; Fechteler v. Palm Bros. & Co. 66 C. C. A. 336, 133 Fed. 471; Re Grice, 79 Fed. 642; Willson v. Morse, 117 Iowa, 584, 91 N. W. 823; Wheeler-Stenzel Co. v. American Window Glass Co. 202 Mass. 475, — L.R.A.(N.S.) —, 89 N. E. 28.

Attorney General **Wickersham** and Mr. **Frank B. Kellogg** argued the cause, and, with Messrs. Charles B. Morrison and Cordenio A. Severance, filed a brief for appellee:

It is immaterial that this conspiracy had its inception prior to the enactment of the Sherman law, or that many of the rebates and discriminations granted by the railroads, which enabled the defendants to monopolize the commerce in petroleum, antedated the enactment of the interstate commerce law; the principles of the common law applied to interstate as well as to intrastate commerce.

Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. Rep. 561; Murray v. Chicago & N. W. R. Co. 62 Fed. 24; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Bank of Kentucky, v. Adams Exp. Co. 93 U. S. 174, 23 L. ed. 872.

The trust agreements of 1879 and 1882 were in unreasonable restraint of trade, tended to monopoly, and were void at common law.

State ex rel. Watson v. Standard Oil Co. 49 Ohio St. 137, 15 L.R.A. 145, 34 Am. St. Rep. 541, 30 N. E. 279; Pocahontas Coke Co. v. Powhatan Coal & Coke Co. 60 W. Va. 508, 10 L.R.A.(N.S.) 268, 116 Am. St. Rep. 901, 50 S. E. 264, 9 A. & E. Ann. Cas. 667; Charleston Natural Gas Co. v. Kanawha Natural Gas, Light & Fuel Co. 53 W. Va. 22, 112 Am. St. Rep. 936, 50 S. E. 877, 6 A. & E. Ann. Cas. 154; Slaughter v. Thacker Coal & Coke Co. 55 W. Va. 642, 65 L.R.A. 342, 104 Am. St. Rep. 1013, 47 S. E. 247, 2 A. & E. Ann. Cas. 335; Finck v. Schneider Granite Co. 187 Mo. 244, 106 Am. St. Rep. 452, 86 S. W. 213; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572; Bigelow v. Calumet & H. Min. Co. 155 Fed. 869; Continental Wall Paper Co. v. Louis Voight & Sons Co. 19 L.R.A.(N.S.) 143, 78 C. C. A. 567, 148 Fed. 939; United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 279; Dunbar v. American

Teleph. & Teleg. Co. 224 Ill. 9, 115 Am. St. Rep. 132, 79 N. E. 423, 8 A. & E. Ann. Cas. 57; Texas Standard Oil Co. v. Adoue, 83 Tex. 650, 15 L.R.A. 598, 29 Am. St. Rep. 690, 19 S. W. 274; Pacific Factor Co. v. Adler, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36; Nester v. Continental Brewing Co. 161 Pa. 473, 24 L.R.A. 247, 41 Am. St. Rep. 894, 29 Atl. 102; Morris Run Coal Co. v. Barclay Coal Co. 68 Pa. 173, 8 Am. Rep. 159; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; Stanton v. Allen, 5 Denio, 434, 49 Am. Dec. 282; Watson v. Harlem & N. Y. Nav. Co. 52 How. Pr. 348; Anderson v. Jett, 89 Ky. 375, 6 L.R.A. 390, 12 S. W. 670; Leslie v. Lorillard, 40 Hun, 392; India Bagging Asso. v. Kock, 14 La. Ann. 164; Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Cummings v. Union Blue Stone Co. 15 App. Div. 602, 44 N. Y. Supp. 787; People v. Sheldon, 66 Hun, 590, 21 N. Y. Supp. 859, 139 N. Y. 251, 23 L.R.A. 221, 36 Am. St. Rep. 690, 34 N. E. 785; People v. Milk Exchange, 145 N. Y. 267, 27 L.R.A. 437, 45 Am. St. Rep. 609, 39 N. E. 1062; Emery v. Ohio Candle Co. 47 Ohio St. 320, 21 Am. St. Rep. 819, 24 N. E. 660; Judd v. Harrington, 139 N. Y. 105, 34 N. E. 790; Leonard v. Poole, 114 N. Y. 371, 4 L.R.A. 728, 11 Am. St. Rep. 667, 21 N. E. 707; Central Ohio Salt Co. v. Guthrie. 35 Ohio St. 666; Chapin v. Brown Bros. 83 Iowa, 156, 12 L.R.A. 428, 32 Am. St. Rep. 297, 48 N. W. 1074; Pittsburg Carbon Co. v. McMillin, 119 N. Y. 46, 7 L.R.A. 46, 23 N. E. 530; Santa Clara Valley Mill & Lumber Co. v. Hayes, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391; De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co. 16 Daly, 529, 14 N. Y. Supp. 277; Hoffman v. Brooks, 6 Ohio Dec. Reprint, 1215; State ex rel. Crow v. Armour Packing Co. 173 Mo. 356, 61 L.R.A. 464, 96 Am. St. Rep. 515, 73 S. W. 652; State ex rel. Crow v. Swarzschild & S. Co. 173 Mo. 394, 73 S. W. 1132; Clark v. Needham, 125 Mich. 84, 51 L.R.A. 785, 84 Am. St. Rep. 559, 83 N. W. 1027; State ex rel. Snyder v. Portland Natural Gas & Oil Co. 153 Ind. 483, 53 L.R.A. 413, 74 Am. St. Rep. 314, 53 N. E. 1089; Chicago v. Rumpff, 45 Ill. 90, 92 Am. Dec. 196; Arnot v. Pittston & E. Coal Co. 68 N. Y. 558, 23 Am. Rep. 190; People v. North River Sugar Ref. Co. 54 Hun, 354, 5 L.R.A. 386, 7 N. Y. Supp. 406; State v. Nebraska Distilling Co. 29 Neb. 700, 46 N. W. 155; Distilling & Cattle Feeding Co. v. People, 156 Ill. 449, 47 Am. St. Rep. 200, 41 N. E. 188; Harding v. American Glucose Co. 182 Ill. 551, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577; People ex rel. Peabody v. Chicago Gas Trust Co. 130 Ill. 268, 8 L.R.A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; National Lead Co. v. S. E. Grote Paint Store Co. 80 Mo. App. 247; Unckles v. Colgate, 148 N. Y. 529, 43 N. E. 59; Finck v. Schneider Granite Co. 187 Mo. 244, 106 Am. St. Rep. 452, 86 S. W. 213; General Paper Co. v. United States, 201 U. S. 117, 50 L. ed. 686, 26 Sup. Ct. Rep. 356; Fairbank v. Leary, 40 Wis. 637; Arnold & Co. v. Jones Cotton Co. 152 Ala. 501, 12 L.R.A.(N.S.) 150, 44 So. 662.

From the earliest date these various corporations were held together by trust agreements which were void at common law; but whether they were void or not is manifestly immaterial in view of the decisions of this court. The combination was a continuing one. There was no vested right by reason of the acquisition of these stocks by the trustees, and when the Sherman act was passed the continuance of the combination became illegal.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; Waters-Pierce Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; Thomsen v. Union Castle Mail S. S. Co. 92 C. C. A. 315, 166 Fed. 251; United States v. American Tobacco Co. 164 Fed. 700; Finck v. Schneider Granite Co. 187 Mo. 244, 106 Am. St. Rep. 452, 86 S. W. 221; Ford v. Chicago Milk Shippers' Asso. 155 Ill. 166, 27 L.R.A. 298, 39 N. E. 651.

The defendants are in no position to claim that there was not a dissolution of the earlier trust agreements, and that the Standard Oil combination was but a continuance of a previous amalgamation which was legal when it was made.

Daniels v. Tearney, 102 U. S. 415, 26 L. ed. 187; Hamilton v. Zimmerman, 5 Sneed, 47; Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 48 L. ed. 598, 24 Sup. Ct. Rep. 310; Electric Co. v. Dow, 166 U. S. 489, 41 L. ed. 1088, 17 Sup. Ct. Rep. 645; San Diego Land & Town Co. v. National City, 74 Fed. 79; Pitkin v. Springfield, 112 Mass. 509; People v. Murray, 5 Hill, 468.

The present combination is void under the Sherman act and as a monopoly.

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; United States v. American Tobacco Co. 164 Fed. 700; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815; Continental Wall Paper Co. v. Louis Voight & Sons Co. 19 L.R.A.(N.S.) 143, 78 C.

C. A. 567, 148 Fed. 939, 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; Burrows v. Interborough Metropolitan Co. 156 Fed. 389; Bigelow v. Calumet & H. Min. Co. 155 Fed. 869; Pennsylvania Sugar Ref. Co. v. American Sugar Ref. Co. 92 C. C. A. 318, 166 Fed. 254, reversing 160 Fed. 144; Noyes, Incorporate Relations, §§ 331, 332, 383; Eddy, Combinations, chaps. 15, 16, 18, §§ 606, 607; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Harriman v. Northern Securities Co. 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493; Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188, People ex rel. Peabody v. Chicago Gas Trust Co. 130 Ill. 268, 8 L.R.A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; Harding v. American Glucose Co. 182 Ill. 551, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577; Dunbar v. American Teleph. & Teleg. Co. 224 Ill. 9, 115 Am. St. Rep. 132, 79 N. E. 427, 8 A. & E. Ann. Cas. 57; National Lead Co. v. S. E. Grote Paint Store Co. 80 Mo. App. 247; Richardson v. Buhl, 77 Mich. 632, 6 L.R.A. 457, 43 N. W. 1102; American Biscuit & Mfg. Co. v. Klotz, 44 Fed. 721; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96, 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; National Harrow Co. v. Hench, 76 Fed. 667, 36 L.R.A. 299, 27 C. C. A. 349, 55 U. S. App. 53, 83 Fed. 36; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; Merz Capsule Co. v. United States Capsule Co. 67 Fed. 414; Hunt v. Riverside Co-op. Club, 140 Mich. 538, 112 Am. St. Rep. 420, 104 N. W. 40; General Paper Co. v. United States, 201 U. S. 117, 50 L. ed. 686, 26 Sup. Ct. Rep. 356; Pocahontas Coke Co. v. Powhatan Coal & Coke Co. 60 W. Va. 508, 10 L.R.A.(N.S.) 268, 116 Am. St. Rep. 901, 56 S. E. 264, 9 A. & E. Ann. Cas. 667; Slaughter v. Thacker Coal & Coke Co. 55 W. Va. 642, 65 L.R.A. 342, 104 Am. St. Rep. 1013, 47 S. E. 247, 2 A. & E. Ann. Cas. 335; Finck v. Schneider Granite Co. 187 Mo. 244, 106 Am. St. Rep. 452, 86 S. W. 213; Strait v. National Harrow Co. 18 N. Y. Supp. 224; John D. Park & Sons Co. v. Hartman, 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24.

The defendants are engaged in interstate commerce.

Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; United States v. American Tobacco Co. 164 Fed. 700; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815; Caldwell v. North Carolina, 187 U. S. 622, 632, 47 L. ed. 336, 341, 23 Sup. Ct. Rep. 229; Robbins v. Taxing Dist. 120 U. S. 489, 497, 30 L. ed. 694, 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

Courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reasons, as well as the meaning, of particular provisions in it.

United States v. Union P. R. Co. 91 U. S. 79, 23 L. ed. 228.

In all subsequent decisions of this court, United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249, has been treated as turning upon the point that, as a matter of fact, the contracts and acts of the defendants related exclusively to the acquisition of properties in the state of Pennsylvania, and had no direct relation to interstate commerce, and that the evidence failed to disclose any intention to affect interstate commerce.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 313, 41 L. ed. 1007, 1018, 17 Sup. Ct. Rep. 540; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 240, 44 L. ed. 136, 147, 20 Sup. Ct. Rep. 96; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Swift & Co. v. United States, 196 U. S. 375, 397, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276; Loewe v. Lawlor, 208 U. S. 274, 297, 52 L. ed. 488, 497, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815.

There is no question that the Supreme Court of the United States has in subsequent decisions consistently emphasized the limitations of the decision in the Knight Case, and pointed out that it is not an authority for the proposition that a combination of manufacturers engaged not only in manufacturing, but transporting and selling their products in various states, is not within the Sherman act.

Northern Securities Co. v. United States, 193 U. S. 334, 48 L. ed. 699, 24 Sup. Ct. Rep. 436; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572.

Any contract or combination in the form of a trust or otherwise, or conspiracy in restraint of trade, which tends to monopoly, is prohibited by the 1st section.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Northern Securities Co.

v. United States, 193 U. S. 334, 48 L. ed. 699, 24 Sup. Ct. Rep. 436.

The acts of the defendants in securing the control of the commerce in petroleum and its products, by the Standard Oil Company of New Jersey, through its various subsidiary corporations, amount to the monopolizing, or attempting to monopolize, interstate trade and commerce within § 2 of the Sherman act.

Waters-Pierce Co. v. Texas, 212 U. S. 86, 110, 111, 53 L. ed. 417, 430, 29 Sup. Ct. Rep. 220; Addyston Pipe & Steel Co. v. United States, 175 U. S. 237, 44 L. ed. 146, 20 Sup. Ct. Rep. 96; Northern Securities Co. v. United States, 193 U. S. 332, 48 L. ed. 698, 24 Sup. Ct. Rep. 436; National Cotton Oil Co. v. Texas, 197 U. S. 129, 49 L. ed. 694, 25 Sup. Ct. Rep. 379; Shawnee Compress Co. v. Anderson, 209 U. S. 433, 434, 52 L. ed. 875, 28 Sup. Ct. Rep. 572; Burrows v. Interborough Metropolitan Co. 156 Fed. 392; Pocahantas Coke Co. v. Powhatan Coal & Coke Co. 60 W. Va. 525, 10 L.R.A.(N.S.) 268, 116 Am. St. Rep. 901, 56 S. E. 264, 9 A. & E. Ann. Cas. 667; American Biscuit Mfg. Co. v. Klotz, 44 Fed. 721; National Lead Co. v. S. E. Grote Paint Store Co. 80 Mo. App. 247; Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188; Harding v. American Glucose Co. 182 Ill. 551, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577; People ex rel. Peabody v. Chicago Gas Trust Co. 130 Ill. 295, 8 L.R.A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; Dunbar v. American Teleph. & Teleg. Co. 224 Ill. 9, 115 Am. St. Rep. 132, 79 N. E. 423, 8 A. & E. Ann. Cas. 57; Richardson v. Buhl, 77 Mich. 660, 6 L.R.A. 457, 43 N. W. 1102.

In every instance where the Standard Oil combination has come before the state courts, it has been held invalid as a monopoly or as tending to monopoly.

State ex rel. Watson v. Standard Oil Co. 49 Ohio St. 137, 15 L.R.A. 145, 34 Am. St. Rep. 541, 30 N. E. 279; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; State ex rel. Hadley v. Standard Oil Co. 218 Mo. 1, 116 S. W. 902; Standard Oil Co. v. State, 117 Tenn. 618, 10 L.R.A.(N.S.) 1015, 100 S. W. 705.

At common law a grant of monopoly made to a single person or corporation was void because it destroyed the freedom of trade and discouraged labor and industry, which should be free to all the subjects of the realm.

Case of Monopolies, 11 Coke, 84b; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 754, 28 L. ed. 588, 4 Sup. Ct. Rep. 654.

If the court finds this combination to be in restraint of trade, and a monopoly, it is authorized by § 3 to enjoin the same, and has plenary power to make such decree as is necessary to enforce the terms and provisions of the act.

Northern Securities Co. v. United States, 193 U. S. 336, 337, 344, 48 L. ed. 699, 700, 703, 24 Sup. Ct. Rep. 436; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; United States v. Marigold, 9 How. 560–566, 13 L. ed. 257–260; Crutcher v. Kentucky, 141 U. S. 57, 35 L. ed. 652, 11 Sup. Ct. Rep. 851; Re Rapier, 143 U. S. 110, 36 L. ed. 93, 12 Sup. Ct. Rep. 374; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; United States v. American Tobacco Co. 164 Fed. 700; Chicago, R. I. & P. R. Co. v. Union P. R. Co. 47 Fed. 26; Re Debs, 158 U. S. 582, 39 L. ed. 1101, 15 Sup. Ct. Rep. 900.

Were this but a single government, and the power to regulate the commerce of the country vested in Congress, we know of no provision of the Constitution of the United States that limits that power to mere regulaion of the carriage of merchandise, and does not permit Congress, when in its judgment there arises a just cause, to inhibit it altogether.

Crutcher v. Kentucky, 141 U. S. 57, 35 L. ed. 652, 11 Sup. Ct. Rep. 851; Brown v. Houston, 114 U. S. 622, 630, 29 L. ed. 257, 260, 5 Sup. Ct. Rep. 1091; United States v. Marigold, 9 How. 560, 566, 13 L. ed. 257, 260; Re Rapier, 143 U. S. 110, 134, 36 L. ed. 93, 102, 12 Sup. Ct. Rep. 374; United States v. Joint Traffic Asso. 171 U. S. 505, 573, 43 L. ed. 259, 288, 19 Sup. Ct. Rep. 25; Northern Securities Co. v. United States, 193 U. S. 337, 350–352, 48 L. ed. 700, 705, 706, 24 Sup. Ct. Rep. 436; Beebe v. State, 6 Ind. 528, 63 Am. Dec. 391; Johnston v. Com. 1 Bibb, 603; Flint River S. B. Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248; State v. Kruttschnitt, 4 Nev. 178, 14 Mor. Min. Rep. 130; Walker v. Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24; Hills v. Chicago, 60 Ill. 86; Ballentine v. Pulaski, 15 Lea, 633; State v. Traders' Bank, 41 La. Ann. 329, 6 So. 582.

If power exists, it is to be assumed that legislative discretion has been properly exercised.

Cooley, Const. Lim. 6th ed. 220; People ex rel. Crowell v. Lawrence, 36 Barb. 177; People v. New York C. R. Co. 34 Barb. 123; Baltimore v. State, 15 Md. 376; Goddin v. Crump, 8 Leigh, 154; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730.

There can be no question about the pow-

er of Congress to absolutely prohibit interstate commerce being carried on by a combination in restraint of trade, or by a corporation or corporations engaged in monopoly.

Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280.

In all of the decrees that we have been able to find, the court has invariably, not only annulled existing contracts in restraint of trade, and enjoined the perpetuation of the particular form of combination disclosed by the bill and proofs, but has been careful to make the injunction broad enough to strike at the root of the evil complained of, namely, the formation of any combination or conspiracy the effect of which would be to deprive the people of the benefits of free and unrestricted competition among the defendants to the suit.

Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

Evidence that the defendant companies obtained rebates and discriminatory rates in the transportation of their product, as against their competitors, and engaged in oppressive methods of competition, thereby destroying the small manufacturers and dealers throughout the country, is material in this case.

United States v. Swift & Co. 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; United States v. Trans-Missouri Freight Asso. 166 U. S. 323, 41 L. ed. 1021, 17 Sup. Ct. Rep. 540.

In cases of conspiracy it is always permissible to allege and prove the history and various steps culminating in the final conspiracy, even though the previous steps were separate and distinct offenses, if they tend to throw light on the present conspiracy, and to show the intent with which the final acts were committed.

Wharton, Crim. Ev. § 32; Greenl. Ev. § 111; 8 Cyc. Law & Proc. pp. 677, 678, 684; Swift & Co. v. United States, 196 U. S. 395, 49 L. ed. 523, 25 Sup. Ct. Rep. 276; United States v. Greene, 115 Fed. 344; Lincoln v. Claflin, 7 Wall. 132, 19 L. ed. 106; Mutual L. Ins. Co. v. Armstrong, 117 U. S. 598, 29 L. ed. 999, 6 Sup. Ct. Rep. 877; Moline-Milburn Co. v. Franklin, 37 Minn. 137, 33 N. W. 323; Com. v. Scott, 123 Mass. 222, 25 Am. Rep. 81; Carroll v. Com. 84 Pa. 107, 2 Am. Crim. Rep. 290; Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570; 8 Cyc. Law & Cahill, 72 Iowa, 111, 30 N. W. 553, 33 N. W. 599; Tarbox v. State, 38 Ohio St. 581; Com. v. O'Brien, 140 Pa. 555, 21 Atl. 385; State v. Adams, 20 Kan. 311; Wood v. United States, 16 Pet. 360, 10 L. ed. 994; Nelson v. State, 43 Tex. Crim. Rep. 553, 67 S. W. 320; Ford v. State, 34 Ark. 650; Card v. State, 109 Ind. 415, 9 N. E. 591; State v. Greenwade, 72 Mo. 298; People v. Saunders, 25 Mich. 119; Swan v. Com. 104 Pa. 218, 4 Am. Crim. Rep. 188; Lorenz v. United States, 24 App. D. C. 337; Smith v. Schwed, 9 Fed. 483; People v. Van Tassel, 156 N. Y. 561, 51 N. E. 274; Davis v. United States, 46 C. C. A. 619, 107 Fed. 753; Kelley v. People, 55 N. Y. 565, 14 Am. Rep. 342; Mussina v. Clark, 17 Abb. Pr. 188; Molony v. Dows, 15 How. Pr. 261; United States v. Lancaster, 10 L.R.A. 333, 44 Fed. 896; Mussel Slough Case, 6 Sawy. 612, 5 Fed. 680; United States v. Newton, 52 Fed. 275; Reilley v. United States, 46 C. C. A. 25, 106 Fed. 896.

A person or corporation joining a conspiracy after it is formed, and thereafter aiding in its execution, becomes from that time as much a conspirator as if he originally designed and put it into operation.

United States v. Standard Oil Co. 152 Fed. 294; Lincoln v. Claflin, 7 Wall. 132, 19 L. ed. 106; United States v. Babcock, 3 Dill. 581, Fed. Cas. No. 14,487; United States v. Cassidy, 67 Fed. 702; Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570; United States v. Johnson, 26 Fed. 684; People v. Mather, 4 Wend. 230, 21 Am. Dec. 122.

This conspiracy was a continuing offense. Every overt act committed in furtherance thereof was a renewal of the same as to all of the parties. The statute of limitations does not begin to run until the commission of the last overt act. Neither can the parties claim a vested right to violate the law.

19 Am. & Eng. Enc. Law, 2d ed. "Limitations of Actions;" United States v. Greene, 115 Fed. 343; Ochs v. People, 124 Ill. 399, 16 N. E. 662; Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570; State v. McProc. p. 678; State v. Pippin, 88 N. C. 646; United States v. Bradford, 148 Fed. 413; Com. v. Bartilson, 85 Pa. 489; People v. Mather, 4 Wend. 261, 21 Am. Dec. 122; State v. Kemp, 87 N. C. 538; Fire Ins. Cos. v. State, 75 Miss. 24, 22 So. 99; Lorenz v. United States, 24 App. D. C. 337; People v. Willis, 23 Misc. 568, 52 N. Y. Supp. 808; Raleigh v. Cook, 60 Tex. 438; Com. v Gillespie, 7 Serg. & R. 469, 10 Am. Dec. 480.

Where two or more persons are associated together for some illegal purpose, the acts or declarations of one of them in ref-

erence to the common object are admissible against all.

1 Greenl. Ev. § 111; 2 Wigmore, Ev. § 1079; American Fur Co. v. United States, 2 Pet. 358, 7 L. ed. 450; Clune v. United States, 159 U. S. 593, 40 L. ed. 270, 16 Sup. Ct. Rep. 125; Wiborg v. United States, 163 U. S. 656, 41 L. ed. 298, 16 Sup. Ct Rep. 1127, 1197; Lincoln v. Claflin, 7 Wall. 138, 19 L. ed. 109; Connecticut Mut. L. Ins. Co. v. Hillmon, 188 U. S. 219, 47 L. ed. 451, 23 Sup. Ct. Rep. 294; United States v. Newton, 48 Fed. 218; United States v. Gooding, 12 Wheat. 460, 6 L. ed. 693; Nudd v. Burrows, 91 U. S. 427, 23 L. ed 286; United States v. McKee, 3 Dill. 546, Fed. Cas. No. 15,685; State v. Winner, 17 Kan. 305; State v. Thompson, 69 Conn. 720, 38 Atl. 868; Hunter v. State, 112 Ala. 77, 21 So. 65; Lee v. Lamprey, 43 N. H. 13; Apthorp v. Comstock, 2 Paige, 482; Jackson v. Summerville, 13 Pa. 359; Burns v. McCabe, 72 Pa. 309, 7 Mor. Min. Rep. 1; Confer v. McNeal, 74 Pa. 112; State v. Grant, 86 Iowa, 216, 53 N. W. 120; State v. Stockford, 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769; Com. v. Rogers, 181 Mass. 184, 63 N. E. 421.

The facts in this case, in our opinion, clearly show that the conspiracy had been proved long before the questions concerning the declarations of witnesses were offered in evidence. Even if this were not so, the general rule is always relaxed where proof of the conspiracy depends upon a vast amount of circumstantial evidence, or a number of isolated and independent facts.

1 Greenl. Ev. 111; State v. Thompson, 69 Conn. 720, 38 Atl. 868; State v. Winner 17 Kan. 305.

While it is true that mere expressions of opinion by Senators and Representatives in discussing a bill cannot be resorted to for the purpose of construing the language of the law finally enacted, yet such debates may be resorted to for the purpose of showing the condition of the times and the history of the measure, to enable the court to determine the precise conditions which its provisions were designed to remedy.

Blake v. National City Bank, 23 Wall. 317, 23 L. ed. 120; Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 245, 46 L. ed. 1147, 22 Sup. Ct. Rep. 881; American Net & Twine Co. v. Worthington, 141 U. S. 473, 35 L. ed. 823, 12 Sup. Ct. Rep. 55; Jennison v. Kirk, 98 U. S. 460, 25 L. ed. 243; United States v. Trans-Missouri Freight Asso. 166 U. S. 291, 41 L. ed. 1011, 17 Sup. Ct. Rep. 540.

In cases of conspiracy the admissions of the accused conspirators are always a fruitful source of evidence. Only in exceptional cases is the conspiracy shown by direct and positive evidence. The proof is usually indirect and circumstantial, and courts are bound to rely in large measure upon the declarations made by the conspirators, either during or after the accomplishment of the common purpose.

State v. Thompson, 69 Conn. 720, 38 Atl. 868; Clune v. United States, 159 U. S. 592, 40 L. ed. 270, 16 Sup. Ct. Rep. 125; United States v. Hutchins, Fed. Cas. No. 15,430; United States v. Hamilton, Fed. Cas. No. 15,288; Mussel Slough Case, 6 Sawy. 612, 5 Fed. 680; United States v. Babcock, 3 Dill. 581, Fed. Cas. No. 14,484; United States v. Lancaster, 4 Wash. C. C. 64, Fed. Cas. No. 15,557; Davis v. United States, 46 C. C. A. 619, 107 Fed. 753.

Mr. Chief Justice White delivered the opinion of the court:

The Standard Oil Company of New Jersey and thirty-three other corporations, John D. Rockefeller, William Rockefeller, and five other individual defendants, prosecute this appeal to reverse a decree of the court below. Such decree was entered upon a bill filed by the United States under authority of § 4 of the act of July 2, 1890 [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3201], known as the anti-trust act, and had for its object the enforcement of the provisions of that act. The record is inordinately voluminous, consisting of twenty-three volumes of printed matter, aggregating about 12,000 pages, containing a vast amount of confusing and conflicting testimony *relating to in-[31 numerable, complex, and varied business transactions, extending over a period of nearly forty years. In an effort to pave the way to reach the subjects which we are called upon to consider, we propose at the outset, following the order of the bill, to give the merest possible outline of its contents, to summarize the answer, to indicate the course of the trial, and point out briefly the decision below rendered.

The bill and exhibits, covering 170 pages of the printed record, was filed on November 15, 1906. Corporations known as Standard Oil Company of New Jersey, Standard Oil Company of California, Standard Oil Company of Indiana, Standard Oil Company of Iowa, Standard Oil Company of Kansas, Standard Oil Company of Kentucky, Standard Oil Company of Nebraska, Standard Oil Company of New York, Standard Oil Company of Ohio, and sixty-two other corporations and partnerships, as also seven individuals, were named as defendants. The bill was divided into thirty numbered sections, and sought relief upon the theory that the various defendants were engaged in conspiring "to restrain the trade

and commerce in petroleum, commonly called 'crude oil,' in refined oil, and in the other products of petroleum, among the several states and territories of the United States and the District of Columbia and with foreign nations, and to monopolize the said commerce." The conspiracy was alleged to have been formed in or about the year 1870 by three of the individual defendants, *viz.*: John D. Rockefeller, William Rockefeller, and Henry M. Flagler. The detailed averments concerning the alleged conspiracy were arranged with reference to three periods, the first from 1870 to 1882, the second from 1882 to 1899, and the third from 1899 to the time of the filing of the bill.

The general charge concerning the period from 1870 to 1882 was as follows:

32] *"That during said first period the said individual defendants, in connection with the Standard Oil Company of Ohio, purchased and obtained interests through stock ownership and otherwise in, and entered into agreements with, various persons, firms, corporations, and limited partnerships engaged in purchasing, shipping, refining, and selling petroleum and its products among the various states, for the purpose of fixing the price of crude and refined oil and the products thereof, limiting the production thereof, and controlling the transportation therein, and thereby restraining trade and commerce among the several states, and monopolizing the said commerce."

To establish this charge it was averred that John D. and William Rockefeller and several other named individuals, who, prior to 1870, composed three separate partnerships engaged in the business of refining crude oil and shipping its products in interstate commerce, organized in the year 1870 a corporation known as the Standard Oil Company of Ohio, and transferred to that company the business of the said partnerships, the members thereof becoming, in proportion to their prior ownership, stockholders in the corporation. It was averred that the other individual defendants soon afterwards became participants in the illegal combination, and either transferred property to the corporation or to individuals, to be held for the benefit of all parties in interest in proportion to their respective interests in the combination; that is, in proportion to their stock ownership in the Standard Oil Company of Ohio. By the means thus stated, it was charged that by the year 1872, the combination had acquired substantially all but three or four of the thirty-five or forty oil refineries located in Cleveland, Ohio. By reason of the power thus obtained, and in further execution of the intent and purpose to restrain trade and to monopolize the commerce, interstate as well as intrastate, in petroleum and its products, the bill alleged that the combination and its members *obtained large preferential rates and[33 rebates in many and devious ways over their competitors from various railroad companies, and that by means of the advantage thus obtained many, if not virtually all, competitors were forced either to become members of the combination or were driven out of business; and thus, it was alleged, during the period in question, the following results were brought about: (a) That the combination, in addition to the refineries in Cleveland which it had acquired, as previously stated, and which it had either dismantled to limit production, or continued to operate, also from time to time acquired a large number of refineries of crude petroleum, situated in New York, Pennsylvania, Ohio, and elsewhere. The properties thus acquired, like those previously obtained, although belonging to and being held for the benefit of the combination, were ostensibly divergently controlled, some of them being put in the name of the Standard Oil Company of Ohio, some in the name of corporations or limited partnerships affiliated therewith, or some being left in the name of the original owners, who had become stockholders in the Standard Oil Company of Ohio, and thus members of the alleged illegal combination. (b) That the combination had obtained control of the pipe lines available for transporting oil from the oil fields to the refineries in Cleveland, Pittsburg, Titusville, Philadelphia, New York, and New Jersey. (c) That the combination during the period named had obtained a complete mastery over the oil industry, controlling 90 per cent of the business of producing, shipping, refining, and selling petroleum and its products, and thus was able to fix the price of crude and refined petroleum, and to restrain and monopolize all interstate commerce in those products.

The averments bearing upon the second period (1882 to 1899) had relation to the claim:

"That during the said second period of conspiracy the defendants entered into a contract and trust agreement, *by which[34 various independent firms, corporations, limited partnerships, and individuals engaged in purchasing, transporting, refining, shipping, and selling oil and the products thereof among the various states, turned over the management of their said business, corporations, and limited partnerships to nine trustees, composed chiefly of certain individuals defendant herein, which said

trust agreement was in restraint of trade and commerce, and in violation of law, as hereinafter more particularly alleged."

The trust agreement thus referred to was set out in the bill. It was made in January, 1882. By its terms the stock of forty corporations, including the Standard Oil Company of Ohio, and a large quantity of various properties which had been previously acquired by the alleged combination, and which was held in diverse forms, as we have previously indicated, for the benefit of the members of the combination, was vested in the trustees and their successors, "to be held for all parties in interest jointly." In the body of the trust agreement was contained a list of the various individuals and corporations and limited partnerships whose stockholders and members, or a portion thereof, became parties to the agreement. This list is in the margin.†

35] *The agreement made provision for the method of controlling and managing the property by the trustees, for the formation of additional manufacturing, etc., corporations *in various states, and the[36 trust, unless terminated by a mode specified, was to continue "during the lives of the survivors and survivor of the trustees named in the agreement and for twenty-one years thereafter." The agreement provided for the issue of Standard Oil Trust certificates to represent the interest arising under the trust in the properties affected by the trust, which, of course, in view of the provisions of the agreement and the subject to which it related caused the interest in the certificates to be coincident with and the exact representative of the interest in the combination, that is, in the Standard Oil Company of Ohio. Soon afterwards it was alleged the trustees organized the Standard Oil Company of New Jersey and the Standard Oil Company of New York, the former having a capital stock of $3,000,000 and the latter a capital stock of $5,000,000, subsequently increased to $10,000,000 and $15,-

†1st. All the stockholders and members of the following corporations and limited partnerships, to wit:

Acme Oil Company, New York.
Acme Oil Company, Pennsylvania.
Atlantic Refining Company of Philadelphia.
Bush & Company (Limited).
Camden Consolidated Oil Company.
Elizabethport Acid Works.
Imperial Refining Company (Limited).
Charles Pratt & Company.
Paine, Ablett, & Company.
Standard Oil Company, Ohio.
Standard Oil Company, Pittsburg.
Smith's Ferry Oil Transportation Company.
Solar Oil Company (Limited).
Stone & Fleming Manufacturing Company (Limited).

Also all the stockholders and members of such other corporations and limited partnerships as may hereafter join in this agreement at the request of the trustees herein provided for.

2d. The following individuals, to wit:

W. C. Andrews, John D. Archbold, Lide K. Arter, J. A. Bostwick, Benjamin Brewster, D. Bushnell, Thomas C. Bushnell, J. N. Camden, Henry L. Davis, H. M. Flagler, Mrs. H. M. Flagler, John Huntington, H. A. Hutchins, Charles F. G. Heye, A. B. Jennings, Charles Lockhart, A. M. McGregor, William H. Macy, William H. Macy, Jr., estate of Josiah Macy, William H. Macy, Jr., executor; O. H. Payne, A. J. Pouch, John D. Rockefeller, William Rockefeller, Henry H. Rogers, W. P. Thompson, J. J. Vandergrift, William T. Wardell, W. G. Warden, Joseph L. Warden, Warden Frew & Company, Louise C. Wheaton, H. M. Hanna, and George W. Chapin, D. M. Harkness, D. M. Harkness, trustee, S. V. Harkness, O. H. Payne, trustee; Charles Pratt, Horace A. Pratt, C. M. Pratt, Julia H. York, George H. Vilas, M. R. Keith, trustees, George F. Chester.

Also all such individuals as may hereafter join in the agreement at the request of the trustees herein provided for.

3d. A portion of the stockholders and members of the following corporations and limited partnerships, to wit:

American Lubricating Oil Company.
Baltimore United Oil Company.
Beacon Oil Company.
Bush & Denslow Manufacturing Company.
Central Refining Company of Pittsburg.
Chesebrough Manufacturing Company.
Chess Carley Company.
Consolidated Tank Line Company.
Inland Oil Company.
Keystone Refining Company.
Maverick Oil Company.
National Transit Company.
Portland Kerosene Oil Company.
Producers' Consolidated Land & Petroleum Company.
Signal Oil Works (Limited).
Thompson & Bedford Company (Limited).
Devoe Manufacturing Company.
Eclipse Lubricating Oil Company (Limited).
Empire Refining Company (Limited).
Franklin Pipe Company (Limited).
Galena Oil Works (Limited).
Galena Farm Oil Company (Limited).
Germania Mining Company.
Vacuum Oil Company.
H. C. Van Tine & Company (Limited).
Waters-Pierce Oil Company.

Also stockholders and members (not being all thereof) of other corporations and limited partnerships who may hereafter join in this agreement at the request of the trustees herein provided for.

000,000, respectively. The bill alleged "that pursuant to said trust agreement the said trustees caused to be transferred to themselves the stocks of all corporations and limited partnerships named in said trust agreement, and caused various of the individuals and copartnerships who owned apparently independent refineries and other properties employed in the business of refining and transporting and selling oil in and among said various states and terri-
37]tories *of the United States, as aforesaid, to transfer their property situated in said several states to the respective Standard Oil Companies of said states of New York, New Jersey, Pennsylvania, and Ohio, and other corporations organized or acquired by said trustees from time to time. . . ." For the stocks and property so acquired the trustees issued trust certificates. It was alleged that in 1888 the trustees "unlawfully controlled the stock and ownership of various corporations and limited partnerships engaged in such purchase and transportations, refining, selling, and shipping of oil," as per a list which is excerpted in the margin.†

38] *The bill charged that during the second period quo warranto proceedings were commenced against the Standard Oil Company of Ohio, which resulted in the entry by the supreme court of Ohio, on March 2, 1892, of a decree *adjudging the trust[39 agreement to be void, not only because the Standard Oil Company of Ohio was a party to the same, but also because the agreement in and of itself *was in restraint of[40 trade and amounted to the creation of an unlawful monopoly. It was alleged that shortly after this decision, seemingly for the purpose of complying therewith, voluntary proceedings were had apparently to dissolve the trust, but that these proceedings were a subterfuge and a sham because they simply amounted to a transfer of the stock held by the trust in sixty-four of the companies which it controlled to some of the remaining twenty companies, it having controlled before the decree eighty-four in all, thereby, while seemingly in part giving up its dominion, yet in reality preserving the same by means of the control of the companies as to which it had retained complete authority. It was charged that especially was this the case, as the stock in the companies selected for transfer was

†List of Corporations the Stocks of Which Were Wholly or Partially Held by the Trustees of Standard Oil Trust.

	Capital Stock.	S. O. trust ownership.
New York state:		
Acme Oil Company, manufacturers of petroleum products	$300,000	Entire.
Atlas Refining Company, manufacturers of petroleum products	200,000	Do.
American Wick Manufacturing Company, manufacturers of lamp wicks	25,000	Do.
Bush & Denslow Manufacturing Company, manufacturers of petroleum products	300,000	50 per cent.
Chesebrough Manufacturing Company, manufacturers of petrolcum	500,000	2,661–5,000
Central Refining Company (Limited), manufacturers of petroleum products	200,000	1–67.2 per ct.
Devoe Manufacturing Company, packers, manufacturers of petroleum	300,000	Entire.
Empire Refining Company (Limited), manufacturers of petroleum products	100,000	80 per cent.
Oswego Manufacturing Company, manufacturers of wood cases	100,000	Entire.
Pratt Manufacturing Company, manufacturers of petroleum products	500,000	Do.
Standard Oil Company of New York, manufacturers of petroleum products	5,000,000	Do.
Stone & Fleming Manufacturing Company (Limited), manufacturers of petroleum products	250,000	Do.
Thompson & Bedford Company (Limited), manufacturers of petroleum products	250,000	80 per cent.
Vacuum Oil Company, manufacturers of petroleum products	25,000	75 per cent.
New Jersey:		
Eagle Oil Company, manufacturers of petroleum products	350,000	Entire.
McKirgan Oil Company, jobbers of petroleum products	75,000	Do.
Standard Oil Company of New Jersey, manufacturers of petroleum products	3,000,000	Do.

virtually owned by the nine trustees or the members of their immediate families or associates. The bill further alleged that in 1897 the attorney general of Ohio instituted contempt proceedings in the quo warranto case, based upon the claim that the trust had not been dissolved as required by the decree in that case. About the same time, also, proceedings in quo warranto were commenced to forfeit the charter of a pipe line known as the Buckeye Pipe Line Com-41]pany, an *Ohio corporation, whose stock, it was alleged, was owned by the members of the combination, on the ground of its connection with the trust which had been held to be illegal.

The result of these proceedings, the bill charged, caused a resort to the alleged wrongful acts asserted to have been committed during the third period, as follows:

"That during the third period of said conspiracy, and in pursuance thereof, the said individual defendants operated through the Standard Oil Company of New Jersey, as a holding corporation, which corporation obtained and acquired the majority of the stocks of the various corporations engaged in purchasing, transporting, refining, shipping, and selling oil into and among the various states and territories of the United States and the District of Columbia and with foreign nations, and thereby managed and controlled the same, in violation of the laws of the United States, as hereinafter more particularly alleged."

It was alleged that in or about the month of January, 1899, the individual defendants caused the charter of the Standard Oil Company of New Jersey to be amended, "so that the business and objects of said

	Capital Stock.	S. O. trust ownership.
Pennsylvania:		
Acme Oil Company, manufacturers of petroleum products	300,000	Do.
Atlantic Refining Company, manufacturers of petroleum products	400,000	Do.
Galena Oil Works (Limited), manufacturers of petroleum products	150,000	86¼ per cent.
Imperial Refining Company (Limited), manufacturers of petroleum products	300,000	Entire.
Producers' Consolidated Land & Petroleum Company, producers of crude oil	1,000,000	65/132 per cent.
National Transit Company, transporters of crude oil	25,455,200	94 per cent.
Standard Oil Company, manufacturers of petroleum products	400,000	Entire.
Signal Oil Works (Limited), manufacturers of petroleum products	100,000	38¾ per cent.
Ohio:		
Consolidated Tank-Line Company, jobbers of petroleum products	1,000,000	57 per cent.
Inland Oil Company, jobbers of petroleum products..	50,000	50 per cent.
Standard Oil Company, manufacturers of petroleum products	3,500,000	Entire.
Solar Refining Company, manufacturers of petroleum products	500,000	Do.
Kentucky:		
Standard Oil Company, jobbers of petroleum products	600,000	Do.
Maryland:		
Baltimore United Oil Company, manufacturers of petroleum products	600,000	5,059–6,000
West Virginia:		
Camden Consolidated Oil Company, manufacturers of petroleum products	200,000	51 per cent.
Minnesota:		
Standard Oil Company, jobbers of petroleum products	100,000	Entire.
Missouri:		
Waters-Pierce Oil Company, jobbers of petroleum products	400,000	50 per cent.
Massachusetts:		
Beacon Oil Company, jobbers of petroleum products..	100,000	Entire.
Maverick Oil Company, jobbers of petroleum products	100,000	Do.
Maine:		
Portland Kerosene Oil Company, jobbers of petroleum products	200,000	Do.
Iowa:		
Standard Oil Company, jobbers of petroleum products	600,000	60 per cent.
Continental Oil Company, jobbers of petroleum products	300,000	62½ per cent.

company were stated as follows, to wit: 'To do all kinds of mining, manufacturing, and trading business; transporting goods and merchandise by land or water in any manner; to buy, sell, lease, and improve land; build houses, structures, vessels, cars, wharves, docks, and piers; to lay and operate pipe lines; to erect lines for conducting electricity; to enter into and carry out contracts of every kind pertaining to its business; to acquire, use, sell, and grant licenses under patent rights; to purchase or otherwise acquire, hold, sell, assign, and transfer shares of capital stock and bonds or other evidences of indebtedness of corporations, and to exercise all the privileges of ownership, including voting upon the stock so held; to carry on its business and have offices and agencies therefor in all parts 42]of the world, and *to hold, purchase, mortgage, and convey real estate and personal property outside the state of New Jersey.'"

The capital stock of the company—which, since March 19, 1892, had been $10,000,000—was increased to $110,000,000; and the individual defendants, as therefore, continued to be a majority of the board of directors.

Without going into detail it suffices to say that it was alleged in the bill that shortly after these proceedings the trust came to an end, the stock of the various corporations which had been controlled by it being transferred by its holders to the Standard Oil Company of New Jersey, which corporation issued therefor certificates of its common stock to the amount of $97,250,000. The bill contained allegations referring to the development of new oil fields; for example, in California, southeastern Kansas, northern Indian territory, and northern Oklahoma, and made reference to the building or otherwise acquiring by the combination of refineries and pipe lines in the new fields for the purpose of restraining and monopolizing the interstate trade in petroleum and its products.

Reiterating in substance the averments that both the Standard Oil Trust from 1882 to 1899, and the Standard Oil Company of New Jersey, since 1899, had monopolized and restrained interstate commerce in petroleum and its products, the bill at great length additionally set forth various means by which, during the second and third periods, in addition to the effect occasioned by the combination of alleged previously independent concerns, the monopoly and restraint complained of were continued. Without attempting to follow the elaborate averments on these subjects, spread over fifty-seven pages of the printed record, it suffices to say that such averments may properly be grouped under the following heads: Rebates, preferences, and other discriminatory practices in favor of the combination by railroad companies; restraint and monopolization by control of pipe lines, and unfair practices against competing *pipe lines;[43 contracts with competitors in restraint of trade; unfair methods of competition, such as local price cutting at the points where necessary to suppress competition; espionage of the business of competitors, the operation of bogus independent companies, and payment of rebates on oil, with the like intent; the division of the United States into districts, and the limiting the operations of the various subsidiary corporations as to such districts so that competition in the sale of petroleum products between such corporations had been entirely eliminated and destroyed; and finally reference was made to what was alleged to be the "enormous and unreasonable profits" earned by the Standard Oil Trust and the Standard Oil Company as a result of the alleged monopoly; which presumably was averred as a means of reflexly inferring the scope and power acquired by the alleged combination.

Coming to the prayer of the bill, it suffices to say that in general terms the substantial relief asked was, first, that the combination in restraint of interstate trade and commerce, and which had monopolized the same, as alleged in the bill, be found to have existence, and that the parties thereto be perpetually enjoined from doing any further act to give effect to it; second, that the transfer of the stocks of the various corporations to the Standard Oil Company of New Jersey, as alleged in the bill, be held to be in violation of the 1st and 2d sections of the anti-trust act, and that the Standard Oil Company of New Jersey be enjoined and restrained from in any manner continuing to exert control over the subsidiary corporations by means of ownership of said stock or otherwise; third, that specific relief by injunction be awarded against further violation of the statute by any of the acts specifically complained of in the bill. There was also a prayer for general relief.

Of the numerous defendants named in the bill, the Waters-Pierce Oil Company was the only resident of the *district in[44 which the suit was commenced and the only defendant served with process therein. Contemporaneous with the filing of the bill the court made an order, under § 5 of the anti-trust act, for the service of process upon all the other defendants, wherever they could be found. Thereafter the various defendants unsuccessfully moved to vacate the order for service on nonresident de-

fendants or filed pleas to the jurisdiction. Joint exceptions were likewise unsuccessfully filed, upon the ground of impertinence, to many of the averments of the bill of complaint, particularly those which related to acts alleged to have been done by the combination prior to the passage of the anti-trust act, and prior to the year 1899.

Certain of the defendants filed separate answers, and a joint answer was filed on behalf of the Standard Oil Company of New Jersey and numerous of the other defendants. The scope of the answers will be adequately indicated by quoting a summary on the subject, made in the brief for the appellants.

"It is sufficient to say that, whilst admitting many of the alleged acquisitions of property, the formation of the so-called trust of 1882, its dissolution in 1892, and the acquisition by the Standard Oil Company of New Jersey of the stocks of the various corporations in 1899, they deny all the allegations respecting combinations or conspiracies to restrain or monopolize the oil trade; and particularly that the so-called trust of 1882, or the acquisition of the shares of the defendant companies by the Standard Oil Company of New Jersey in 1899, was a combination of *independent or competing* concerns or corporations. The averments of the petition respecting the means adopted to monopolize the oil trade are traversed either by a denial of the acts alleged, or of their purpose, intent, or effect."

On June 24, 1907, the cause being at issue, a special examiner was appointed to take the evidence, and his report was filed March 22, 1909. It was heard on 45]April 5 to 10, 1909, *under the expediting act of February 11, 1903 [32 Stat. at L. 823, chap. 544, U. S. Comp. Stat. Supp. 1909, p. 1211], before a circuit court consisting of four judges.

The court decided in favor of the United States. In the opinion delivered, all the multitude of acts of wrongdoing charged in the bill were put aside, in so far as they were alleged to have been committed prior to the passage of the anti-trust act, "except as evidence of their (the defendants') purpose, of their continuing conduct, and of its effect." (173 Fed. 177.)

By the decree which was entered it was adjudged that the combining of the stocks of various companies in the hands of the Standard Oil Company of New Jersey in 1899 constituted a combination in restraint of trade and also an attempt to monopolize and a monopolization under § 2 of the anti-trust act. The decree was against seven individual defendants, the Standard Oil Company of New Jersey, thirty-six domestic companies, and one foreign company which the Standard Oil Company of New Jersey controls by stock ownership; these thirty-eight corporate defendants being held to be parties to the combination found to exist.†

The bill was dismissed as to all other corporate defendants, thirty-three in number, it being adjudged by § 3 of the decree that they "have not been proved to be engaged in the operation or carrying out of the combination."††

*The Standard Oil Company of New[46 Jersey was enjoined from voting the stocks or exerting any control over the said thirty-seven subsidiary companies, and the subsidiary companies were enjoined from paying any dividends as to the Standard Company, or permitting it to exercise any control over them by virtue of the stock ownership or power acquired by means of the combination. The individuals and corporations were also enjoined from entering into or carrying into effect any like combination which would evade the decree. Further, the individual defendants, the Standard Company, and the thirty-seven subsidiary corporations, were enjoined from engaging or continuing in interstate commerce in petroleum or its products during the continuance of the illegal combination.

At the outset a question of jurisdiction requires consideration, and we shall, also, as a preliminary, dispose of another question, to the end that our attention may be completely concentrated upon the merits of the controversy when we come to consider them.

First. We are of opinion that, in consequence of the presence within the district of the Waters-Pierce Oil Company, the court, under the authority of § 5 of the

†Counsel for appellants says: "Of the thirty-eight (thirty-seven) corporate defendants named in § 2 of the decree, and as to which the judgment of the court applies, four have not appealed; to wit: Corsicana Refining Company, Manhattan Oil Company, Security Oil Company, Waters-Pierce Oil Company, and one, the Standard Oil Company, of Iowa, has been liquidated and no longer exists."

††Of the dismissed defendants, sixteen were natural gas companies and ten were companies which were liquidated and ceased to exist before the filing of the petition. The other dismissed defendants, seven in number, were: Florence Oil Refining Company, United Oil Company, Tidewater Oil Company, Tide Water Pipe Company, (L't'd), Platt & Washburn Refining Company, Franklin Pipe Company, and Pennsylvania Oil Company.

anti-trust act, rightly took jurisdiction over the cause, and properly ordered notice to be served upon the nonresident defendants.

Second. The overruling of the exceptions taken to so much of the bill as counted upon facts occurring prior to the passage of the anti-trust act,—whatever may be the view as an original question of the duty to restrict the controversy to a much narrower area than that propounded by the bill,—we think by no possibility, in the present stage of the case, can the action of the court be treated as prejudicial error justifying reversal. We say this because the court, as we shall do, gave no weight to the testimony adduced under the averments complained of except in so far as it tended to throw light upon the acts done [47] after the *passage of the anti-trust act and the results of which it was charged were being participated in and enjoyed by the alleged combination at the time of the filing of the bill.

We are thus brought face to face with the merits of the controversy.

Both as to the law and as to the facts, the opposing contentions pressed in the argument are numerous, and in all their aspects are so irreconcilable that it is difficult to reduce them to some fundamental generalization, which, by being disposed of, would decide them all. For instance, as to the law. While both sides agree that the determination of the controversy rests upon the correct construction and application of the 1st and 2d sections of the anti-trust act, yet the views as to the meaning of the act are as wide apart as the poles, since there is no real point of agreement on any view of the act. And this also is the case as to the scope and effect of authorities relied upon, even although in some instances one and the same authority is asserted to be controlling.

So also is it as to the facts. Thus, on the one hand, with relentless pertinacity and minuteness of analysis, it is insisted that the facts establish that the assailed combination took its birth in a purpose to unlawfully acquire wealth by oppressing the public and destroying the just rights of others, and that its entire career exemplifies an inexorable carrying out of such wrongful intents, since, it is asserted, the pathway of the combination from the beginning to the time of the filing of the bill is marked with constant proofs of wrong inflicted upon the public, and is strewn with the wrecks resulting from crushing out, without regard to law, the individual rights of others. Indeed, so conclusive, it is urged, is the proof on these subjects, that it is asserted that the existence of the principal corporate defendant,—the Standard Oil Company of New Jersey,—with the vast accumulation of property which it owns or controls, because of its infinite potency *for harm and the dangerous [48] example which its continued existence affords, is an open and enduring menace to all freedom of trade, and is a byword and reproach to modern economic methods. On the other hand, in a powerful analysis of the facts, it is insisted that they demonstrate that the origin and development of the vast business which the defendants control was but the result of lawful competitive methods, guided by economic genius of the highest order, sustained by courage, by a keen insight into commercial situations, resulting in the acquisition of great wealth, but at the same time serving to stimulate and increase production, to widely extend the distribution of the products of petroleum at a cost largely below that which would have otherwise prevailed, thus proving to be at one and the same time a benefaction to the general public as well as of enormous advantage to individuals. It is not denied that in the enormous volume of proof contained in the record in the period of almost a lifetime, to which that proof is addressed, there may be found acts of wrongdoing, but the insistence is that they were rather the exception than the rule, and in most cases were either the result of too great individual zeal in the keen rivalries of business, or of the methods and habits of dealing which, even if wrong, were commonly practised at the time. And to discover and state the truth concerning these contentions both arguments call for the analysis and weighing, as we have said at the outset, of a jungle of conflicting testimony covering a period of forty years, —a duty difficult to rightly perform, and, even if satisfactorily accomplished, almost impossible to state with any reasonable regard to brevity.

Duly appreciating the situation just stated, it is certain that only one point of concord between the parties is discernible, which is, that the controversy in every aspect is controlled by a correct conception of the meaning of the 1st and 2d sections of the anti-trust act. We shall *there- [49] for—departing from what otherwise would be the natural order of analysis—make this one point of harmony the initial basis of our examination of the contentions, relying upon the conception that by doing so some harmonious resonance may result adequate to dominate and control the discord with which the case abounds. That is to say, we shall first come to consider the meaning of the 1st and 2d sections of the anti-trust act by the text, and after dis-

cerning what by that process appears to be its true meaning, we shall proceed to consider the respective contentions of the parties concerning the act, the strength or weakness of those contentions, as well as the accuracy of the meaning of the act as deduced from the text in the light of the prior decisions of this court concerning it. When we have done this, we shall then approach the facts. Following this course, we shall make our investigation under four separate headings: First. The text of the 1st and 2d sections of the act, originally considered, and its meaning in the light of the common law and the law of this country at the time of its adoption. Second. The contentions of the parties concerning the act, and the scope and effect of the decisions of this court upon which they rely. Third. The application of the statute to facts; and, Fourth. The remedy, if any, to be afforded as the result of such application.

First. The text of the act and its meaning.

We quote the text of the 1st and 2d sections of the act, as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding 50]$5,000, or by *imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200.]

The debates show that doubt as to whether there was a common law of the United States which governed the subject in the absence of legislation was among the influences leading to the passage of the act. They conclusively show, however, that the main cause which led to the legislation was the thought that it was required by the economic condition of the times; that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally. Although debates may not be used as a means for interpreting a statute (United States v. Trans-Missouri Freight Asso. 166 U. S. 318, 41 L. ed. 1019, 17 Sup. Ct. Rep. 548, and cases cited), that rule, in the nature of things, is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law; that is, the history of the period when it was adopted.

There can be no doubt that the sole subject with which the 1st section deals is restraint of trade as therein contemplated, and that the attempt to monopolize and monopolization is the subject with which the 2d section *is concerned. It is cer-[51 tain that those terms, at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the act in question.

We shall endeavor, then first, to seek their meaning, not by indulging in an elaborate and learned analysis of the English law and of the law of this country, but by making a very brief reference to the elementary and indisputable conceptions of both the English and American law on the subject prior to the passage of the anti-trust act.

a. It is certain that at a very remote period the words "contract in restraint of trade" in England came to refer to some voluntary restraint put by contract by an individual on his right to carry on his trade or calling. Originally all such contracts were considered to be illegal, because it was deemed they were injurious to the public as well as to the individuals who made them. In the interest of the freedom of individuals to contract, this doctrine was modified so that it was only when a restraint by contract was so general as to be coterminos with the kingdom that it was treated as void. That is to say, if the restraint was partial in its operation, and was otherwise reasonable, the contract was held to be valid:

b. Monopolies were defined by Lord Coke as follows:

"'A monopoly is an institution or allowance by the King by his grant, commission, or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working,

or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.' (3 Inst. 181.)"

Hawkins thus defined them:

"'A monopoly is an allowance by the King to a particular person or persons of 52]the sole buying, selling, making, *working, or using of anything whereby any person is sought to be restrained from any freedom [of manufacturing or trading] which he had before.' (Hawk. P. C. bk. 1, chap. 79.)"

The frequent granting of monopolies and the struggle which led to a denial of the power to create them, that is to say, to the establishment that they were incompatible with the English Constitution, is known to all and need not be reviewed. The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: (1) The power which the monopoly gave to the one who enjoyed it, to fix the price and thereby injure the public; (2) The power which it engendered of enabling a limitation on production; and (3) The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale. As monopoly, as thus conceived, embraced only a consequence arising from an exertion of sovereign power, no express restrictions or prohibitions obtained against the creation by an individual of a monopoly as such. But as it was considered, at least, so far as the necessaries of life were concerned, that individuals, by the abuse of their right to contract, might be able to usurp the power arbitrarily to enhance prices (one of the wrongs arising from monopoly), it came to be that laws were passed relating to offenses such as forestalling, regrating, and engrossing by which prohibitions were placed upon the power of individuals to deal under such circumstances and conditions as, according to the conception of the times, created a presumption that the dealings were not simply the honest exertion of one's right to contract for his own benefit, unaccompanied by a wrongful motive to injure others, but were the consequence of a contract or course of dealing of such a character as to give rise to the presumption of an intent to injure others through the means, for instance, of a monopolistic increase of prices. 53]*This is illustrated by the definition of engrossing found in the statute, 5 and 6 Edw. VI., chap. 14, as follows:

"Whatsoever person or persons . . . shall engross or get into his or their hands by buying, contracting, or promise-taking, other than by demise, grant, or lease of land, or tithe, any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victuals whatsoever, within the realm of England, to the intent to sell the same again, shall be accepted, reputed, and taken an unlawful engrosser or engrossers."

As by the statutes providing against engrossing the quantity engrossed was not required to be the whole or a proximate part of the whole of an article, it is clear that there was a wide difference between monopoly and engrossing, etc. But as the principal wrong which it was deemed would result from monopoly, that is, an enhancement of the price, was the same wrong to which it was thought the prohibited engrossment would give rise, it came to pass that monopoly and engrossing were regarded as virtually one and the same thing. In other words, the prohibited act of engrossing, because of its inevitable accomplishment of one of the evils deemed to be engendered by monopoly, came to be referred to as being a monopoly or constituting an attempt to monopolize. Thus Pollexfen, in his argument in East India Co. v. Sandys, Skinner, 165, 169, said:

"By common law, he said that trade is free, and for that cited 3 Co. Inst. 181; F. B. 65; Taylors de Ipswich v. Sherring, 1 Rolle, Rep. 4; that the common law is as much against monopoly as engrossing; and that they differ only that a monopoly is by patent from the King, the other is by the act of the subject between party and party; but that the michiefs are the same from both, and there is the same law against both. Darcy v. Allen, F. Moore, 673, 11 Coke, 84. The sole trade of anything is engrossing *ex rei natura*, for whosoever hath the sale trade of buying and selling hath engrossed that trade; and whosoever *hath the sole trade to any[54 country hath the sole trade of buying and selling the produce of that country, at his own price, which is an engrossing."

And by operation of the mental process which led to considering as a monopoly acts which, although they did not constitute a monopoly, were thought to produce some of its baneful effects, so also because of the impediment or burden to the due course of trade which they produced, such acts came to be referred to as in restraint of trade. This is shown by my Lord Coke's definition of monopoly as being "an institution or allowance . . . whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade." It is

illustrated also by the definition which Hawkins gives of monopoly wherein it is said that the effect of monopoly is to restrain the citizen "from the freedom of manufacturing or trading which he had before." And see especially the opinion of Parker, C. J., in Mitchel v. Reynolds (1711) 1 P. Wms. 181, where a classification is made of monopoly which brings it generically within the description of restraint of trade.

Generalizing these considerations, the situation is this: 1. That by the common law, monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public. 2. That as to necessaries of life, the freedom of the individual to deal was restricted where the nature and character of the dealing was such as to engender the presumption of intent to bring about at least one of the injuries which it was deemed would result from monopoly,—that is, an undue enhancement of price. 3. That to protect the freedom of contract of the individual, not only in his own interest, but principally in the interest of the common weal, a contract of an individual by which he put an unreasonable restraint upon himself as to carrying on his trade or business 55]*was void. And that at common law the evils consequent upon engrossing, etc., caused those things to be treated as coming within monopoly and sometimes to be called monopoly, and the same considerations caused monopoly, because of its operation and effect, to be brought within and spoken of generally as impeding the due course of, or being in restraint of, trade.

From the development of more accurate enonomic conceptions and the changes in conditions of society, it came to be recognized that the acts prohibited by the engrossing, forestalling, etc., statutes did not have the harmful tendency which they were presumed to have when the legislation concerning them was enacted, and therefore did not justify the presumption which had previously been deduced from them, but, on the contrary, such acts tended to fructify and develop trade. See the statutes of 12th George III., chap. 71, enacted in 1772, and statute of 7 and 8 Victoria, chap. 24, enacted in 1844, repealing the prohibitions against engrossing, forestalling, etc., upon the express ground that the prohibited acts had come to be considered as favorable to the development of, and not in restraint of, trade. It is remarkable that nowhere at common law can there be found a prohibition against the creation of monopoly by an individual. This would seem to manifest, either consciously or intuitively, a profound conception as to the inevitable operation of economic forces and the equipoise or balance in favor of the protection of the rights of individuals which resulted. That is to say, as it was deemed that monopoly in the concrete could only arise from an act of sovereign power, and, such sovereign power being restrained, prohibitions as to individuals were directed not against the creation of monopoly, but were only applied to such acts in relation to particular subjects as to which it was deemed, if not restrained, some of the consequences of monopoly might result. After all, this was but an instinctive recognition *of the truisms that the course of trade[56 could not be made free by obstructing it, and that an individual's right to trade could not be protected by destroying such right.

From the review just made it clearly results that outside of the restrictions resulting from the want of power in an individual to voluntarily and unreasonably restrain his right to carry on his trade or business, and outside of the want of right to restrain the free course of trade by contracts or acts which implied a wrongful purpose, freedom to contract and to abstain from contracting, and to exercise every reasonable right incident thereto, became the rule in the English law. The scope and effect of this freedom to trade and contract is clearly shown by the decision in Mogul S. S. Co. v. McGregor [1891] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101. While it is true that the decision of the House of Lords in the case in question was announced shortly after the passage of the anti-trust act, it serves reflexly to show the exact state of the law in England at the time the anti-trust statute was enacted.

In this country also the acts from which it was deemed there resulted a part if not all of the injuries consequences ascribed to monopoly, came to be referred to as a monopoly itself. In other words, here as had been the case in England, practical common sense caused attention to be concentrated not upon the theoretically correct name to be given to the condition or acts which gave rise to a harmful result, but to the result itself and to the remedying of the evils which it produced. The statement just made is illustrated by an early statute of the province of Massachusetts, that is, chap. 31 of the Laws of 1778–1779, by which monopoly and forestalling were expressly treated as one and the same thing.

It is also true that while the principles concerning contracts in restraint of trade, that is, voluntary restraint put by a person

on his right to pursue his calling, hence only operating subjectively, came generally 57]to be recognized *in accordance with the English rule, it came moreover to pass that contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition and hence to enhance prices—in other words, to monopolize—came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade, and therefore as being in restraint of trade. The dread of monopoly as an emanation of governmental power, while it passed at an early date out of mind in this country, as a result of the structure of our government, did not serve to assuage the fear as to the evil consequences which might arise from the acts of individuals producing or tending to produce the consequences of monopoly. It resulted that treating such acts as we have said as amounting to monopoly, sometimes constitutional restrictions, again legislative enactments or judicial decisions, served to enforce and illustrate the purpose to prevent the occurrence of the evils recognized in the mother country as consequent upon monopoly, by providing against contracts or acts of individuals or combinations of individuals or corporations deemed to be conducive to such results. To refer to the constitutional or legislative provisions on the subject, or the many judicial decisions which illustrate it, would unnecessarily prolong this opinion. We append in the margin a note to treatises, etc., wherein are contained references to constitutional and statutory provisions and to numerous decisions, etc., relating to the subject.†

It will be found that, as modern conditions arose, the trend of legislation and judicial decision came more and more to adapt the recognized restrictions to new manifestations of conduct or of dealing 58]which it was thought *justified the inference of intent to do the wrong which it had been the purpose to prevent from the beginning. The evolution is clearly pointed out in National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379, and Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572; and, indeed, will be found to be illustrated in various aspects by the decisions of this court which have been concerned with the enforcement of the act we are now considering.

Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing, trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy. It is equally true to say that the survey of the legislation in this country on this subject from the beginning will show, depending, as it did, upon the economic conceptions which obtained at the time when the legislation was adopted or judicial decision was rendered, that contracts or acts were at one time deemed to be of such a character as to justify the inference of wrongful intent which were at another period thought not to be *of that char-[59 acter. But this again, as we have seen, simply followed the line of development of the law of England.

Let us consider the language of the 1st and 2d sections, guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary.†

As to the 1st section, the words to be interpreted are: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or com-

†2 Purdy's Beach, Priv. Corp. pp. 1403 et seq., chapter on Trusts and Monopolies: Cooke, Trade & Labor Combinations, Appx. II, pp. 194, 195; 20 Am. & Eng. Enc. Law, 2d ed. article "Monopolies and Trusts," pp. 844 et seq.

†Swearingen v. United States, 161 U. S. 446, 40 L. ed. 765, 16 Sup. Ct. Rep. 562; United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456; Keck v. United States, 172 U. S. 446, 43 L. ed. 510, 19 Sup. Ct. Rep. 254; Kepner v. United States, 195 U. S. 126, 49 L. ed. 123, 24 Sup. Ct. Rep. 797, 1 A. & E. Ann. Cas. 655.

merce . . . is hereby declared to be illegal." As there is no room for dispute that the statute was intended to formulate a rule for the regulation of interstate and foreign commerce, the question is, What was the rule which it adopted?

In view of the common law and the law in this country as to restraint of trade, which we have reviewed, and the illuminating effect which that history must have under the rule to which we have referred, we think it results:

a. That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense.

b. That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an [60] undue restraint of *interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference,—that is, an undue restraint.

c. And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated. Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.

And a consideration of the text of the 2d section serves to establish that it was intended to supplement the 1st, and to make sure that by no possible guise could the public policy embodied in the 1st section be frustrated or evaded. The prohibition of the 2d embrace *"every per-[61 son who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations. . . ." By reference to the terms of § 8 it is certain that the word "person" clearly implies a corporation as well as an individual.

The commerce referred to by the words "any part," construed in the light of the manifest purpose of the statute, has both a geographical and a distributive significance; that is, it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce.

Undoubtedly, the words "to monopolize" and "monopolize," as used in the section, reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the 1st section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the 2d section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the 1st section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the 1st section. And, of course, when the 2d section is thus harmonized with and made, as it *was intended to be, the complement of [62 the 1st, it becomes obvious that the criteria

to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act, and thus the public policy which its restrictions were obviously enacted to subserve. And it is worthy of observation, as we have previously remarked concerning the common law, that although the statute, by the comprehensiveness of the enumerations embodied in both the 1st and 2d sections, makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete, it indicates a consciousness that the freedom of the individual right to contract, when not unduly or improperly exercised, was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneoous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words, that freedom to contract was the essence of freedom from undue restraint on the right to contract.

Clear as it seems to us is the meaning of the provisions of the statute in the light of the review which we have made, nevertheless, before definitively applying that meaning, it behooves us to consider the contentions urged on one side or the other concerning the meaning of the statute, which, if maintained, would give to it, in some aspects, a much wider and in every view, at least, a somewhat different, significance. And to do this brings us to the second question, which, at the outset, we have stated it was our purpose to consider and dispose of.

63] *Second. *The contentions of the parties as to the meaning of the statute, and the decisions of this court relied upon concerning those contentions.*

In substance, the propositions urged by the government are reducible to this: That the language of the statute embraces every contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language. The error involved lies in assuming the matter to be decided. This is true, because, as the acts which may come under the classes stated in the 1st section and the restraint of trade to which that section applies are not specifically enumerated or defined, it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether, if the act is within such classes, its nature or effect causes it to be a restraint of trade within the intendment of the act. To hold to the contrary would require the conclusion either that every contract, act, or combination of any kind or nature, whether it operated a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce, or, if this conclusion were not reached, then the contention would require it to be held that, as the statute did not define the things to which it related, and excluded resort to the only means by which the acts to which it relates could be ascertained,—the light of reason,—the enforcement of the statute was impossible because of its uncertainty. The merely generic enumeration which the statute makes of the acts to which it refers, and the absence of any definition of restraint of trade as used in the statute, leaves room for but one conclusion, which is, that it was expressly designed not to unduly limit the application *of the act by precise definition,[64 but, while clearly fixing a standard, that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute.

But, it is said, persuasive as these views may be, they may not be here applied, because the previous decisions of this court have given to the statute a meaning which expressly excludes the construction which must result from the reasoning stated. The cases are United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, and United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25. Both the cases involved the legality of combinations or associations of railroads engaged in interstate commerce for the purpose of controlling the conduct of the parties to the association or combination in many particulars. The association or combination was assailed in each case as being in violation of the statute. It was held that they were. It is undoubted that, in the opinion in each case, general language was made use of, which, when separated from its

context, would justify the conclusion that it was decided that reason could not be resorted to for the purpose of determining whether the acts complained of were within the statute. It is, however, also true that the nature and character of the contract or agreement in each case was fully referred to, and suggestions as to their unreasonableness pointed out in order to indicate that they were within the prohibitions of the statute. As the cases cannot, by any possible conception, be treated as authoritative without the certitude that reason was resorted to for the purpose of deciding them, it follows as a matter of course that it must have been held by the light of reason, since the conclusion could not have been otherwise reached, that the assailed 65]*contracts or agreements were within the general enumeration of the statute, and that their operation and effect brought about the restraint of trade which the statute prohibited. This being inevitable, the deduction can in reason only be this: That in the cases relied upon, it having been found that the acts complained of were within the statute, and operated to produce the injuries which the statute forbade, that resort to reason was not permissible in order to allow that to be done which the statute prohibited. This being true, the rulings in the case relied upon, when rightly appreciated, were therefore this, and nothing more: That as considering the contracts and agreements, their necessary effect, and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or nonexpediency of having made the contracts, or the wisdom or want of wisdom of the statute which prohibited their being made. That is to say, the cases but decided that the nature and character of the contracts, creating, as they did, a conclusive presumption which brought them within the statute, such result was not to be disregarded by the substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made.

But aside from reasoning, it is true to say that the cases relied upon do not, when rightly construed, sustain the doctrine contended for, is established by all of the numerous decisions of this court which have applied and enforced the anti-trust act, since they all, in the very nature of things, rest upon the premise that reason was the guide by which the provisions of the act were in every case interpreted. Indeed, intermediate the decision of the two cases, that is, after the decision in the Freight Association Case, and before the decision in the Joint Traffic Case, the case of Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40, was decided, *the opinion being delivered by[66 Mr. Justice Peckham, who wrote both the opinions in the Freight Association and in the Joint Traffic Cases. And, referring in the Hopkins Case to the broad claim made as to the rule of interpretation announced in the Freight Association Case, it was said (p. 592): "To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act." And in the Joint Traffic Case this statement was expressly reiterated and approved and illustrated by example. Like limitation on the general language used in Freight Association and Joint Traffic Cases is also the clear result of E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 92, 46 L. ed. 1058, 1069, 22 Sup. Ct. Rep. 747, and especially of Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208.

If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct. This is true, because the construction which we have deduced from the history of the act and the analysis of its text is simply that in every case where it is claimed that an act or acts are in violation of the statute, the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied. From this it follows, since that rule and the result of the test as to direct or indirect, in their ultimate aspect, come to one and the same thing, that the difference between the two is therefore only that which obtains between things which do not differ at all.

*If it be true that there is this iden-[67 tity of result between the rule intended to be applied in the Freight Association Case, that is, the rule of direct and indirect, and the rule of reason which, under the statute as we construe it, should be here applied, it may be asked how was it that, in the opinion in the Freight Association Case,

much consideration was given to the subject of whether the agreement or combination which was involved in that case could be taken out of the prohibitions of the statute upon the theory of its reasonableness. The question is pertinent and must be fully and frankly met; for if it be now decmed that the Freight Association Case was mistakenly decided or too broadly stated, the doctrine which it announced should be either expressly overruled or limited.

The confusion which gives rise to the question results from failing to distinguish between the want of power to take a case which, by its terms or the circumstances which surrounded it, considering among such circumstances the character of the parties, is plainly within the statute, out of the operation of the statute by resort to reason in effect to establish that the contract ought not to be treated as within the statute, and the duty in every case where it becomes necessary from the nature and character of the parties to decide whether it was within the statute, to pass upon that question by the light of reason. This distinction, we think, serves to point out what, in its ultimate conception, was the thought underlying the reference to the rule of reason made in the Freight Association Case,—especially when such reference is interpreted by the context of the opinion and in the light of the subsequent opinion in the Hopkins Case and in Cincinnati, P. B. S. & P. Packet Co. v. Bay.

And in order not in the slightest degree to be wanting in frankness, we say that in so far, however, as by separating the general language used in the opinions in the Freight Association and Joint Traffic Cases 68]from the context *and the subject and parties with which the cases were concerned, it may be conceived that the language referred to conflicts with the construction which we give the statute, they are necessarily now limited and qualified. We see no possible escape from this conclusion if we are to adhere to the many cases decided in this court in which the anti-trust law has been applied and enforced, and if the duty to apply and enforce that law in the future is to continue to exist. The first is true, because the construction which we now give the statute does not in the slightest degree conflict with a single previous case decided concerning the anti-trust law, aside from the contention as to the Freight Association and Joint Traffic Cases, and because every one of those cases applied the rule of reason for the purpose of determining whether the subject before the court was within the statute. The second is also true, since, as we have already pointed out, unaided by the light of reason it is impossible to understand how the statute may in the future be enforced and the public policy which it establishes be made efficacious.

So far as the objections of the appellants are concerned, they are all embraced under two headings:—

a. That the act, even if the averments of the bill be true, cannot be constitutionally applied, because to do so would extend the power of Congress to subjects *dehors* the reach of its authority to regulate commerce, by enabling that body to deal with mere questions of production of commodities within the states. But all the structure upon which this argument proceeds is based upon the decision in United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249. The view, however, which the argument takes of that case, and the arguments based upon that view, have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the anti-trust act, and have been so necessarily and expressly decided to be unsound, as to cause the contentions to be plainly foreclosed and to require no express *notice. Northern Securities[69 Co. v. United States, 193 U. S. 334, 48 L. ed. 699, 24 Sup. Ct. Rep. 436; Loewe v. Lawler, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572.

b. Many arguments are pressed in various forms of statement which in substance amount to contending that the statute cannot be applied under the facts of this case without impairing rights of property and destroying the freedom of contract or trade which is essentially necessary to the well-being of society, and which, it is insisted, is protected by the constitutional guaranty of due process of law. But the ultimate foundation of all these arguments is the assumption that reason may not be resorted to in interpreting and applying the statute, and therefore that the statute unreasonably restricts the right to contract, and unreasonably operates upon the right to acquire and hold property. As the premise is demonstrated to be unsound by the construction we have given the statute, of course the propositions which rest upon that premise need not be further noticed.

So far as the arguments proceed upon the conception that, in view of the generality of the statute, it is not susceptible of

being enforced by the courts because it cannot be carried out without a judicial exertion of legislative power, they are clearly unsound. The statute certainly generically enumerates the character of acts which it prohibits and the wrong which it was intended to prevent. The propositions therefore insist that, consistently with the fundamental principles of due process of law, it never can be left to the judiciary to decide whether, in a given case, particular acts come within a generic statutory provision. But to reduce the propositions, however, to this, their final meaning, makes it clear that in substance they deny the existence of essential legislative authority, and challenge the right of the judiciary to perform duties which that department of the government has exerted 70]from *the beginning. This is so clear as to require no elaboration. Yet, let us demonstrate that which needs no demonstration, by a few obvious examples. Take, for instance, the familiar cases where the judiciary is called upon to determine whether a particular act or acts are within a given prohibition, depending upon wrongful intent. Take questions of fraud. Consider the power which must be exercised in every case where the courts are called upon to determine whether particular acts are invalid which are, abstractly speaking, in and of themselves valid, but which are asserted to be invalid because of their direct effect upon interestate commerce.

We come, then, to the third proposition requiring consideration, *viz.:*

Third. The facts and the application of the statute to them.

Beyond dispute the proofs establish substantially as alleged in the bill the following facts:

1. The creation of the Standard Oil Company of Ohio.

2. The organization of the Standard Oil Trust of 1882, and also a previous one of 1879, not referred to in the bill, and the proceedings in the supreme court of Ohio, culminating in a decree based upon the finding that the company was unlawfully a party to that trust; the transfer by the trustees of stocks in certain of the companies; the contempt proceedings; and, finally, the increase of the capital of the Standard Oil Company of New Jersey and the acquisition by that company of the shares of the stock of the other corporations in exchange for its certificates.

The vast amount of property and the possibilities of far-reaching control which resulted from the facts last stated are shown by the statement which we have previously annexed concerning the parties to the trust agreement of 1882, and the corporations whose stock was held by the trustees under the trust, and which came therefore to be held by the New Jersey corporation. But these statements do not with accuracy convey an appreciation of the *situation as it existed at the time[71 of the entry of the decree below, since, during the more than ten years which elapsed between the acquiring by the New Jersey corporation of the stock and other property which was formerly held by the trustees under the trust agreement, the situation, of course, had somewhat changed,—a change which, when analyzed in the light of the proof, we think establishes that the result of enlarging the capital stock of the New Jersey company and giving it the vast power to which we have referred produced its normal consequence; that is, it gave to the corporation, despite enormous dividends and despite the dropping out of certain corporations enumerated in the decree of the court below, an enlarged and more perfect sway and control over the trade and commerce in petroleum and its products. The ultimate situation referred to will be made manifest by an examination of §§ 2 and 4 of the decree below, which are excerpted in the margin.†

*Giving to the facts just stated the[72 weight which it was deemed they were entitled to, in the light afforded by the *proof of other cognate facts and cir-[73 cumstances, the court below held that the acts and dealings established by the *proof operated to destroy the "po-[74 tentiality of competition" which otherwise would have existed to such an extent as

† Section 2. That the defendants John D. Rockefeller, William Rockefeller, Henry H. Rogers, Henry M. Flagler, John D. Archbold, Oliver H. Payne, and Charles M. Pratt, hereafter called the seven individual defendants, united with the Standard Oil Company and other defendants to form and effectuate this combination, and since its formation have been and still are engaged in carrying it into effect and continuing it; that the defendants Anglo-American Oil Company (Limited), Atlantic Refining Company, Buckeye Pipe Line Company, Borne-Scrymser Company, Chesebrough Manufacturing Company, Consolidated, Cumberland Pipe Line Company, Colonial Oil Company Continental Oil Company, Crescent Pipe Line Company, Henry C. Folger, Jr., and Calvin N. Payne, a copartnership doing business under the firm name and style of Corsicana Refining Company, Eureka Pipe Line Company, Galena Signal Oil Company, Indiana Pipe Line Company, Manhattan Oil Company, National Transit Company, New York Transit Company, Northern Pipe Line Company, Ohio Oil Company, Prairie Oil & Gas Company, Security Oil Company, Solar Refining Company, Southern Pipe Line

to cause the transfers of stock which were made to the New Jersey Corporation and the control which resulted over the many and various subsidiary corporations to be a combination or conspiracy in restraint of trade, in violation of the 1st section of the act, but also to be an attempt to monopolize and monopolization bringing about a perennial violation of the 2d section.

We see no cause to doubt the correctness of these conclusions, considering the subject from every aspect; that is, both in view of the facts established by the record and the necessary operation and effect of the 75]law as we have *construed it upon the inferences deducible from the facts, for the following reasons:

a. Because the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the prima facie presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade, and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.

b. Because the prima facie presumption

Company, South Penn Oil Company, Southwest Pennsylvania Pipe Lines Company, Standard Oil Company of California, Standard Oil Company of Indiana, Standard Oil Company of Iowa, Standard Oil Company of Kansas, Standard Oil Company of Kentucky, Standard Oil Company of Nebraska, Standard Oil Company of New York, Standard Oil Company of Ohio, Swan & Finch Company, Union Tank Line Company, Vacuum Oil Company, Washington Oil Company, Waters-Pierce Oil Company,—have entered into and become parties to this combination, and are either actively operating or aiding in the operation of it; that by means of this combination the defendants named in this section have combined and conspired to monopolize, have monopolized, and are continuing to monopolize, a substantial part of the commerce among the states, in the territories, and with foreign nations, in violation of § 2 of the anti-trust act.

. . . . . .

Section 4. That in the formation and execution of the combination or conspiracy the Standard Company has issued its stock to the amount of more than $90,000,000 in exchange for the stocks of other corporations which it holds, and it now owns and controls all of the capital stock of many corporations, a majority of the stock or controlling interests in some corporations, and stock in other corporations as follows:

Name of company.	Total capital stock.	Owned by Standard Oil Company.
Anglo-American Oil Company, Limited	£1,000,000	£999,740
Atlantic Refining Company	$5,000,000	$5,000,000
Borne-Scrymser Company	200.000	199,700
Buckeye Pipe Line Company	10,000.000	9,999,700
Chesebrough Manufacturing Company, Consolidated	500,000	277,700
Colonial Oil Company	250,000	249.300
Continental Oil Company	300,000	300.000
Crescent Pipe Line Company	3,000.000	3,000,000
Eureka Pipe Line Company	5,000.000	4,999,400
Galena-Signal Oil Company	10,000,000	7,079,500
Indiana Pipe Line Company	1,000.000	999,700
Lawrence Natural Gas Company	450.000	450,000
Mahoning Gas Fuel Company	150.000	149,900
Mountain State Gas Company	500,000	500,000
National Transit Company	25,455.200	25,451,650
New York Transit Company	5,000,000	5,000,000
Northern Pipe Line Company	4,000,000	4,000,000
Northwestern Ohio Natural Gas Company	2,775,250	1,649,450
Ohio Oil Company	10,000,000	9,999,850
People's Natural Gas Company	1,000,000	1,000,000
Pittsburg Natural Gas Company	310,000	310,000
Solar Refining Company	500.000	499,400
Southern Pipe Line Company	10,000,000	10,000,000
South Penn Oil Company	2,500,000	2,500,000
Southwest Pennsylvania Pipe Lines	3,500,000	3,500,000
Standard Oil Company (of California)	17,000,000	16,999,500
Standard Oil Company (of Indiana)	1,000,000	999,000

of intent to restrain trade, to monopolize and to bring about monopolization, resulting from the act of expanding the stock of the New Jersey corporation and vesting it with such vast control of the oil industry, is made conclusive by considering (1) the conduct of the persons or corporations who were mainly instrumental in bringing about the extension of power in the New Jersey corporation before the consummation of that result and prior to the formation of the trust agreements of 1879 and 1882; (2) by considering the proof as to what was done under those agreements and the acts which immediately preceded the vesting of power in the New Jersey corporation, as well as by weighing the modes in which the power vested in that corporation has been exerted and the results which have arisen from it.

Recurring to the acts done by the individuals or corporations who were mainly instrumental in bringing about the *ex-[76 pansion of the New Jersey corporation during the period prior to the formation of the trust agreements of 1879 and 1882, including those agreements, not for the purpose of weighing the substantial merit of the numerous charges of wrongdoing made during such period, but solely as an aid for discovering intent and purpose, we think no disinterested mind can survey the period in question without being irresistibly driven to the conclusion that the very genius for commercial development and organization which it would seem was manifested from the beginning soon begot an intent and purpose to exclude others which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business

Name of company.	Total capital stock.	Owned by Standard Oil Company.
Standard Oil Company (of Iowa)	1,000,000	1,000,000
Standard Oil Company (of Kansas)	1,000,000	999,300
Standard Oil Company (of Kentucky)	1,000,000	997,200
Standard Oil Company (of Nebraska)	600,000	599,500
Standard Oil Company of New York	15,000,000	15,000,000
Standard Oil Company (of Ohio)	3,500,000	3,499,400
Swan & Finch Company	100,000	100,000
Union Tank Line Company	3,500,000	3,499,400
Vacuum Oil Company	2,500,000	2,500,000
Washington Oil Company	100,000	71,480
Waters-Pierce Oil Company	400,000	274,700

That the defendant National Transit Company, which is owned and controlled by the Standard Oil Company as aforesaid, owns and controls the amounts of the capital stocks of the following-named corporations and limited partnerships stated opposite each, respectively, as follows:

Name of company.	Total capital stock.	Owned by National Transit Company.
Connecting Gas Company	$825,000	$412,000
Cumberland Pipe Line Company	1,000,000	998,500
East Ohio Gas Company	6,000,000	5,999,500
Franklin Pipe Company, Limited	50,000	19,500
Prairie Oil & Gas Company	10,000,000	9,999,500

That the Standard Company has also acquired the control by the ownership of its stock or otherwise of the Security Oil Company, a corporation created under the laws of Texas, which owns a refinery at Beaumont in that state, and the Manhattan Oil Company, a corporation, which owns a pipe line situated in the states of Indiana and Ohio; that the Standard Company and the corporations and partnerships named in § 2 are engaged in the various branches of the business of producing, purchasing, and transporting petroleum in the principal oil-producing districts of the United States, in New York, Pennsylvania, West Virginia, Tennessee, Kentucky, Ohio, Indiana, Illinois, Kansas, Oklahoma, Lousiana, Texas, Colorado, and California, in shipping and transporting the oil through pipe lines owned or controlled by these companies from the various oil-producing districts into and through other states, in refining the petroleum and manufacturing it into various products, in shipping the petroleum and the products thereof into the states and territories of the United States, the District of Columbia, and to foreign nations, in shipping the petroleum and its products in tank cars owned or controlled by the subsidiary companies into various states and territories of the United States and into the District of Columbia, and in selling the petroleum and its products in various places in the states and territories of the United States, in the District of Columbia, and in foreign countries; that the Standard Company controls the subsidiary companies and directs the management thereof, so that none of the subsidiary companies competes with any other of those companies or with the Standard Company, but their trade is all managed as that of a single person.

power by usual methods, but which, on the contrary, necessarily involved the intent to drive others from the field and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view. And, considering the period from the date of the trust agreements of 1879 and 1882, up to the time of the expansion of the New Jersey corporation, the gradual extension of the power over the commerce in oil which ensued, the decision of the supreme court of Ohio, the tardiness or reluctance in conforming to the commands of that decision, the methods first adopted and that which finally culminated in the plan of the New Jersey corporation, all additionally serve to make manifest the continued existence of the intent which we have previously indicated, and which, among other things, impelled the expansion of the New Jersey corporation. The exercise of the power which resulted from that organization fortifies the foregoing conclusions, since the development which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed and brought [77] under control, *the system of marketing which was adopted by which the country was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination, and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention.

The inference that no attempt to monopolize could have been intended, and that no monopolization resulted from the acts complained of, since it is established that a very small percentage of the crude oil produced was controlled by the combination, is unwarranted. As substantial power over the crude product was the inevitable result of the absolute control which existed over the refined product, the monopolization of the one carried with it the power to control the other; and if the inferences which this situation suggests were developed, which we deem it unnecessary to do, they might well serve to add additional cogency to the presumption of intent to monopolize which we have found arises from the unquestioned proof on other subjects.

We are thus brought to the last subject which we are called upon to consider, *viz.:*

Fourth. The remedy to be administered.

It may be conceded that, ordinarily where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies. As penalties which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted *the applica-[78] tion of remedies two-fold in character becomes essential: 1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about.

In applying remedies for this purpose, however, the fact must not be overlooked that injury to the public by the prevention of an undue restraint on, or the monopolization of, trade or commerce, is the foundation upon which the prohibitions of the statute rest, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property.

Let us, then, as a means of accurately determining what relief we are to afford, first come to consider what relief was afforded by the court below, in order to fix how far it is necessary to take from or add to that relief, to the end that the prohibitions of the statute may have complete and operative force.

The court below, by virtue of §§ 1, 2, and 4 of its decree, which we have in part previously excerpted in the margin, adjudged that the New Jersey corporation, in so far as it held the stock of the various corporations recited in §§ 2 and 4 of the decree, or controlled the same, was a combination in violation of the 1st section of the act, and an attempt to monopolize or a monopolization contrary to the 2d section of the act. It commanded the dissolution of the combination, and therefore in effect directed the transfer by the New Jersey corporation back to the stockholders of the various subsidiary corporations entitled to the same of the stock which had been turned over to the New Jersey com-

pany in exchange for its stock. To 79]*make this command effective, § 5 of the decree forbade the New Jersey corporation from in any form or manner exercising any ownership or exerting any power directly or indirectly in virtue of its apparent title to the stocks of the subsidiary corporations, and prohibited those subsidiary corporations from paying any dividends to the New Jersey corporations, or doing any act which would recognize further power in that company, except to the extent that it was necessary to enable that company to transfer the stock. So far as the owners of the stock of the subsidiary corporations and the corporations themselves were concerned after the stock had been transferred, § 6 of the decree enjoined them from in any way conspiring or combining to violate the act, or to monopolize or attempt to monopolize in virtue of their ownership of the stock transferred to them, and prohibited all agreements between the subsidiary corporations or other stockholders in the future, tending to produce or bring about further violations of the act.

By § 7, pending the accomplishment of the dissolution of the combination by the transfer of stock, and until it was consummated, the defendants named in § 2, constituting all the corporations to which we have referred, were enjoined from engaging in or carrying on interstate commerce. And by § 9, among other things, a delay of thirty days was granted for the carrying into effect of the directions of the decree.

So far as the decree held that the ownership of the stock of the New Jersey corporation constituted a combination in violation of the 1st section and an attempt to create a monopoly or to monopolize under the 2d section, and commanded the dissolution of the combination, the decree was clearly appropriate. And this also is true of § 5 of the decree, which restrained both the New Jersey corporation and the subsidiary corporations from doing anything which would recognize or give effect 80]to further ownership *in the New Jersey corporation of the stocks which were ordered to be retransferred.

But the contention is that, in so far as the relief by way of injunction which was awarded by § 6 against the stockholders of the subsidiary corporations or the subsidiary corporations themselves after the transfer of stock by the New Jersey corporation was completed in conformity to the decree, that the relief awarded was too broad: a. Because it was not sufficiently specific, and tended to cause those who were within the embrace of the order to cease to be under the protection of the law of the land and required them to thereafter conduct their business under the jeopardy of punishments for contempt for violating a general injunction. New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 404, 50 L. ed. 526, 26 Sup. Ct. Rep. 272. Besides it is said that the restraint imposed by § 6—even putting out of view the consideration just stated—was, moreover, calculated to do injury to the public, and it may be in and of itself to produce the very restraint on the due course of trade which it was intended to prevent. We say this since it does not necessarily follow because an illegal restraint of trade or an attempt to monopolize or a monopolization resulted from the combination and the transfer of the stocks of the subsidiary corporations to the New Jersey corporation that a like restraint or attempt to monopolize or monopolization would necessarily arise from agreements between one or more of the subsidiary corporations after the transfer of the stock by the New Jersey corporation. For illustration, take the pipe lines. By the effect of the transfer of the stock, the pipe lines would come under the control of various corporations instead of being subjected to a uniform control. If various corporations owning the lines determined in the public interests to so combine as to make a continuous line, such agreement or combination would not be repugnant to the act, and yet it might be restrained by the decree. As another example, take the *Union Tank Line Company, one of the[81 subsidiary corporations, the owner practically of all the tank cars in use by the combination. If no possibility existed of agreements for the distribution of these cars among the subsidiary corporations, the most serious detriment to the public interest might result. Conceding the merit, abstractly considered, of these contentions, they are irrelevant. We so think, since we construe the sixth paragraph of the decree, not as depriving the stockholders or the corporations, after the dissolution of the combination, of the power to make normal and lawful contracts or agreements, but as restraining them from, by any device whatever, recreating, directly or indirectly, the illegal combination which the decree dissolved. In other words, we construe the sixth paragraph of the decree, not as depriving the stockholders or corporations of the right to live under the law of the land, but as compelling obedience to that law. As therefore the sixth paragraph as thus construed is not amenable to the criticism directed against it and cannot produce the harmful results which the arguments suggest, it was obviously right. We think

that, in view of the magnitude of the interests involved and their complexity, the delay of thirty days allowed for executing the decree was too short and should be extended so as to embrace a period of at least six months. So also, in view of the possible serious injury to result to the public from an absolute cessation of interstate commerce in petroleum and its products by such vast agencies as are embraced in the combination, a result which might arise from that portion of the decree which enjoined carrying on of interstate commerce not only by the New Jersey corporation, but by all the subsidiary companies, until the dissolution of the combination by the transfer of the stocks in accordance with the decree, the injunction provided for in § 7 thereof should not have been awarded.

Our conclusion is that the decree below was right and should be affirmed, except as 82]to the minor matters concerning *which we have indicated the decree should be modified. Our order will therefore be one of affirmance, with directions, however, to modify the decree in accordance with this opinion. The court below to retain jurisdiction to the extent necessary to compel compliance in every respect with its decree.

And it is so ordered.

Mr. Justice **Harlan**, concurring in part and dissenting in part:

A sense of duty constrains me to express the objections which I have to certain declarations in the opinion just delivered on behalf of the court.

I concur in holding that the Standard Oil Company of New Jersey and its subsidiary companies constitute a combination in restraint of interstate commerce, and that they have attempted to monopolize and have monopolized parts of such commerce,—all in violation of what is known as the anti-trust act of 1890. 26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200. The evidence in this case overwhelmingly sustained that view and led the circuit court, by its final decree, to order the dissolution of the New Jersey corporation and the discontinuance of the illegal combination between that corporation and its subsidiary companies.

In my judgment, the decree below should have been affirmed without qualification. But the court, while affirming the decree, directs some modifications in respect of what it characterizes as "minor matters." It is to be apprehended that those modifications may prove to be mischievous. In saying this, I have particularly in view the statement in the opinion that "it does not necessarily follow because an illegal restraint of trade or an attempt to monopolize or a monopolization resulted from the combination and the transfer of the stocks of the subsidiary corporations to the New Jersey corporation, *that a like re-[83 straint of trade or attempt to monopolize or monopolization would necessarily arise from agreements between one or more of the subsidiary corporations after the transfer of the stock by the New Jersey Corporation," Taking this language, in connection with other parts of the opinion, the subsidiary companies are thus, in effect, informed—unwisely, I think—that although the New Jersey corporation, being an illegal combination, must go out of existence, *they* may join in an agreement *to restrain commerce* among the states if such restraint be not "undue."

In order that my objections to certain parts of the court's opinion may distinctly appear, I must state the circumstances under which Congress passed the anti-trust act, and trace the course of judicial decisions as to its meaning and scope. This is the more necessary because the court by its decision, when interpreted by the language of its opinion, has not only upset the long-settled interpretation of the act, but has usurped the constitutional functions of the legislative branch of the government. With all due respect for the opinions of others, I feel bound to say that what the court has said may well cause some alarm for the integrity of our institutions. Let us see how the matter stands.

All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The nation had been rid of human slavery,—fortunately, as all now feel,—but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people; namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life. Such a danger was thought to be then *imminent, and all felt that is must be[84 met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong. Congress therefore took up the matter and gave the whole subject the fullest consideration. All agreed that the national government could not, by legislation, regulate the domestic trade carried on wholly within the several states; for power to regulate such trade remained with, because never surrendered by, the states. But, under authority expressly

granted to it by the Constitution, Congress could regulate commerce among the several states and with foreign states. Its authority to regulate such commerce was and is paramount, due force being given to other provisions of the fundamental law, devised by the fathers for the safety of the government and for the protection and security of the essential rights inhering in life, liberty, and property.

Guided by these considerations, and to the end that the people, *so far as interstate commerce* was concerned, might not be dominated by vast combinations and monopolies, having power to advance their own selfish ends, regardless of the general interests and welfare, Congress passed the anti-trust act of 1890 in these words (the italics here and elsewhere in this opinion are mine):

"§ 1. *Every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make *any such contract or engage in any such combination or conspiracy* shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. § 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any 85]other person or persons *to monopolize, *any part* of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. § 3. *Every* contract, combination in form of trust *or otherwise*, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories and any state or states or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, is hereby declared illegal. Every person who shall make any *such* contract or engage in any *such* combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200.

The important inquiry in the present case is as to the meaning and scope of that act in its application to interstate commerce.

In 1896 this court had occasion to determine the meaning and scope of the act in an important case known as the Trans-Missouri Freight Case, 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540. The question there was as to the validity under the anti-trust act of a certain agreement between numerous railroad companies, whereby they formed an association for the purpose of establishing and maintaining rates, rules, and regulations in respect of freight traffic over specified routes. Two questions were involved: first, whether the act applied to railroad carriers; second, whether the agreement which was the basis of the suit which the United States brought to have the agreement annulled was illegal. The court *held that railroad carriers were em-[86 braced by the act. In determining that question, the court, among other things, said:

"The language of the act includes *every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations. So far as the very terms of the statute go, they apply to *any* contract of the nature described. A contract, therefore, that is in restraint of trade or commerce, is, by the strict language of the act, prohibited, even though such contract is entered into between competing common carriers by railroad, and only for the purposes of thereby affecting traffic rates for the transportation of persons and property. If such an agreement restrains trade or commerce, it is prohibited by the statute, unless it can be said that an agreement, no matter what its terms, relating only to transportation, cannot restrain trade or commerce. We see no escape from the conclusion that if an agreement of such a nature does restrain it, the agreement is condemned by this act. . . . Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital. Congress has, so far as its jurisdiction extends, prohibited *all* contracts or combinations in the form of trusts entered into for the purpose or restraining trade and commerce. . . . While the statute prohibits all combinations in the form of trusts or otherwise, the limitation is not confined to that form alone. *All* combinations which are *in restraint of trade or commerce* are prohibited, whether in the form of trusts or *in any other form whatever.*" 166 U. S. 290, 312, 324, 326.

The court then proceeded to consider the second of the above questions, saying: "The

next question to be discussed is as to what is the true construction of the statute, 87]*assuming that it applies to common carriers by railroad. What is the meaning of the language as used in the statute, that 'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal?' Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers, —all contracts of that nature? . . . It is now with much amplification of argument urged that the statute, in declaring illegal every combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in *unreasonable* restraint of trade, while leaving all others unaffected by the provisions of the act; that the common-law meaning of the term 'contract in restraint of trade' includes only such contracts as are in *unreasonable* restraint of trade; and when that term is used in the Federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof. . . . By the simple use of the term 'contract in restraint of trade,' *all* contracts of that nature, whether valid or otherwise, would be included, and *not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade.* When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but *all* contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress. . . . If only that kind of con-88]tract *which is in unreasonable restraint of trade be within the meaning of the statute, and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty. . . . To say, therefore, that the act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of reasonableness to the companies themselves. . . . But assuming that agreements of this nature are not void at common law, and that the various cases cited by the learned courts below show it, the answer to the statement of their validity now is to be found *in the terms of the statute* under consideration. . . . The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act *by way of judicial legislation an exception that is not placed there by the lawmaking branch of the government,* and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This *we cannot and ought not to do.* . . .

"If the act ought to read, as contended for by defendants, *Congress is the body to amend it, and not this court, by a process of judicial legislation wholly unjustifiable.* Large numbers do not agree that the view taken by defendants *is sound or true[89 in substance, and Congress may and very probably did share in that belief in passing the act. The public policy of the government is to be found *in its statutes,* and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, *public policy in such a case is what the statute enacts.* If the law prohibit any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject. The conclusion which we have drawn from the examination above made into the question before us is that the anti-trust act applies to railroads, and that it renders illegal *all* agreements which are *in restraint* of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature."

I have made these extended extracts from the opinion of the court in the Trans-Missouri Freight Case in order to show beyond

question that the point was there urged by counsel that the anti-trust act condemned *only* contracts, combinations, trusts, and conspiracies that were in *unreasonable* restraint of interstate commerce, and that the court in clear and decisive language met that point. It adjudged that Congress had in unequivocal words declared that "*every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of commerce among the several states," shall be illegal, and that no distinction, *so far as interstate commerce was concerned*, was to be tolerated between restraints of such commerce as were undue or unreasonable, and restraints that were due or reasonable. With full knowledge of the then condition of the country and of 90]its business, Congress determined *to meet, and did meet, the situation by an absolute, statutory prohibition of "*every* contract, combination in the form of trusts or otherwise, in restraint of trade or commerce." Still more; in response to the suggestion by able counsel that Congress intended only to strike down such contracts, combinations, and monopolies as unreasonably restrained interstate commerce, this court, in words too clear to be misunderstood, said that to so hold was "to read into the act by way of *judicial legislation*, an exception not placed there by the lawmaking branch of the government." "This," the court said, as we have seen, "*we cannot* and *ought not* to do."

It thus appears that fifteen years ago, when the purpose of Congress in passing the anti-trust act was fresh in the minds of courts, lawyers, statesmen, and the general public, this court expressly declined to indulge in judicial legislation, by inserting in the act the word "unreasonable" or any other word of like import. It may be stated here that the country at large accepted this view of the act, and the Federal courts throughout the entire country enforced its provisions according to the interpretation given in the Freight Association Case. What, then, was to be done by those who questioned the soundness of the interpretation placed on the act by this court in that case? As the court had decided that to insert the word "unreasonable" in the act would be "judicial legislation" on its part, the only alternative left to those who opposed the decision in that case was to induce Congress to so *amend* the act as to recognize the right to restrain interstate commerce to a *reasonable* extent. The public press, magazines, and law journals, the debates in Congress, speeches and addresses by public men and jurists, all contain abundant evidence of the general understanding that the meaning, extent, and scope of the anti-trust act had been judicially determined by this court, and that the only question remaining open for discussion was the *wisdom of the policy declared by the[91 act,—a matter that was exclusively within the cognizance of Congress. But at every session of Congress since the decision of 1896, the lawmaking branch of the government, with full knowledge of that decision, has refused to change the policy it had declared, or to so amend the act of 1890 as to except from its operation contracts, combinations, and trusts that *reasonably* restrain interstate commerce.

But those who were in combinations that were illegal did not despair. They at once set up the baseless claim that the decision of 1896 disturbed the "business interests of the country," and let it be known that they would never be content until the rule was established that would permit interstate commerce to be subjected to *reasonable* restraints. Finally, an opportunity came again to raise the same question which this court had, upon full consideration, determined in 1896. I now allude to the case of United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25, decided in 1898. What was that case?

It was a suit by the United States against more than thirty railroad companies, to have the court declare illegal, under the anti-trust act, a certain agreement between these companies. The relief asked was denied in the subordinate Federal courts and the government brought the case here.

It is important to state the points urged in that case by the defendant companies charged with violating the anti-trust act, and to show that the court promptly met them. To that end I make a copious extract from the opinion in the Joint Traffic Case. Among other things, the court said: "Upon comparing that agreement [the one in the Joint Traffic Case, then under consideration (171 U. S. 505)] with the one set forth in the case of United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, the great similarity between them suggests that a similar result should be reached in the two cases." (P. 558.) *Learned[92 counsel in the Joint Traffic Case urged a reconsideration of the question decided in the Trans-Missouri Case, contending that "the decision in that case [the Trans-Missouri Freight Case] is quite plainly erroneous, and the consequences of such error are far-reaching and disastrous, and clearly at war with justice and sound policy, and the construction placed upon the anti-trust statute has been received by the public with surprise and alarm." They suggested that

the point made in the Joint Traffic Case as to the meaning and scope of the act might have been, but was not, made in the previous case. The court said (171 U. S. 559) that "the report of the Trans-Missouri Case clearly shows not only that the point now taken *was* there urged upon the attention of the court, but it was then *intentionally* and *necessarily* decided."

The question whether the court should again consider the point decided in the Trans-Missouri Case was disposed of in the most decisive language, as follows: "Finally, we are asked to reconsider the question decided in the Trans-Missouri Case, and to retrace the steps taken therein, because of the plain error contained in that decision and the widespread alarm with which it was received, and the serious consequences which have resulted, or may soon result, from the law as interpreted in that case. It is proper to remark that an application for a reconsideration of a question but lately decided by this court is usually based upon a statement that some of the arguments employed on the original hearing of the question have been overlooked or misunderstood, or that some controlling authority has been either misapplied by the court or passed over without discussion or notice. While this is not strictly an application for a rehearing in the same case, yet in substance it is the same thing. The court is asked to reconsider a question but just decided after a careful investigation of the matter involved. There have heretofore been in effect two arguments of 93]precisely the same *questions now before the court, and the same arguments were addressed to us on both those occasions. The report of the Trans-Missouri Case shows a dissenting opinion delivered in that case, and that the opinion was concurred in by three other members of the court. That opinion, it will be seen, gives with great force and ability the arguments against the decision which was finally arrived at by the court. It was after a full discussion of the questions involved, and with the knowledge of the views entertained by the minority, as expressed in the dissenting opinion, that the majority of the court came to the conclusion it did. Soon after the decision a petition for a rehearing of the case was made, supported by a printed argument in its favor, and pressed with an earnestness and vigor and at a length which were certainly commensurate with the importance of the case. This court, *with care and deliberation* and also with a full appreciation of their importance, again considered the questions involved in its former decision. A majority of the court once more arrived at the conclusion it had first announced, and accordingly it denied the application. And now *for the third time* the same arguments are employed, and the court is again asked to recant its former opinion, and to decide the same question in direct opposition to the conclusion arrived at in the Trans-Missouri Case. The learned counsel, while making the application, frankly confess that the argument in opposition to the decision in the case above named has been so fully, so clearly, and so forcibly presented in the dissenting opinion of Mr. Justice White [in the Freight Case] that it is hardly possible to add to it, nor is it necessary to repeat it. The fact that there was so close a division of opinion in this court when the matter was first under advisement, together with the different views taken by some of the judges of the lower courts, led us to the most careful and scrutinizing examination of the arguments advanced by both sides, and it was after such an examination that the majority of *the court came to the conclusion it did.[94 It is not now alleged that the court on the former occasion overlooked any argument for the respondents or misapplied any controlling authority. It is simply insisted that the court, notwithstanding the arguments for an opposite view, arrived at an erroneous result, which, for reasons already stated, ought to be reconsidered and reversed. *As we have twice already deliberately and earnestly considered the same arguments which are now for a third time pressed upon our attention*, it could hardly be expected that our opinion should now change from that already expressed."

These utterances, taken in connection with what was previously said in the Trans-Missouri Freight Case, show so clearly and affirmatively as to admit of no doubt that this court, many years ago, upon the fullest consideration, interpreted the anti-trust act as prohibiting and making illegal not only *every* contract or combination, in whatever form, which was in restraint of interstate commerce, without regard to its reasonableness or unreasonableness, but all monopolies or attempt to monopolize "any part" of such trade or commerce. Let me refer to a few other cases in which the scope of the decision in the Freight Association Case was referred to: In E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 92, 46 L. ed. 1058, 1069, 22 Sup. Ct. Rep. 747, the court said: "It is true that it has been held by this court that the act (anti-trust act) included any restraint of commerce, whether *reasonable or unreasonable*,"—citing United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup.

Ct. Rep. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96. In W. W. Montague & Co. v. Lowry, 193 U. S. 38, 46, 48 L. ed. 608, 611, 24 Sup. Ct. Rep. 307, which involved the validity, under the anti-trust act, of a certain association formed for the sale of tiles, mantels, and grates, the court, referring to the contention that the sale of tiles in San Francisco was so small "as to be a negligible quantity," held that the association was nevertheless a combination [95] in restraint of interstate trade or *commerce, in violation of the anti-trust act. In Loewe v. Lawlor, 208 U. S. 274, 297, 52 L. ed. 488, 498, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815, all the members of this court concurred in saying that the Trans-Missouri, Joint Traffic, and Northern Securities [193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436] Cases "hold in effect that the anti-trust law has a broader application than the prohibition of restraints of trade unlawful at common law." In Shawnee Compress Co. v. Anderson (1908) 209 U. S. 423, 432, 52 L. ed. 865, 874, 28 Sup. Ct. Rep. 572, all the members of the court again concurred in declaring that "it has been decided that not only unreasonable but all direct restraints of trade are prohibited, the law being thereby distinguished from the common law." In United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 278, Judge Taft, speaking for the circuit court of appeals of the sixth circuit, said that according to the decision of this court in the Freight Association Case, "contracts in restraint of interstate transportation were within the statute, whether the restraints could be regarded as reasonable at common law or not." In Chesapeake & O. Fuel Co. v. United States (1902) 53 C. C. A. 256, 115 Fed. 610, 619, the circuit court of appeals for the sixth circuit, after referring to the right of Congress to regulate interstate commerce, thus interpreted the prior decisions of this court in the Trans-Missouri, the Joint Traffic, and the Addyston Pipe & Steel Co. Cases: "In the exercise of this right, Congress has seen fit to prohibit *all* contracts in restraint of trade. It has not left to the courts the consideration of the question whether such restraint is reasonable or unreasonable, or whether the contract would have been illegal at the common law or not. The act leaves for consideration by judicial authority no question of this character, but *all* contracts and combinations are declared illegal if in restraint of trade or commerce among the states." As far back as Robbins v. Taxing Dist. 120 U. S. 489, 497, 30 L. ed. 694, 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, it was held that certain local regulations subjecting drummers engaged in both interstate and domestic trade could not be sustained by reason of the fact that no discrimination *was made among citizens [96] of the different states. The court observed that this did not meet the difficulty, for the reason that "interstate commerce cannot be taxed *at all*." Under this view Congress no doubt acted when by the anti-trust act it forbade *any* restraint whatever upon interstate commerce. It manifestly proceeded upon the theory that interstate commerce could not be restrained *at all* by combinations, trusts, or monopolies, but must be allowed to flow in its accustomed channels, wholly unvexed and unobstructed by anything that would restrain its ordinary movement. See also Minnesota v. Barber, 136 U. S. 313, 326, 34 L. ed. 455, 460, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Brimmer v. Rebman, 138 U. S. 78, 82, 83, 34 L. ed. 862, 864, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213.

In the opinion delivered on behalf of the minority in the Northern Securities Case, 193 U. S. our present chief justice referred to the contentions made by the defendants in the Freight Association Case, namely, one of which was that the agreement there involved did not unreasonably restrain interstate commerce, and said: "Both these contentions were decided against the association, the court holding that the anti-trust act did embrace interstate carriage by railroad corporations, and as that act prohibited *any* contract in restraint of interstate commerce, *it hence embraced all contracts of that character, whether they were reasonable or unreasonable.*" One of the justices who dissented in the Northern Securities Case in a separate opinion, concurred in by the minority, thus referred to the Freight and Joint Traffic Cases: "For it cannot be too carefully remembered that that clause applies to 'every' contract of the forbidden kind,—a consideration which was the turning point of the Trans-Missouri Freight Association Case. . . . Size has nothing to do with the matter. A monopoly of 'any part' of commerce among the states is unlawful." In this connection it may be well to refer to the adverse report made in 1909, by Senator Nelson, on behalf of the Senate Judiciary Committee, in reference to a certain bill *offered in the [97] Senate, and which proposed to amend the anti-trust act in various particulars. That report contains a full, careful, and able analysis of judicial decisions relating to combinations and monopolies in restraint of trade and commerce. Among other things said in it which bear on the questions involved in the present case are these:

"The anti-trust act makes it a criminal offense to violate the law, and provides a punishment both by fine and imprisonment. To inject into the act the question of whether an agreement or combination is *reasonable* or *unreasonable* would render the act as a criminal or penal statute indefinite and uncertain, and hence, to that extent, utterly nugatory and void, and would practically amount to a repeal of that part of the act. . . . And while the same technical objection does not apply to civil prosecutions, *the injection of the rule of reasonableness or unreasonableness would lead to the greatest variableness and uncertainty in the enforcement of the law. The defense of reasonable restraint would be made in every case, and there would be as many different rules of reasonableness as cases, courts, and juries.* What one court or jury might deem unreasonable another court or jury might deem reasonable. A court or jury in Ohio might find a given agreement or combination reasonable, while a court and jury in Wisconsin might find the same agreement and combination unreasonable. In the case of the People v. Sheldon, 139 N. Y. 264, 23 L.R.A. 221, 36 Am. St. Rep. 690, 34 N. E. 785, Chief Justice Andrews remarks: 'If agreements and combinations to prevent competition in prices are or may be hurtful to trade, *the only sure remedy is to prohibit all agreements of that character.* If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing.' . . . To amend the anti-trust act, as suggested by this bill, would be to entirely emasculate it, and for all practical purposes render it nugatory as a 98]remedial *statute. Criminal prosecutions would not lie, and civil remedies would labor under the greatest doubt and uncertainty. The act as it exists is clear, comprehensive, certain, and highly remedial. It practically covers the field of Federal jurisdiction, and is in every respect a model law. To destroy or undermine it at the present juncture, when combinations are on the increase, and appear to be as oblivious as ever of the rights of the public, would be a calamity." The result was the indefinite postponement by the Senate of any further consideration of the proposed amendments of the anti-trust act.

After what has been adjudged, upon full consideration, as to the meaning and scope of the anti-trust act, and in view of the usages of this court when attorneys for litigants have attempted to reopen questions that have been deliberately decided, I confess to no little surprise as to what has occurred in the present case. The court says that the previous cases, above cited, "cannot by any possible conception be treated as authoritative without the certitude that *reason* was resorted to for the purpose of deciding them." And its opinion is full of intimations that this court proceeded in those cases, so far as the present question is concerned, without being guided by the "rule of reason" or "the light of reason." It is more than once intimated, if not suggested, that if the anti-trust act is to be construed as prohibiting *every* contract or combination, of whatever nature, which is in fact in restraint of commerce, regardless of the reasonableness or unreasonableness of such restraint, that fact would show that the court had not proceeded, in its decision, according to "the light of reason," but had disregarded the "rule of reason." If the court, in those cases, was wrong in its construction of the act, it is certain that it fully apprehended the views advanced by learned counsel in previous cases and pronounced them to be untenable. The published reports place this beyond all question. The opinion of the court *was de-[99 livered by a justice of wide experience as a judicial officer, and the court had before it the Attorney General of the United States and lawyers who were recognized, on all sides, as great leaders in their profession. The same eminent jurist who delivered the opinion in the Trans-Missouri Case delivered the opinion in the Joint Traffic Case, while the Association in the latter case was represented by lawyers whose ability was universally recognized. Is it to be supposed that any point escaped notice in those cases when we think of the sagacity of the justice who expressed the views of the court, or of the ability of the profound, astute lawyers who sought such an interpretation of the act as would compel the court to insert words in the statute which Congress had not put there, and the insertion of which words would amount to "judicial legislation?" Now this court is asked to do that which it has distinctly declared it could not and would not do, and has now done what it then said it could not constitutionally do. It has, by mere interpretation, modified the act of Congress, and deprived it of practical value as a defensive measure against the evils to be remedied. On reading the opinion just delivered, the first inquiry will be, that as the court is unanimous in holding that the particular things done by the Standard Oil Company and its subsidiary companies, in this case, were illegal under the anti-trust act, whether those things were in reasonable or unreasonable restraint of interstate commerce, why was it necessary to

make an elaborate argument, as is done in the opinion, to show that according to the "rule of reason" the act as passed by Congress should be interpreted as if it contained the word "unreasonable" or the word "undue?" The only answer which, in frankness, can be given to this question, is, that the court intends to decide that its deliberate judgment, fifteen years ago, to the effect that the act permitted no restraint whatever of interstate commerce, whether reasonable or unreasonable, was not in ac-[100]cordance with *the "rule of reason." In effect the court says that it will now, for the first time, bring the discussion under the "light of reason," and apply the "rule of reason" to the questions to be decided. I have the authority of this court for saying that such a course of proceeding on its part would be "judicial legislation."

Still more, what is now done involves a serious departure from the settled usages of this court. Counsel have not ordinarily been allowed to discuss questions already settled by previous decisions. More than once at the present term, that rule has been applied. In St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, the court had occasion to determine the meaning and scope of the original safety appliance act of Congress, passed for the protection of railroad employees and passengers on interstate trains. 27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174. A particular construction of that act was insisted upon by the interstate carrier which was sued under the safety appliance act; and the contention was that a different construction than the one insisted upon by the carrier would be a harsh one. After quoting the words of the act, Mr. Justice Moody said for the court: "There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was *to supplant the qualified duty of the common law with an absolute duty deemed by it more just.* If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. *They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional* [101]*power of the lawmaking *body.* . . . It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are, in the main, helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words. We see no error in this part of the case." And at the present term of this court we were asked, in a case arising under the safety appliance act, to reconsider the question decided in the Taylor Case. We declined to do so, saying in an opinion just now handed down: "In view of these facts, we are unwilling to regard the question as to the meaning and scope of the safety appliance act, so far as it relates to automatic couplers on trains moving interstate traffic, as open to further discussion here. *If the court was wrong in the Taylor Case, the way is open for such an amendment of the statute as Congress may, in its discretion, deem proper.* This court ought not now disturb what has been so widely accepted and acted upon by the courts as having been decided in that case. A contrary course would cause infinite uncertainty, if not mischief, in the administration of the law in the Federal courts. To avoid misapprehension, it is appropriate to say that we are not to be understood as questioning the soundness of the interpretation heretofore placed by this court upon the safety appliance act. We only mean to say that until Congress, by an amendment of the statute, changes the rule announced in the Taylor Case, this court will adhere to and apply that rule." Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, ante, 582, 31 Sup. Ct. Rep. 612. When counsel in the present case insisted upon a reversal of the former rulings of this court, and asked such an interpretation of the anti-trust act as would allow reasonable restraints of interstate commerce, this *court, in deference to es-[102 tablished practice, should, I submit, have said to them: "That question, according to our practice, is not open for further discussion here. This court long ago deliberately held (1) that the act, interpreting its words in their ordinary acceptation, prohibits *all* restraints of interstate commerce by combinations in whatever form, and whether reasonable or unreasonable; (2) the question relates to matters of public policy in reference to commerce among the states and with foreign nations, and Congress alone can deal with the subject; (3) this court would encroach upon the authori-

ty of Congress if, under the guise of construction, it should assume to determine a matter of public policy; (4) the parties must go to Congress and obtain an amendment of the anti-trust act if they think this court was wrong in its former decisions; and (5) this court cannot and will not *judicially legislate,* since its function is to declare the law, while it belongs to the legislative department to make the law." Such a course, I am sure, would not have offended the "rule of reason."

But my brethren, in their wisdom, have deemed it best to pursue a different course. They have now said to those who condemn our former decisions and who object to all legislative prohibitions of contracts, combinations, and trusts in restraint of interstate commerce, "You may *now* restrain such commerce, provided you are reasonable about it; only take care that the restraint is not undue." The disposition of the case under consideration, according to the views of the defendants, will, it is claimed, quiet and give rest to "the business of the country." On the contrary, I have a strong conviction that it will throw the business of the country into confusion and invite widely-extended and harassing litigation, the injurious effects of which will be felt for many years to come. When Congress prohibited *every* contract, combination, or monopoly, in restraint of commerce, it prescribed a simple, definite rule that all could understand, and which could be easily 103]applied *by everyone wishing to obey the law, and not to conduct their business in violation of law. But now, it is to be feared, we are to have, in cases without number, the constantly recurring inquiry—difficult to solve by proof—whether the particular contract, combination, or trust involved in each case is or is not an "unreasonable" or "undue" restraint of trade. Congress, in effect, said that there should be *no* restraint of trade, *in any form,* and this court solemnly adjudged many years ago that Congress meant what it thus said in clear and explicit words, and that it *could not* add to the words of the act. But those who condemn the action of Congress are now, in effect, informed that the courts will allow such restraint of interstate commerce as are shown not to be unreasonable or undue.

It remains for me to refer, more fully than I have heretofore done, to another, and, in my judgment,—if we look to the future,—the most important, aspect of this case. That aspect concerns the usurpation by the judicial branch of the government of the functions of the legislative department. The illustrious men who laid the foundations of our institutions deemed no part of the national Constitution of more consequence or more essential to the permanency of our form of government than the provisions under which were distributed the powers of government among three separate, equal, and co-ordinate departments,—legislative, executive, and judicial. This was at that time a new feature of governmental regulation among the nations of the earth, and it is deemed by the people of every section of our own country as most vital in the workings of a representative republic whose Constitution was ordained and established in order to accomplish the objects stated in its Preamble by the means, *but only by the means,* provided, either expressly or by necessary implication, by the instrument itself. No department of that government can constitutionally exercise the *powers committed strictly to another[104 and separate department.

I said at the outset that the action of the court in this case might well alarm thoughtful men who revered the Constitution. I meant by this that many things are intimated and said in the court's opinion which will not be regarded otherwise than as sanctioning an invasion by the judiciary of the constitutional domain of Congress,—an attempt by interpretation to soften or modify what some regard as a harsh public policy. This court, let me repeat, solemnly adjudged many years ago that it could not, except by *"judicial legislation,"* read words into the anti-trust act not put there by Congress, and which, being inserted, gives it a meaning which the words of the act, as passed, if properly interpreted, would not justify. The court has decided that it could not thus change a public policy formulated and declared by Congress; that Congress has paramount authority to regulate interstate commerce, and that it alone can change a policy once inaugurated by legislation. The courts have nothing to do with the wisdom or policy of an act of Congress. Their duty is to ascertain the will of Congress, and if the statute embodying the expression of that will is constitutional, the courts must respect it. They have no function to declare a public policy, nor to *amend legislative enactments.* "What is termed the policy of the government with reference to any particular legislation," as this court has said, "is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes." Hadden v. The Collector (Hadden v. Barney) 5 Wall. 107, 18 L. ed. 518. Nevertheless, if

I do not misapprehend its opinion, the court has now read into the act of Congress words which are not to be found there, and has thereby done that which it adjudged in 1896 and 1898 could not be done without 105]violating *the Constitution; namely, by interpretation of a statute changed a public policy declared by the legislative department.

After many years of public service at the national capital, and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad in our land a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction. As a public policy has been declared by the legislative department in respect of interstate commerce, over which Congress has entire control, under the Constitution, all concerned must patiently submit to what has been lawfully done, until the people of the United States—the source of all national power—shall, in their own time, upon reflection and through the legislative department of the government, require a change of that policy. There are some who say that it is a part of one's liberty to conduct commerce among the states without being subject to governmental authority. But that would not be liberty regulated by law, and liberty which cannot be regulated by law is not to be desired. The supreme law of the land, which is binding alike upon all, —upon Presidents, Congresses, the courts and the people,—gives to Congress, and to Congress alone, authority to regulate interstate commerce, and when Congress forbids *any* restraint of such commerce, in any form, all must obey its mandate. To overreach the action of Congress merely by judicial construction, that is, by indirection, is a blow at the integrity of our governmental system, and in the end will prove most dangerous to all. Mr. Justice Bradley wisely said, when on this bench, that illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of legal procedure. Boyd v. United States, 116 U. S. 616, 635, 29 L. ed. 746, 752, 6 Sup. Ct. Rep. 524. We shall do well to heed the warnings of that great jurist.

106] *I do not stop to discuss the merits of the policy embodied in the anti-trust act of 1890; for, as has been often adjudged, the courts, under our constitutional system, have no rightful concern with the wisdom or policy of legislation enacted by that branch of the government which alone can make laws.

For the reasons stated, while concurring in the general affirmance of the decree of the Circuit Court, I dissent from that part of the judgment of this court which directs the modification of the decree of the Circuit Court, as well as from those parts of the opinion which, in effect, assert authority in this court to insert words in the anti-trust act which Congress did not put there, and which, being inserted, Congress is made to declare, as part of the public policy of the country, what it has not chosen to declare.

UNITED STATES OF AMERICA, Appt.,
v.
AMERICAN TOBACCO COMPANY and Others. (No. 118.)

AMERICAN TOBACCO COMPANY and Others, Appts.,
v.
UNITED STATES OF AMERICA. (No. 119.)

(See S. C. Reporter's ed. 106-193.)

Monopoly — under anti-trust act — rule of reason.

1. The words "restraint of trade" in the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), condemning combinations in restraint of interstate or foreign trade or commerce, or the monopolization or attempts to monopolize any part thereof, should be given a meaning which will not destroy the individual right to contract, and render difficult, if not impossible, any movement of trade in the channels of commerce, the free movement of which it was the purpose of the statute to protect.

[For other cases, see Monopolies, II., in Digest Sup. Ct. 1908.]

Monopolies — restraints of trade or commerce — reason as criterion.

2. The standard of reason which had theretofore been applied at the common law and in the United States in dealing with subjects of the character embraced by the prohibitions of the act of July 2, 1890, §§ 1, 2, against combinations in restraint of interstate or foreign trade or commerce, or monopolization or attempts to monopolize any part thereof, was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.

[For other cases, see Monopolies, II., in Digest Sup. Ct. 1908.]

NOTE.—On illegal trusts under modern anti-trust laws—see notes to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

As to what relation a contract or combination must bear to interstate commerce in order to bring it within the scope of the Federal anti-trust act—see note to Loewe v. Lawlor, 52 L. ed. U. S. 488.

Monopolies — under anti-trust act — undue restraints.

3. Only acts, contracts, agreements, or combinations which operate to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of their evident purpose, injuriously restrain trade, fall within the condemnation of the act of July 2, 1890, of combinations in restraint of interstate or foreign trade or commerce, or monopolization or attempts to monopolize any part of such trade or commerce.

[For other cases, see Monopolies, II., in Digest Sup. Ct. 1908.]

Monopolies — under anti-trust act — disguise or subterfuge.

4. The generic character of the prohibitions of the act of July 2, 1890, §§ 1, 2, against combinations in restraint of interstate or foreign trade or commerce, and monopolization or attempts to monopolize any part thereof, covers every conceivable act which can possibly come within the spirit or purpose of the condemnation of the law, without regard to the garb in which such acts are clothed.

[For other cases, see Monopolies, II., in Digest Sup. Ct. 1908.]

Monopoly — under anti-trust act — illegal combination — tobacco trust.

5. The acquisition of dominion and control over the tobacco trade by a principal and accessory or subsidiary corporations as the result of purchasing numerous competitors, in many cases closing out the business when acquired, and of obtaining stock control of other competitors, as well as of concerns manufacturing the elements essential to the successful manufacture of tobacco products, brought about in many cases after a ruinous trade war, the parties in interest uniformly covenanting not to engage in the tobacco business, and the former business often continuing ostensibly as an independent concern, violates the prohibitions of the act of July 2, 1890, §§ 1, 2, against combinations in restraint of trade or commerce, or monopolization or attempts to monopolize any part thereof, whether looked at from the point of view of stock ownership, or from the standpoint of the principal and accessory or subsidiary corporations, viewed independently, including certain foreign corporations in so far as, by contracts made by them, they became co-operators in the combination.

[For other cases, see Monopolies, II. b, in Digest Sup. Ct. 1908.]

Judgment — against monopoly — extent of relief.

6. The relief to be granted where a combination has been found to violate the prohibitions of the act of July 2, 1890, against combinations in restraint of interstate or foreign trade or commerce, and monopolization or attempts to monopolize any part thereof, should be dictated by the duty of giving complete and efficacious effect to such prohibitions, the accomplishment of this result with as little injury as possible to the interests of the general public, and a proper regard for the vast interests of private property which may have become vested in many persons as the result of the acquisition of stock or securities of the combination without any guilty knowledge or intent.

[Form of judgment, see Judgment, II., in Digest Sup. Ct. 1908.]

Injunction — against violating anti-trust act — extent of relief.

7. The injury which might be inflicted upon the public by staying interstate commerce in tobacco and its products by a combination controlling the tobacco industry, in violation of the anti-trust act of July 2, 1890, forbids the allowance, in the first instance, of a permanent injunction restraining the combination as a whole, and all the individuals and corporations which form a part of, or co-operate in it in any manner or form, from continuing to engage in interstate commerce until the illegal situation is cured.

[For other cases, see Injunction, II. b, in Digest Sup. Ct. 1908.]

Receiver — for monopoly — occasion for appointment.

8. A receiver will not, in the first instance, be appointed to take charge of the assets and property of a combination controlling the tobacco industry, in violation of the anti-trust act of July 2, 1890, for the purpose of preventing a continued violation of the law, and thus working out, by a sale of the property of the combination or otherwise, a condition which will not be repugnant to the prohibitions of the act, since the extensive power which would result from at once resorting to a receivership might not only do grievous injury to the public, but also cause widespread and perhaps irreparable loss to many innocent persons.

[For other cases, see Receivers, I., in Digest Sup. Ct. 1908.]

Appeal — remanding for further hearing — dissolution of monopoly.

9. To give effective force to a decree of the Federal Supreme Court adjudging that a combination controlling the tobacco industry offends against the anti-trust act of July 2, 1890, the court below will be directed to hear the parties, by evidence or otherwise, as it may deem proper, for the purpose of ascertaining and determining upon some plan or method of dissolving the combination, and of recreating, out of the elements composing it, a new condition which shall not be repugnant to the law.

[For other cases, see Appeal and Error, 5403–5406, in Digest Sup. Ct. 1908.]

Judgment — dissolution of monopoly — time for compliance.

10. Six months, with a possible extension of sixty days, should be given in which to work out a plan for dissolving a combination found to control the tobacco industry in violation of the anti-trust act of July 2, 1890, and recreating out of the elements composing it a condition which will not be repugnant to the prohibitions of the act.

[For other cases, see Judgment, II., in Digest Sup. Ct. 1908.]

Injunction — against monopoly — further illegal acts.

11. Pending the working out of a plan for dissolving a combination found to control the tobacco industry in violation of the anti-trust act of July 2, 1890, and for recreating out of the elements composing it a condition which will not be repugnant to the prohibitions of the act, each and all of such elements should be restrained from doing any act which might further extend or enlarge the power of the combination by any means or device whatsoever.

[For other cases, see Injunction, I. g; II. b, in Digest Sup. Ct. 1908.]

[Nos. 118 and 119.]

Argued January 3, 4, 5, and 16, 1910. Ordered for reargument April 11, 1910. Reargued January 6, 9, 10, 11, and 12, 1911. Decided May 29, 1911.

CROSS APPEALS from the Circuit Court of the United States for the Southern District of New York to review a decree for the dissolution of a combination found to control the tobacco industry in violation of the anti-trust act. Reversed and remanded for further proceedings.

See same case below, 164 Fed. 700.

The facts are stated in the opinion.

Attorney General **Wickersham** and Mr. **J. C. McReynolds**, Special Assistant to the Attorney General, argued the cause and filed a brief for the United States:

Whether, under the circumstances presented and in respect of the rule invoked, certain things constituted parts of interstate or foreign commerce, or materially obstructed its free flow, are practical questions to be solved upon consideration of the facts of each case.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Swift & Co. v. United States, 196 U. S. 375, 398, 49 L. ed. 518, 525, 25 Sup. Ct. Rep. 276; Rearick v. Pennsylvania, 203 U. S. 507, 512, 51 L. ed. 295, 297, 27 Sup. Ct. Rep. 159; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 A. & E. Ann. Cas. 1103; Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; St. Louis Southwestern R. Co. v. Arkansas, 217 U. S. 136, 54 L. ed. 698, 29 L.R.A. (N.S.) 802, 30 Sup. Ct. Rep. 476.

Most of the cases in this line have grown out of supposed conflict between a state statute and the will of Congress; and the court, recognizing that, while the power of Congress to regulate commerce is undoubtedly a beneficient one, the police laws of the state are equally so, has sought to harmonize them in a practical way, permitting each to operate within its proper sphere.

Cook v. Marshall County, 196 U. S. 273, 49 L. ed. 475, 25 Sup. Ct. Rep. 233.

Neither the general expressions in the opinions touching commerce, nor the conclusions announced in respect of what constitutes a regulation or hindrance of it, should be accepted as entirely applicable and conclusive when the actions of individuals are under consideration and no occasion exists for harmonizing beneficent powers. Of necessity, a certain latitude of results has been permitted to statutes of sovereign states, and they have been allowed to affect interstate commerce to a degree not tolerable if occasioned by individuals acting in combination.

Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475.

The boundary lines of the police and taxing powers of a state do not mark out a realm where there may never be found any part of interstate commerce, national in character and susceptible of one uniform system or plan of regulation.

Smith v. Alabama, 124 U. S. 465, 479, 31 L. ed. 508, 512, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Welton v. Missouri, 91 U. S. 275, 282, 23 L. ed. 347, 350; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 378, 37 L. ed. 772, 777, 13 Sup. Ct. Rep. 914; Hall v. De Cuir, 95 U. S. 485, 24 L. ed. 547; Employers Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Chiles v. Chesapeake & O. R. Co. 218 U. S. 71, 54 L. ed. 936, 30 Sup. Ct. Rep. 667; Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406, 54 L. ed. 1088, 31 Sup. Ct. Rep. 59; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Swift & Co. v. United States, 196 U. S. 375, 398–400, 49 L. ed. 518, 525, 526, 25 Sup. Ct. Rep. 276.

Congress has power, by indicating its will, to prescribe valid rules for interstate and foreign commerce, subject only

to the restrictions of the Constitution; and these may be extended to whatever is itself such commerce, or an instrumentality thereof, or a person engaged therein.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 700, 43 L. ed. 1136, 1140, 19 Sup. Ct. Rep. 770; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; United States ex rel. Atty. Gen. v. Delaware & H. R. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 495, 52 L. ed. 297, 307, 28 Sup. Ct. Rep. 141; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764; Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 A. & E. Ann. Cas. 1066; Goodnow, Political Science Quarterly, June, 1910.

A constitutional power may be made effective by all means reasonably necessary, and Congress has wide discretion in respect of them.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Brown v. Maryland, 12 Wheat. 419, 436, 6 L. ed. 678, 684; Prigg. v. Pennsylvania, 16 Pet. 539, 608, 10 L. ed. 1060, 1086; The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; Legal Tender Cases, 110 U. S. 421, 28 L. ed. 204, 4 Sup. Ct. Rep. 122; California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 495, 52 L. ed. 297, 307, 28 Sup. Ct. Rep. 141; District of Columbia v. Brooke, 214 U. S. 138, 150, 53 L. ed. 941, 945, 29 Sup. Ct. Rep. 560; Ling Su Fan v. United States, 218 U. S. 302, 54 L. ed. 1049, 30 L.R.A.(N.S.) 1176, 31 Sup. Ct. Rep. 21; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 53 L. ed. 431, 29 Sup. Ct. Rep. 227.

Experience demonstrates that a rule properly prescribed—the indicated will of Congress—may be hindered, obstructed, or nullified by what is no part of commerce. There must, therefore, be power to prevent such obstruction; otherwise its will is not supreme.

Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; St. Louis Southwestern R. Co. v. Arkansas, 217 U. S. 136, 54 L. ed. 698, 29 L.R.A. (N.S.) 802, 30 Sup. Ct. Rep. 476; United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 700, 43 L. ed. 1136, 1140, 19 Sup. Ct. Rep. 770; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815.

Under the power granted by the commerce clause, Congress may prohibit whatever, as an efficient cause, will probably occasion, as a natural and reasonable consequence, material obstruction or hindrance to efficacious operation of its lawful will.

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Gibbons v. Ogden, 9 Wheat. 1, 195, 208, 209, 6 L. ed. 23, 69, 73; M'Culloch v. Maryland, 4 Wheat. 316, 408, 409, 4 L. ed. 579, 602; Brown v. Maryland, 12 Wheat. 419, 446, 447, 6 L. ed. 678, 688; United States v. Coombs, 12 Pet. 72, 78, 9 L. ed. 1004, 1006; The Daniel Ball, 10 Wall. 557, 19 L. ed. 999; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815; Monongahela Bridge Co. v. United States, 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356.

Where matters of economic opinion or theory are elements for consideration, and conclusions depend on them, the courts must accept whatever declarations in respect of them Congress has made, and frame their judgments in harmony therewith, unless it should appear that the declaration is without any reasonable foundation.

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed.

619; Arnold v. United States, 147 U. S. 494, 497, 498, 37 L. ed. 253–255, 13 Sup. Ct. Rep. 406; Tide Water Oil Co. v. United States, 171 U. S. 210, 219, 43 L. ed. 139, 142, 18 Sup. Ct. Rep. 837.

Contracts, combinations, and monopolies which directly and materially hindered or obstructed interstate or foreign commerce were unlawful prior to the act of July 2, 1890.

Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 102, 45 L. ed. 765, 770, 21 Sup. Ct. Rep. 561; Loewe v. Lawlor, 208 U. S. 294, 52 L. ed. 496, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Vance v. W. A. Vandercook Co. 170 U. S. 438, 444, 42 L. ed. 1100, 1102, 18 Sup. Ct. Rep. 674; Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Adams Exp. Co. v. Kentucky, 206 U. S. 129, 135, 51 L. ed. 987, 991, 27 Sup. Ct. Rep. 606; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 334, 52 L. ed. 230, 234, 28 Sup. Ct. Rep. 121; Adams Exp. Co. v. Kentucky, 214 U. S. 218, 53 L. ed. 972, 29 Sup. Ct. Rep. 633; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 482, 31 L. ed. 700, 706, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Re Debs, 158 U. S. 564, 577, 599, 39 L. ed. 1092, 1100, 1107, 15 Sup. Ct. Rep. 900; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229.

The anti-trust laws must be reasonably construed, with a view to practical enforcement, and not so as to defeat the purposes leading to their enactment.

Lau Ow Bew v. United States, 144 U. S. 47, 59, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517; United States v. Joint Traffic Asso. 171 U. S. 505, 567, 43 L. ed. 259, 286, 19 Sup. Ct. Rep. 25; Hopkins v. United States, 171 U. S. 578, 600, 43 L. ed. 290, 299, 19 Sup. Ct. Rep. 40; Anderson v. United States, 171 U. S. 604, 616, 43 L. ed. 300, 306, 19 Sup. Ct. Rep. 50; Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 184, 50 L. ed. 428, 432, 26 Sup. Ct. Rep. 208.

Restraint is not used in the statute in mere contrast or opposition to enlarge, expand, or increase. The restraint of the statute is not a mere antonym to enlargement; and trade may be restrained although its volume is expanding.

United States Trans-Missouri Freight Asso. 166 U. S. 290, 323, 41 L. ed. 1007, 1021, 17 Sup. Ct. Rep. 540; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 244, 245, 44 L. ed. 136, 144, 149, 20 Sup. Ct. Rep. 96; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 610.

The validity of state legislation affecting interstate commerce turns upon whether its direct effect or necessary tendency is the material or substantial restraint, hindrance, or obstruction of such commerce. If so, it is unconstitutional, and good intent does not save it. But if the effect on commerce is only immaterial and incidental, this will not invalidate the statute.

Asbell v. Kansas, 209 U. S. 251, 256, 52 L. ed. 778, 781, 28 Sup. Ct. Rep. 485, 14 A. & E. Ann. Cas. 1101; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638; Minnesota v. Barber, 136 U. S. 313, 319, 34 L. ed. 455, 457, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Richmond & A. R. Co. v. R. A. Patterson Tobacco Co. 169 U. S. 311, 314, 42 L. ed. 759, 761, 18 Sup. Ct. Rep. 335; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 626, 42 L. ed. 878, 882, 18 Sup. Ct. Rep. 488; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 482, 31 L. ed. 700, 706, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Smith v. Alabama, 124 U. S. 465, 473, 31 L. ed. 508, 510, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564.

The Sherman act applies when the direct result or necessary tendency of the prohibited thing is the material obstruction, hindrance, or restraint of interstate or foreign commerce. This thing need not be any part of commerce, nor be done by parties engaged therein. Whether such obstruction, hindrance, restraint, or tendency exists must be determined by the court in each case presented, upon all the facts in evidence; conclusion should depend upon practical, not mere theoretical considerations, and necessarily will be influenced by the status of commerce and the public policy existing at the time. That which did not restrain commerce fifty years ago may do so to-day.

Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815; Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1–9, 24 L. ed. 708–710; Union Bridge Co. v. United States,

204 U. S. 364, 400, 51 L. ed. 523, 539, 27 Sup. Ct. Rep. 367; Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 14 L. ed. 249; Pennsylvania v. Wheeling & B. Bridge Co. 18 How. 421, 15 L. ed. 435.

Persons of sound mind are presumed to intend the necessary or ordinary consequences of their acts (First Nat. Bank v. Jones, 21 Wall. 325, 337, 22 L. ed. 542, 545); and, in general, the intent or purpose consciously entertained or dominant in the minds of the parties to a combination is not material when hindrance or restraint to commerce actually results therefrom,—certainly is not decisive of its legality. Where attempts to monopolize are charged, or where it is essential to show a plan not neccssarily inferred from the circumstances, or where the effects of established acts are doubtful, the actual conscious purpose of the parties may be material,—perhaps essential.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 341, 342, 41 L. ed. 1007, 1027, 1028, 17 Sup. Ct. Rep. 540; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 234, 44 L. ed. 136, 145, 20 Sup. Ct. Rep. 96; Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276.

A combination is "the union or association of two or more persons (or corporations) for the attainment of some common end."

Century Dict.; Noyes, Intercorporate Relations, § 302.

A conspiracy is sufficiently described as "a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means."

Pettibone v. United States, 148 U. S. 197, 203, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542; Noyes, Intercorporate Relations, §§ 324 et seq.

An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished if the result be hurtful to the public, or to the individual against whom the concerted action is direeted.

Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 54 L. ed. 826, 30 Sup. Ct. Rep. 535; Callan v. Wilson, 127 U. S. 555, 556, 32 L. ed. 228, 8 Sup. Ct. Rep. 1301; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289.

It was strenuously urged below that the lawfulness or unlawfulness of a combination of competing concerns must be determined by the main or primary purpose of the parties; that if this is lawful, then the actual destruction of competition becomes immaterial. But necessary consequences are presumed to have been intended; and, moreover, the fundamental design of the legislation under consideration is not the punishment of immorality, but prevention of mischief consequent upon the unification of business and destruction of competition. The public is chiefly concerned about practical results,—not mental attitudes. The fallacy of the contention was long since declared by this court.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 562, 43 L. ed. 284, 19 Sup. Ct. Rep. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 234, 44 L. ed. 136, 145, 20 Sup. Ct. Rep. 96.

The word "reasonable" cannot be read into the 1st section of the act, and made to qualify "restraint." But this does not render the prohibitions applicable whenever commerce is in some way affected, or to transactions which have never been regarded as objectionable from any standpoint. To insist on a forced construction, and then point out consequent impossible conditions is a device too obvious for success. This court has not declared unlawful those ordinary business arrangements always recognized as desirable at common law, and wholly outside the mischief intended to be prevented,—but distinctly to the contrary (United States v. Joint Traffie Asso. 171 U. S. 505, 567, 568, 43 L. ed. 259, 286, 287, 19 Sup. Ct. Rep. 25; Hopkins v. United States, 171 U. S. 578, 600, 43 L. ed. 290, 299, 19 Sup. Ct. Rep. 40; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208). Any act, however, although entirely innocent when standing alone, may be criminal if part of an unlawful plan.

Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276; Aikens v. Wisconsin, 195 U. S. 194, 205, 49 L. ed. 154, 159, 25 Sup. Ct. Rep. 3; Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 54 L. ed. 826, 30 Sup. Ct. Rep. 535.

Contracts, conspiracies, or combinations which give power materially to restrain interstate commerce and indicate a dangerous probability of its exercise, and those which necessarily tend to monopoly or material restraint of such commerce, are unlawful without more.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; United States v. Trans-Missouri

Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436.

The Sherman act prescribes the rule of free competition in its broad and general sense, and denounces contracts, combinations, and conspiracies in whatever form, which, in effect or necessary tendency, directly and materially obstruct interstate or foreign commerce. The natural effect of competition is to increase commerce; to extinguish or prevent the free play of competition is to hinder it.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 619; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Harriman v. Northern Securities Co. 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815; National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 54 L. ed. 826, 30 Sup. Ct. Rep. 535.

Monopoly is the outcome of the practical cessation of effective business competition. This word in the anti-trust act has no reference to a grant of special privileges, but is used in a broad sense. Trade and commerce in any commodity are monopolized whenever, as the result of the concentration of competing businesses, not occurring as an incident to the orderly growth and development of one of them, one or a few corporations (or persons) acting in concert practically acquire power to control prices and smother competition.

Mitchell v. Reynolds, 1 P. Wms. 181; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; United States v. E. C. Knight Co. 156 U. S. 1, 16, 39 L. ed. 325, 330, 15 Sup. Ct. Rep. 249; People v. North River Sugar Ref. Co. 54 Hun, 354, 5 L.R.A. 386, 7 N. Y. Supp. 406; American Biscuit & Mfg. Co. v. Klotz, 44 Fed. 724; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 392, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 433, 52 L. ed. 865, 875, 28 Sup. Ct. Rep. 572; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 323, 41 L. ed. 1007, 1021, 17 Sup. Ct. Rep. 540; Richardson v. Buhl, 77 Mich. 632, 6 L.R.A. 457, 43 N. W. 1102; Pocahontas Coke Co. v. Powhatan Coal & Coke Co. 60 W. Va. 508, 10 L.R.A.(N.S.) 268, 116 Am. St. Rep. 901, 56 S. E. 264, 9 A. & E. Ann. Cas 667; Harding v. American Glucose Co. 182 Ill. 619, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577; Noyes, Intereorporate Relations, §§ 329, 389; 1 Andrews, Am. Law, 2d ed. 773.

Where parties have deliberately pursued a course the ordinary result or necessary tendency of which is monopoly, they cannot be heard to deny such an intent; and the plan is sufficient to give unlawful character to all their acts.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

The legislation against combinations and monopolies cannot be defeated by causing a corporation to acquire the shares or the property and business of competing corporations, nor by any other scheme or device.

1 Eddy, Combinations, §§ 617–620, 622; Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188; Machen, Corp. §§ 33, 34; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 330, 27 L. ed. 739, 744, 2 Sup. Ct. Rep. 719; Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 327, 336, 337, 40 L. ed. 444, 447, 448, 16 Sup. Ct. Rep. 307;

Miller v. East Side Canal & Irrig. Co. 211 U. S. 293, 53 L. ed. 189, 29 Sup. Ct. Rep. 111; Southern Realty Invest. Co. v. Walker, 211 U. S. 603, 53 L. ed. 346, 29 Sup. Ct. Rep. 211; People v. North River Sugar Ref. Co. 121 N. Y. 615, 9 L.R.A. 33, 18 Am. St. Rep. 843, 24 N. E. 834; State ex rel. Watson v. Standard Oil Co. 49 Ohio St. 137, 15 L.R.A. 145, 34 Am. St. Rep. 541, 30 N. E. 279; Stockton v. Central R. Co. 50 N. J. Eq. 52, 17 L.R.A 97, 24 Atl. 964; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Swift & Co. v. United States, 196 U. S. 396, 49 L. ed. 524, 25 Sup. Ct. Rep. 276; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; National Harrow Co. v. Hench, 39 L.R.A. 299, 27 C. C. A. 349, 55 U. S. App. 53, 83 Fed. 36, 84 Fed. 226; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; Noyes, Intercorporate Relations, §§ 306, 319, 354, 386.

The claim that the act of 1890 was directed against contracts and combinations of an executory nature only, and was not intended to apply where transfers were actually executed before being attacked, is without foundation. It prohibits obstructions to commerce, whether resulting from executory or executed arrangements; the effect on commerce is the important consideration.

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572; People ex rel. Peabody v. Chicago Gas Trust Co. 130 Ill. 268, 8 L.R.A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188; Pocahontas Coke Co. v. Powhatan Coal & Coke Co. 60 W. Va. 508, 10 L.R.A. (N.S.) 268, 116 Am. St. Rep. 901, 56 S. E. 264, 9 A. & E. Ann Cas 667

A foreign corporation doing business within the United States has no right to violate its policy or laws An agreement or combination which in purpose or effect conflicts therewith, altnough actually made in a foreign country where not unlawful, gives no immunity to parties acting here in pursuance of it.

Bank of Augusta v. Earle, 13 Pet. 519, 589, 10 L. ed. 274, 308; London, P. & A. Bank v. Aronstein, 54 C. C. A. 663, 117 Fed. 601; Williams v. Gold Hill Min. Co. 96 Fed. 464; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 370, 15 A. & E. Ann. Cas. 645; Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451; State v. Phipps, 50 Kan. 609, 18 L.R.A. 657, 4 Inters. Com. Rep. 299, 34 Am. St. Rep. 152, 31 Pac. 1097; Harding v. American Glucose Co. 182 Ill. 551, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577; Dayton Coal & I. Co. v. Barton, 103 Tenn. 604, 53 S. W. 970; State v. Standard Oil Co. 61 Neb. 28, 87 Am. St. Rep. 449, 84 N. W. 413; People v. Central R. Co. 48 Barb. 478; Warren Mfg. Co. v. Etna Ins. Co. 2 Paine, 501, Fed. Cas. No. 17,206; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; State ex rel. Astor v. Schlitz Brewing Co. 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033; Thomsen v. Union Castle Mail S. S. Co. 92 C. C. A. 315, 166 Fed. 253.

The courts should enforce the anti-trust legislation by all appropriate processes known to their usages; and decrees should be so molded as to suppress effectually the mischief consequent upon unlawful arrangements.

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; Taylor v. Salmon, 4 Myl. & C. 141; Pom. Eq. Jur. 2d ed. §§ 111–170; Chicago, R. I. & P. R. Co. v. Union P. R. Co. 47 Fed. 26; Stockton v. Central R. Co. 50 N. J. Eq. 52, 17 L.R.A. 97, 24 Atl. 964, 50 N. J. Eq. 489, 25 Atl. 942; McCarter v. Fireman's Ins. Co. 74 N. J. Eq. 372, 29 L.R.A.(N.S.) 1194, 135 Am. St. Rep. 708, 73 Atl. 80, 144, 18 A. & E. Ann. Cas. 1048.

Messrs. **DeLancey Nicoll** and **John G. Johnson** argued the cause, and, with Messrs. William J. Wallace, W. W. Fuller, and Junius Parker, filed a brief for the American Tobacco Company:

If the transactions shown by this record were in restraint of trade, they would not be in violation of the Sherman anti-trust law, because such transactions are not acts of interstate or foreign commerce, nor direct and immediate in their effect on interstate or foreign commerce, and are therefore not within the provisions of the Sherman anti-trust law, nor, indeed, within the constitutional authority of Congress.

Gibbons v. Ogden, 9 Wheat. 1, 189, 6 L.

ed. 23, 68; Veazie v. Moor, 14 How. 568, 14 L. ed. 545; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Turpin v. Burgess, 117 U. S. 504, 29 L. ed. 988, 6 Sup. Ct. Rep. 835; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Re Greene, 52 Fed. 104; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Ware v. Mobile County, 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 A. & E. Ann. Cas. 1031; Bigelow v. Calumet & H. Min. Co. 94 C. C. A. 13, 167 Fed. 721; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

The transactions shown by this record do not constitute contracts, combinations, or conspiracies in restraint of trade, without respect to whether the trade is interstate, foreign, or otherwise.

Fairbank v. Leary, 40 Wis. 637; People v. North River Sugar Ref. Co. 121 N. Y. 583, 9 L.R.A. 33, 18 Am. St. Rep. 843, 24 N. E. 834; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 46 L.R.A. 255, 78 Am. St. Rep. 612, 43 Atl. 723; Cameron v. New York & Mt. V. Water Co. 62 Hun, 269, 16 N. Y. Supp. 757; United States Vinegar Co. v. Foehrenbach, 148 N. Y. 58, 42 N. E. 403; Dittman v. Distilling Co. 64 N. J. Eq. 544, 54 Atl. 570; Com. v. Hunt, 4 Met. 111, 38 Am. Dec. 346; Oakdale Co. v. Garst, 18 R. I. 484, 23 L.R.A. 639, 49 Am. St. Rep. 784, 28 Atl. 973; Macauley Bros. v. Tierney, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; Bohn Mfg. Co. v. Hollis (Bohn v. Northwestern Lumbermen's Asso.) 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; United States v. Joint Traffic Asso. 171 U. S. 505, 567, 568, 43 L. ed. 259, 286, 287, 19 Sup. Ct. Rep. 25; Northern Securities Co. v. United States, 193 U. S. 364, 48 L. ed. 711, 24 Sup. Ct. Rep. 436; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 620; Davis v. A. Booth & Co. 65 C. C. A. 269, 131 Fed. 37; Robinson v. Suburban Brick Co. 62 C. C. A. 484, 127 Fed. 804; Camors-McConnell Co. v. McConnell, 140 Fed. 412, affirmed in 72 C. C. A. 681, 140 Fed. 987; Fisheries Co. v. Lennen, 116 Fed. 217; Harrison v. Glucose Sugar Ref. Co. 58 L.R.A. 915, 53 C. C. A. 484, 116 Fed. 304; National Enameling & Stamping Co. v. Haberman, 120 Fed. 415.

The consolidation of competing properties, or the purchase, by the owner of one property, of property theretofore used in competition with it (and no other transaction is shown by this record), however often repeated, and even if they had been intended to bring within one ownership all of the plants at the time producing or distributing the particular commodity, were not transactions of, nor direct in their effect on, interstate or foreign commerce, and so do not constitute monoplizing or attempting to monopolize interstate or foreign commerce, within the 2d section of the Sherman anti-trust law.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

Courts have said that the 2d section of the Sherman law was passed in aid of the 1st section, and have intimated that without violation of the 1st it was hard to conceive a violation of the 2d.

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 462.

Congress did not mean, by the 2d section of the Sherman anti-trust law, to limit the acquisition of property by citizens of states and corporations formed under state authority. The language used is that there must be no monopolizing of "trade," not that there must be no monopolizing of commodities or plants.

United States v. E. C. Knight Co. 156 U. S. 1, 16, 39 L. ed. 325, 330, 15 Sup. Ct. Rep. 249; Mogul S. S. Co. v. McGregor, L. R. 23 Q. B. Div. 618; Oakdale Mfg. Co. v. Garst, 18 R. I. 484, 23 L.R.A. 639, 49 Am. St. Rep. 784, 28 Atl. 973; Re Greene, 52 Fed. 115.

At common law a monopoly was a license or privilege allowed by the King for the sole buying and selling, making, working, or using of anything whatsoever, whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before.

4 Bl. Com. p. 159.

"Monopoly" and "monopolize" are words which still carry with them the idea of exclusion or restraint. Whatever the magnitude of the single concern may be, and whatever the volume of business there may be to-day in its hands, it is not guilty of the crime of monopolizing or attempting to monopolize, unless it is doing something by which there is either attained or attempted this result, to wit: that the subject in general (the person not connected

with the single concern) is restrained from that liberty of manufacturing or trading which he had before.

Northern Securities Co. v. United States, 193 U. S. 409, 48 L. ed. 729, 24 Sup. Ct. Rep. 436; Re Greene, 52 Fed. 116; United States Chemical Co. v. Provident Chemical Co. 64 Fed. 949.

It would seem to these defendants that there cannot be a monopolizing of the trade in a given commodity, except in one of the four following ways, to wit: (1) By preventing others from getting their fair requirement of the raw material for the manufacture of commodities; (2) by preventing others from obtaining their fair requirements of machinery or other facilities needed to produce the given commodity; (3) by preventing others from the use of transportation facilites for the distribution of their manufactured product; (4) by preventing others from using the machinery of distribution,—in the tobacco business, jobbers and retailers.

It is not intended to concede that, if any of these four results come incidentally in the conduct of one's own business, there is any infraction of the Sherman law. For instance, a manufacturer may, if his needs require, buy all of the raw material available, although there incidentally results that his competitors are unable to procure their requirements. The discoverer or inventor of a secret process or improved machinery for manufacture is under no duty to disclose his secret process or refrain from patenting his machine, although his failure to do so results in his competitors' being unable to economically and efficiently manufacture the product. A manufacturer has the right to offer inducements to a given wholesaler or retailer to handle his products exclusively; this is simply competition, and his competitor can do the same with other merchants in existence, or with other merchants induced to come into existence.

Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 462.

Laws which punish—whether by regular criminal proceedings or otherwise—should be so definite and explicit as to advise citizens what they may and may not do.

Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; United States v. Brewer, 139 U. S. 278, 35 L. ed. 190, 11 Sup. Ct. Rep. 538; Louisville & N. R. Co. v. Railroad Commission, 19 Fed. 679.

Since the Sherman law was enacted to foster competition, the attained or attempted exclusion of others from trade, that is the necessary element in monopolizing, or attempting to monopolize, must be by methods not allowed in competition at common law.

Whitwell v. Continental Tobacco Co. supra; Phillips v. Iola Portland Cement Co. 61 C. C. A. 19, 125 Fed. 593, 192 U. S. 606, 48 L. ed. 585, 24 Sup. Ct. Rep. 850.

Competition, it is often said, is the life of trade. But the object of all competition is to drive out other competitors.

Bonsack Mach. Co. v. Smith, 70 Fed. 388.

"To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection."

Mogul S. S. Co. v. McGregor, L. R. 23 Q. B. Div. 598.

The rights of competitors are and have always been different from the rights of strangers to the trade.

Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815; Berry v. Donovan, 188 Mass. 353, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 A. & E. Ann. Cas. 738; Barnes v. Chicago Typographical Union No. 16, 232 Ill. 424, 14 L.R.A.(N.S.) 1018, 83 N. E. 940, 13 A. & E. Ann. Cas. 54; Barr v. Essex Trades Council, 53 N. J. Eq. 124, 30 Atl. 881; Doremus v. Hennessey, 176 Ill. 608, 43 L.R.A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; Mogul S. S. Co. v. McGregor, L. R. 23 Q. B. Div. 598 [1892] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101.

Competitors may undersell competitors (Com. v. Hunt, 4 Met. 134, 38 Am. Dec. 346; National Protective Asso. v. Cumming, 170 N. Y. 330, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; Lough v. Outerbridge, 143 N. Y. 283, 25 L.R.A. 674, 42 Am. St. Rep. 712, 38 N. E. 292; Tuttle v. Buck, 107 Minn. 145, 22 L.R.A.(N.S.) 599, 131 Am. St. Rep. 446, 119 N W. 946), 16 A. & E. Ann. Cas. 807), have secret partners (1 Lindley, Partn. 2d Am. ed. *16; Mechem, Elements of Partn. § 15; Winship v. Bank of United States, 5 Pet. 529, 562, 8 L. ed. 216, 228; Brooke v. Washington, 8 Gratt. 248, 56 Am. Dec. 142), adopt a policy of business that can only result in destruction of weaker competitors, even though as a part of it there is a sale of goods below cost (Aikens v. Wisconsin, 195 U. S. 194, 203, 49 L. ed. 154, 158, 25 Sup. Ct. Rep. 3; Jaster v. Currie, 198 U. S. 144, 148, 49 L. ed. 988, 989, 25 Sup. Ct. Rep. 614; National Fireproofing Co. v. Mason Builders' Asso. 26 L.R.A.(N.S.) 148, 94 C. C. A. 535, 169 Fed.

265; Citizens' Light, Heat & P. Co. v. Montgomery Light & Water Power Co. 171 Fed 559; Vegelahn v. Guntlier, 167 Mass. 92. 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; Lewis v. Huie-Hodge Lumber Co. 121 La. 658, 46 So. 685; Karges Furniture Co. v. Amalgamated Woodworkers' Local Union No. 131, 165 Ind. 421, 2 L.R.A.(N.S.) 788, 75 N. E. 877, 6 A. & E. Ann. Cas. 829), and have provision for exclusive handling (Palmer v. Stebbins, 3 Pick. 192, 15 Am. Dec. 204; Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co. 139 U. S. 79, 80, 35 L. ed. 97, 11 Sup. Ct. Rep. 490; Brown v. Rounsavell, 78 Ill. 589; Walsh v. Dwight, 40 App. Div. 513, 58 N. Y. Supp. 91; Houck v. Wright, 77 Miss. 476, 27 So. 616; Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co. 75 S. C. 378, 9 L.R.A.(N.S.) 501, 55 S. E. 973, 9 A. & E. Ann. Cas. 902; Ferris v. American Brewing Co. 155 Ind. 539, 52 L.R.A. 305, 58 N. E. 701; Re Greene, 52 Fed. 117; Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co. 14 C. C. A. 14, 35 U. S. App. 16, 66 Fed. 664; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 460).

Purchases of competing businesses were not unlawful at common law, even though such purchases were made to get rid of ruinous competition (United Shoe Machinery Co. v. Kimball, 193 Mass. 351, 79 N. E. 790; Wood v. Whitehead Bros. Co. 165 N. Y. 551, 59 N. E. 357; Lanyon v. Garden City Sand Co. 223 Ill. 616, 9 L.R.A. (N.S.) 446, 79 N. E. 313, 7 A. & E. Ann. Cas. 50; National Distilling Co. v. Cream City Importing Co. 86 Wis. 352, 39 Am. St. Rep. 902, 56 N. W. 864), nor are they under this act (Cincinnati P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208; Brett v. Ebel, 29 App. Div. 259, 51 N. Y. Supp. 573; Bancroft v. Union Embossing Co. 72 N. H. 402, 64 L.R.A. 298, 57 Atl. 97; United States Chemical Co. v. Provident Chemical Co. 64 Fed. 950).

The 2d section of the Sherman anti-trust law, forbidding monopolizing or attempting to monopolize, can never justify an injunction against a state of being, but only against threatened activities,—such activities or conduct as are not threatened in the case at bar.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

The act construed so as to devest property from its owner is in violation of the 5th Amendment of the Constitution of the United States, in that such construction practically prevents a person from buying from, selling to, or consolidating or forming a partnership with, a competitor.

Monongahela Nav. Co. v. United States, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; Adair v. United States, 208 U. S. 161, 180, 52 L. ed. 436, 445, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764; Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427.

A corporation actually and actively engaged in interstate commerce cannot constitutionally be excluded from such commerce by act of Congress.

Gibbons v. Ogden, 9 Wheat. 1, 211, 6 L. ed. 23, 73; Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 396, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; Monongahela Nav. Co. v. United States, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Hale v. Henkel, 201 U. S. 43, 76, 85, 50 L. ed. 652, 665, 669, 26 Sup. Ct. Rep. 370; Railroad Tax Case, 8 Sawy. 238, 13 Fed. 746; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357.

With two constructions of a statute possible, the court will adopt that construction which is not in conflict with the Constitution. Indeed, when the one construction raises a grave constitutional question, and the other does not, the court will adopt the construction which renders the statute clearly and undisputably constitutional.

United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527.

The covenants given by various vendors to defendants, not to re-engage in a business to the injury of the good will sold, are not illegal; they are not contracts in restraint of trade, such as are condemned by the 1st section of the Sherman anti-trust law, and the conduct of defendants' vendees in taking them was not monopolizing nor attempting to monopolize trade, in violation of the 2d section of the act.

United States v. Trans-Missouri Freight Asso. 166 U. S. 327, 328, 41 L. ed. 1023, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 568, 43 L. ed. 287, 19 Sup. Ct. Rep. 25; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208; Robinson v. Suburban Brick Co. 62 C. C. A. 484, 127 Fed. 807; A. Booth & Co. v. Davis, 127 Fed. 877, affirmed in 65 C. C. A. 269, 131 Fed. 31; Camors-McConnell Co. v. McConnell, 140 Fed. 412, affirmed in 72 C. C. A. 681, 140 Fed. 987; Fowle v. Park, 131 U. S. 88, 33 L. ed. 67, 9 Sup. Ct. Rep.

658; National Enameling & Stamping Co. v. Haberman, 120 Fed. 415; Harrison v. Glucose Sugar Ref. Co. 58 L.R.A. 915, 53 C. C. A. 484, 116 Fed. 304; United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 280.

Neither of the several contracts which were executed at the time of the formation of the British-American Tobacco Company, Limited—ordinarily called the English contracts—nor the British American Tobacco Company, Limited, itself, offends any of the provisions of the Sherman anti-trust law.

United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 280; Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22 L. ed. 315; Hitchcock v. Coker, 6 Ad. & El. 438, 1 Nev. & P. 796, 2 H. & W. 464, 6 L. J. Exch. N. S. 266; Archer v. Marsh, 6 Ad. & El. 959, 2 Nev. & P. 562, W. W. & D. 641, 6 L. J. K. B. N. S. 244; Mallan v. May, 11 Mees. & W. 653, 12 L. J. Exch. N. S. 376, 7 Jur. 536, 6 Eng. Rul. Cas. 393; Pemberton v. Vaughan, 10 Q. B. 87, 16 L. J. Q. B. N. S. 161, 11 Jur. 411; Atkyns v. Kinnier, 19 L. J. Exch. N. S. 132, 4 Exch. 776; Elves v. Croft, 10 C. B. 241, 19 L. J. C. P. N. S. 385, 14 Jur. 855; Avery v. Langford, 23 L. J. Ch. N. S. 837, 1 Kay, 663, 18 Jur. 905, 2 Week. Rep. 615; Page, Contr. § 380; National Enameling & Stamping Co. v. Haberman, 120 Fed. 415; Anchor Electric Co. v. Hawkes, 171 Mass. 101, 41 L.R.A. 189, 68 Am. St. Rep. 403, 50 N. E. 509.

The Knight Case and the Greene Case settled the effect of the law.

Re Corning, 51 Fed. 205, 213, 50 Fed. 469; United States v. E. C. Knight Co. 60 Fed. 306, 24 L.R.A. 428, 9 C. C. A. 297, 17 U. S. App. 466, 60 Fed. 934, 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Ops. Atty. Gen. 1895, p. 13; Ops. Atty. Gen. 1896, p. 27; Ops. Atty. Gen. 1899, p. 21; Ops. Atty. Gen. 1906, p. 7; Senate Doc. No. 687, 2d Sess. 60th Congress, p. 27; 7 Columbia L. Rev. 93; (Judge Noyes); 29 Am. L. Rev. 293 (Editorial); 34 Am. L. Rev. 194 (E W. Huffcut); 7 Harvard L. Rev. 167; 1 Va. L. Reg. 709; 2 Va. L. Reg. 160; 2 Eddy, Combinations, §§ 818 et seq. ; Spelling, Monolopies, p. 227.

It is almost as important that the law should be settled permanently as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly, unless clearly erroneous.

Gilman v. Philadelphia, 3 Wall. 713, 724, 18 L. ed. 96, 99; Vail v. Arizona, 207 U. S. 201, 205, 52 L. ed. 169, 171, 28 Sup. Ct. Rep. 107.

The unification of however so many theretofore separate and conflicting, competing factors in trade is not monopolizing, provided, always, that there is not, from the nature of the business or the activities of the unit, an exclusion of others.

Prof. Ely, Monopolies & Trusts, pp. 21, 34, 143, 144; Clark, Control of Trusts, pp. 6, 60–65, 81.

If this transaction is a contract, combination, or conspiracy in restraint of interstate trade, it is violative of the Sherman law, whatever the intent of the actors; if it is not such, it is not violative of the Sherman law, whatsoever conceivable intent the actors had.

Ellis v. United States, 206 U. S. 246, 257, 51 L. ed. 1047, 1053, 27 Sup. Ct. Rep. 600, 11 A. & E. Ann. Cas. 589; Davis v. United States, 160 U. S. 469, 484, 40 L. ed. 499, 504, 16 Sup. Ct. Rep. 353; United States v. Simmons, 96 U. S. 360, 365, 24 L. ed. 819, 821; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 234, 44 L. ed. 136, 145, 20 Sup. Ct. Rep. 96; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 623; Re Greene, 52 Fed. 112; United States v. E. C. Knight Co. 156 U. S. 1, 16, 39 L. ed. 325, 330, 15 Sup. Ct. Rep. 249.

There is nothing unlawful in buying a competitor to get rid of competition.

United States Chemical Co. v. Provident Chemical Co. 64 Fed. 950; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208.

The meaning and effect of the statute is to preserve to every one opportunity and liberty to engage in interstate trade, to preserve such opportunity and liberty against the voluntary covenant or quasi covenant of the trader, as well as against the improper conduct of other persons.

United States v. Reading Co. 183 Fed. 427.

No contract, arrangement, or conduct has been condemned by this court as against the Sherman law, which would have been favored at common law; no contract, or quasi contract, has been condemned that would have been enforceable at common law.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271.

This conception of the law does not make it insignificant. The statute had its origin, not in any supposed inefficiency of the common law, but because it was doubtful whether these principles extended to

interstate trade, and there are no Federal common-law crimes; most vital and well-considered statutes have their principal utility in the application of effective remedies to common-law wrongs. In our view there is no decision of this court inconsistent with our conception of the law as just stated, but under the law there have been decisions of this court which prevented competing railway companies from agreeing upon rates to be charged by them (United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25); a decision which prevented the elimination of competition between railway companies by a scheme of their respective stockholders entered into for the express and only purpose of eliminating that competition (Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436); a decision which prevented an agreement among the manufacturers of iron pipes that their competition should be only ostensible, and not real (Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96); and which gave to the purchaser who had paid an excessive price for his iron pipes on account of the existence of that arrangement treble damages as against a member of the illegal combination (Chattanooga Foundry & Pipe Co. v. Atlanta, 203 U. S. 390, 51 L. ed. 241, 27 Sup. Ct. Rep. 65), decisions which gave to the merchant or manufacturer injured by a boycott, whether of men banded together in what they called a labor union, or of others engaged in the same business as the injured party, treble the amount of damage suffered (Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307). Surely legislation under which results so considerable and so salutary have been attained cannot be called insignificant or inconsequential.

Mr. William W. Ivins also filed a brief for the American Tobacco Company:

The actual conclusions of this court are these and these only: (1) That manufacture is not commerce, and the acquisition by one manufacturer of the plant of another, directly or by the acquisition of capital stock of another, does not constitute nor affect interstate commerce; (2) that the act applies to unreasonable restraints in either of the classes described by Holmes, J., in the Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436, and by the court in the Gibbs v. Consolidated Gas Co. 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; (3) that the restraint complained of must be proximate and direct; (4) that the act applies to conspiracies unlawfully and illegally to injure another in his business, or to restrict his freedom of the market; (5) that the intent of a combination must be proven, or must be implicit in the plan as the same is disclosed by the agreement; (6) that railroad corporations are under legal duty of competing, and are within the act; (7) that, as thus construed and applied, the act is constitutional.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; Addyston Pipe & Steel Co. v. United States, 175 U. S. 221, 44 L. ed. 140, 20 Sup. Ct. Rep. 96; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Harriman v. Northern Securities Co. 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; American Banana Co. v. United Fruit Co. 213 U. S. 347, 53 L. ed. 826, 29 Sup. Ct. Rep. 511, 16 A. & E. Ann. Cas. 1047.

At common law, contracts in restraint of trade (other than conspiracies to injure) were illegal in the sense that they were unenforceable, but they were not unlawful in the sense that they were prohibited.

Mogul S. S. Co. v. McGregor [1892] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101, L. R. 23 Q. B. Div. 620; Printing & Numerical Registering Co. v. Sampson, L. R. 19 Eq. 462, 44 L. J. Ch. N. S. 705, 32 L. T. N. S. 354, 23 Week. Rep. 463, 21 Eng. Rul. Cas. 696; Nordenfeldt v. Maxim-Nordenfeldt Guns & Ammunition Co. [1894] A. C. 535, 63 L. J. Ch. N. S. 908, 11 Reports, 1, 71 L. T. N. S. 489, 6 Eng. Rul. Cas. 413; Morris Run Coal Co. v. Barclay Coal Co. 68 Pa. 173, 8 Am.

Rep. 159; Arnot v. Pittston & E. Coal Co. 68 N. Y. 565, 23 Am. Rep. 190; Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171.

The modern tendency of the general or common law recognizes a larger freedom of contract, a wider liberty to bargain, and materially broadens the narrow and medieval view as to what did constitute a restraint of trade.

Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; Matthews v. Associated Press, 136 N. Y. 333, 32 Am. St. Rep. 741, 32 N. E. 981; Gibbs v. Consolidated Gas Co. 130 U. S. 410, 32 L. ed. 984, 9 Sup. Ct. Rep. 553; United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271.

The canons of construction require that the statute be interpreted in accordance with defendants' views.

Petrie v. Commercial Nat. Bank, 142 U. S. 650, 35 L. ed. 1146, 12 Sup. Ct. Rep. 325; Pennington v. Coxe, 2 Cranch, 52, 2 L. ed. 204; Boyd v. United States, 116 U. S. 622, 29 L. ed. 748, 6 Sup. Ct. Rep. 524; Smythe v. Fiske, 23 Wall. 380, 23 L. ed. 49; Stewart v. Kahn, 11 Wall. 504, 20 L. ed. 178; Atkins v. Fibre Disintegrating Co. 18 Wall. 301, 21 L. ed. 844; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 300, 23 L. ed. 901; United States v. Moore, 95 U. S. 763, 24 L. ed. 589; Raymond v. Thomas, 91 U. S. 715, 23 L. ed. 435; Jones v. New York Guaranty & I. Co. 101 U. S. 626, 25 L. ed. 1034; Church of the Holy Trinity v. United States, 143 U. S. 459, 36 L. ed. 228, 12 Sup. Ct. Rep. 511; Treat v. White, 181 U. S. 267, 45 L. ed. 854, 21 Sup. Ct. Rep. 611; United States v. Trans-Missouri Freight Asso. 166 U. S. 318, 353, 354, 41 L. ed. 1019, 1031, 1032, 17 Sup. Ct. Rep. 540; Reid v. Colorado, 187 U. S. 150, 47 L. ed. 115, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 462, 30 L. ed. 241, 6 Sup. Ct. Rep. 1114; Ross v. Jones, 22 Wall. 592, 22 L. ed. 735; United States v. Anderson, 194 U. S. 394, 48 L. ed. 1035, 24 Sup. Ct. Rep. 716; Maxwell v. Dow, 176 U. S. 601, 44 L. ed. 604, 20 Sup. Ct. Rep. 448, 494; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Downes v. Bidwell, 182 U. S. 254, 386, 45 L. ed. 1093, 1144, 21 Sup. Ct. Rep. 770; Huidekoper v. Douglass, 3 Cranch, 72, 2 L. ed. 369; Rutherford v. Greene, 2 Wheat. 203, 4 L. ed. 220; Hepburn v. Griswold, 8 Wall. 607, 19 L. ed. 521; Miller v. United States (Page v. United States) 11 Wall. 309, 20 L. ed. 145; Schell v. Fauché, 138 U. S. 572, 34 L. ed. 1043, 11 Sup. Ct. Rep. 376; Johnson v. Southern P. Co. 196 U. S. 17, 49 L. ed. 369, 25 Sup. Ct. Rep. 158; Central R. & Bkg. Co. v. Georgia, 92 U. S. 674, 23 L. ed. 761; Cook v. United States, 138 U. S. 181, 34 L. ed. 912, 11 Sup. Ct. Rep. 268; Twenty Per Cent Cases, 20 Wall. 187, 22 L. ed. 341; United States v. Moore, 95 U. S. 762, 24 L. ed. 588; Lewis v. Lewis, 7 How. 784, 12 L. ed. 913; Stephens v. Cherokee Nation, 174 U. S. 478, 43 L. ed. 1053, 19 Sup. Ct. Rep. 722; Northern Securities Co. v. United States, 193 U. S. 402, 48 L. ed. 726, 24 Sup. Ct. Rep. 436; Western U. Teleg. Co. v. Eyser, 19 Wall. 432, 22 L. ed. 45; Griffith v. Bogert, 18 How. 163, 15 L. ed. 310; Lau Ow Bew v. United States, 144 U. S. 59, 36 L. ed. 344, 12 Sup. Ct. Rep. 517; Plessy v. Ferguson, 163 U. S. 558, 41 L. ed. 263, 16 Sup. Ct. Rep. 1138; United States v. Whitridge, 197 U. S. 143, 49 L. ed. 698, 25 Sup. Ct. Rep. 406; Kirk v. Smith, 9 Wheat. 272, 6 L. ed. 88; United States v. Fisher, 2 Cranch, 389, 2 L. ed. 314; United States v. Wiltberger, 5 Wheat. 96, 5 L. ed. 42; Ex parte Wells, 18 How. 321, 15 L. ed. 428; Munn. v. Illinois, 94 U. S. 142, 24 L. ed. 90; Sinking Fund Cases, 99 U. S. 744, 25 L. ed. 510; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

The prohibition of "monopolizing," as used in the act, does not limit or penalize any of the lawful incidents of property, possession, superior location, credit, reputation, ability, intelligence, or knowledge.

Mogul S. S. Co. v. McGregor, L. R. 23 Q. B. Div. 598; Re Greene, 52 Fed. 115.

Interference with freedom of competition is in law to be considered from the same juridical point of view as interference with, or restraint of, trade. The rule here is precisely the same as that in the case of restraint of trade and monopolizing, and does not mean the attempt to substitute one rule of right or one economic order for another, but is merely the prevention and punishment of an abuse of right.

Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; Mogul S. S. Co. v. McGregor, L. R. 23 Q. B. Div. 598; Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085.

There is no more popular superstition than that competition is the life of trade, because the life of trade is only that competition which eliminates the weak competitor, and gives the market to him who gives most to the world.

Mogul S. S. Co. v. McGregor, L. R. 23 Q. B. Div. 598; Bonsack Mach. Co. v. Smith, 70 Fed. 388; McKechnie, The State and

the Individual; Landry, Manuel D'Economique, pp. 276 et seq.

No man has a right to be protected against the consequences of competition in such manner as to guarantee his own continuation in business.

Vegelahn v. Gunther, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; Martell v. White, 185 Mass. 257, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085.

The right of combination is as fundamental as the right of competition; and legality, and not tendency, is the test of right.

Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

Mr. **William B. Hornblower** argued the cause, and, with Messrs. John Pickrell, William W. Miller, and Morgan M. Mann, filed a brief for the Imperial Tobacco Company:

The Sherman anti-trust act does not, and cannot have, and was not intended to have, any extra-territorial effect.

American Banana Co. v. United Fruit Co. 213 U. S. 347, 355, 53 L. ed. 826, 831, 29 Sup. Ct. Rep. 511, 16 A. & E. Ann. Cas. 1047.

There are certain contracts in partial restraint of trade which would not be invalid at common law, and which do not come within the prohibition of the Sherman act.

(a) This principle has been recognized in the very cases in which this court has been understood to have held that all contracts in restraint of trade, whether reasonable or unreasonable, are in violation of the Sherman act.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 566, 43 L. ed. 286, 19 Sup. Ct. Rep. 25.

(b) From other opinions of this court, also, it is clear that contracts of the nature of the agreements involved in this suit, between the American Company and the Imperial Company, are not within the prohibition of the statute.

Northern Securities Co. v. United States, 193 U. S. 197, 361, 48 L. ed. 679, 710, 24 Sup. Ct. Rep. 436; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 184, 50 L. ed. 428, 432, 26 Sup. Ct. Rep. 208; United States v. E. C. Knight Co. 156 U. S. 1, 16, 39 L. ed. 325, 330, 15 Sup. Ct. Rep. 249; United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271, modified and affirmed in 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

(c) The decisions of the state courts in construing the Sherman act are equally clear on this point.

Brett v. Ebel, 29 App. Div. 256, 51 N. Y. Supp. 573; Lanyon v. Garden City Sand Co. 223 Ill. 616, 9 L.R.A.(N.S.) 446, 79 N. E. 313, 7 A. & E. Ann. Cas. 50; Bancroft v. Union Embossing Co. 72 N. H. 402, 64 L.R.A. 298, 57 Atl. 97; Harbison-Walker Refractories Co. v. Stanton, 227 Pa. 55, 75 Atl. 988.

The contracts in partial restraint of trade, which have been approved by the long course of decisions at common law, clearly include the American-Imperial agreements, which are therefore exempt from the prohibitions of the Sherman anti-trust law.

Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22 L. ed. 315; Gibbs v. Consolidated Gas Co. 130 U. S. 396, 409, 32 L. ed. 979, 984, 9 Sup. Ct. Rep. 553; Fowle v. Park, 131 U. S. 88, 96, 33 L. ed. 67, 74, 9 Sup. Ct. Rep. 658; Carter v. Alling, 43 Fed. 208; United States Chemical Co. v. Provident Chemical Co. 64 Fed. 946; Harrison v. Glucose Sugar Ref. Co. 58 L.R.A. 915, 53 C. C. A. 484, 116 Fed. 308; National Enameling & Stamping Co. v. Haberman, 120 Fed. 415; Prame v. Ferrell, 92 C. C. A. 374, 166 Fed. 702; Walker v. Lawrence, 101 C. C. A. 417, 177 Fed. 363; Leather Cloth Co. v. Lorsont, L. R. 9 Eq. 345, 39 L. J. Ch. N. S. 86, 21 L. T. N. S. 661, 18 Week. Rep. 572; Rousillon v. Rousillon, L. R. 14 Ch. Div. 351, 49 L. J. Ch. N. S. 338, 42 L. T. N. S. 679, 28 Week. Rep. 623, 44 J. P. 663; Nordenfeldt v. Maxim-Nordenfeldt Guns & Ammunition Co. [1894] A. C. 535, 63 L. J. Ch. N. S. 908, 11 Reports, 1, 71 L. T. N. S. 489, 6 Eng. Rul. Cas. 413; Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; Hodge v. Sloan, 107 N. Y. 244, 1 Am. St. Rep. 816, 17 N. E. 335; Leslie v. Lorillard, 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 363; Tode v. Gross, 127 N. Y. 480, 13 L.R.A. 652, 24 Am. St. Rep. 475, 28 N. E. 469; Matthews v. Associated Press, 136 N. Y. 333, 32 Am. St. Rep. 741, 32 N. E. 981; Oakes v. Cattaraugus Water Co. 143 N. Y. 430, 26 L.R.A. 544, 38 N. E. 461; Wood v. Whitehead Bros. Co. 165 N. Y. 545, 59 N. E. 357; New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co. 180 N. Y. 280, 73 N. E. 48; Anchor Electric Co. v. Hawkes, 171 Mass. 101, 41 L.R.A. 189, 68 Am. St. Rep. 403, 50 N. E. 509; United Shoe Machinery Co. v. Kimball, 193 Mass. 351, 79 N. E. 790; Rakestraw v. Lanier, 104 Ga. 188, 69 Am. St. Rep. 154, 30 S. E. 735; Bullock v. Johnson, 110 Ga. 486, 35 S. E. 703; Freudenthal v. Espey, 45 Colo. 488, 26 L.R.A.(N.S.) 961, 102 Pac. 280; Louisville Fire Under-

writers v. Johnson, 133 Ky. 797, 24 L.R.A. (N.S.) 153, 119 S. W. 153; Wolf v. State Medical Examiners, 108 Minn. 523, 121 N. W. 395; Siegel v. Marcus, 18 N. D. 214, 20 L.R.A.(N.S.) 769, 119 N. W. 358; Buckhout v. Witwer, 157 Mich. 406, 23 L.R.A.(N.S.) 506, 122 N. W. 184; Bloom v. Home Ins. Agency, 91 Ark. 367, 121 S. W. 293; Wooten v. Harris, 153 N. C. 43, 68 S. E. 898; Home Teleph. Co. v. North Manchester Teleph. Co. — Ind. App. —, 92 N. E. 558; Artistic Porcelain Co. v. Boch, 76 N. J. Eq. 533, 74 Atl. 680; Harbison-Walker Refractories Co. v. Stanton, 227 Pa. 55, 75 Atl. 988.

Mr. Sol. M. Stroock argued the cause and filed a brief for the United Cigar Stores Company:

This court has consistently recognized the distinction, well known in the criminal law, between mere preparation, which may be either conscious or unconscious, and attempt, which always is conscious.

Swift & Co. v. United States, 196 U. S. 375, 402, 49 L. ed. 518, 527, 25 Sup. Ct. Rep. 276; United States v. E. C. Knight Co. 156 U. S. 1, 13, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249; Kidd v. Pearson, 128 U. S. 1, 23, 24, 32 L. ed. 346, 351, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Loewe v. Lawlor, 208 U. S. 297, 52 L. ed. 497, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815.

This business in which the United Cigar Stores Company is engaged is not interstate commerce within any of the accepted definitions of the term.

Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Ware v. Mobile County, 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 A. & E. Ann. Cas. 1031; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714.

However interstate commerce may be affected by the carrying on of the business of the United Cigar Stores Company, it is evident that its effect is indirect to the remotest degree. By engaging (if at all) in interstate commerce to this very slight and unsubstantial degree, it can reasonably be said that United Cigar Stores Company did not thereby submit to the control of Congress, under the commerce clause, all of its affairs, which were completely within each particular state in which its stores were respectively located.

Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 184, 50 L. ed. 432, 26 Sup. Ct. Rep. 208.

We do not contend that, because the United Cigar Stores Company has not engaged in interstate commerce, therefore, if it made any contract, or engaged in any combination or conspiracy in restraint of interstate commerce, it would be exempt from the penalties of the act.

Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 438, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815.

Assuming all of the parties to be engaged in interstate commerce, the fact of stock ownership by the American Tobacco Company in the United Cigar Stores Company does not constitute a violation of the act.

Northern Securities Co. v. United States, 193 U. S. 197, 333, 48 L. ed. 679, 699, 24 Sup. Ct. Rep. 436; United States v. E. C. Knight Co. 156 U. S. 1, 17, 39 L. ed. 325, 331, 15 Sup. Ct. Rep. 249; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 69 C. C. A. 290, 125 Fed. 454; Phillips v. Iola Portland Cement Co. 61 C. C. A. 19, 125 Fed. 593; Bigelow v. Calumet & H. Min. Co. 167 Fed. 704; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

Intent is essential to an attempt to monopolize.

United States v. E. C. Knight Co. 156 U. S. 1, 17, 39 L. ed. 325, 331, 15 Sup. Ct. Rep. 249; Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276; Re Greene, 52 Fed. 115; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436.

There is no feature of monopoly in the whole transaction.

Anderson v. United States, 171 U. S. 604, 614, 43 L. ed. 300, 305, 19 Sup. Ct. Rep. 50; Phillips v. Iola Portland Cement Co. 61 C. C. A. 19, 125 Fed. 594.

This defendant has not, as an incident of obtaining a monopoly, or as part of any combination in restraint of trade, prevented vendors from engaging in the business of handling and dealing in tobacco products.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 329, 41 L. ed. 1007, 1023, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 567, 43 L. ed. 259, 286, 19 Sup. Ct. Rep. 25; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208; United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A.

141, 54 U. S. App. 723, 85 Fed. 271, affirmed in 175 U. S. 211, 218, 44 L. ed. 136, 139, 20 Sup. Ct. Rep. 96.

Messrs. Charles R. Carruth, Charles J. McDermott, C. B. Watson, James T. Morehead, and A. J. Burton filed a brief for R. P. Richardson, Jr., & Company.

Messrs. J. Parker Kirlin and Thomas Thacher (by special leave) filed a brief for defendants Thomsen v. Union Castle S. S. Company.

Mr. W. Bourke Cockran (by special leave) filed a brief for the American Tobacco Company:

The effect of a combination on trade, and therefor on production,—not its effect on competition,—was the test by which this court has always determined whether it violated or respected the provisions of the Sherman law.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Anderson v. United States, 171 U. S. 614, 43 L. ed. 305, 19 Sup. Ct. Rep. 50; Addyston Pipe & Steel Co. v. United States, 175 U. S. 235, 44 L. ed. 145, 20 Sup. Ct. Rep. 96; W. W. Montague & Co. v. Lowry, 193 U. S. 39, 48 L. ed. 609, 24 Sup. Ct. Rep. 307; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

The only contract in restraint of trade which the courts sanctioned is one which, while it may have operated to restrict the industrial activity of one man to a certain extent, yet at the same time operated to encourage the activities of many other men in various directions, so that the total volume of industrial activity was increased, not restricted.

This exception to the rule condemning contracts in restraint of trade is in furtherance of the rule itself.

Rannie v. Irvine, 7 Mann. & G. 977, 8 Scott, N. R. 674, 14 L. J. C. P. N. S. 10, 8 Jur. 1051; Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419.

Predominance, however extensive, in the manufacture or sale of any commodity, established and maintained solely by superior skill in producing it and disposing of it, has never yet been condemned as a monopoly by the courts of this or any other country.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; National Cotton Oil Co. v. Texas, 197 U. S. 129, 49 L. ed. 694, 25 Sup. Ct. Rep. 379.

Messrs. **DeLancey Nicoll, John G. Johnson,** and **Junius Parker** argued the cause for the American Tobacco Company on reargument.

Mr. Chief Justice **White** delivered the opinion of the court:

This suit was commenced on July 19, 1907, by the United States, to prevent the continuance of alleged violations of the 1st and 2d sections of the anti-trust act of July 2, 1890. [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200.] The defendants were twenty-nine individuals, named in the margin,† sixty-five American *corporations, most of them created in[143 the state of New Jersey, and two English corporations. For convenience of statement we classify the corporate defendants, exclusive of the two foreign ones, which we shall hereafter separately refer to, as follows: The American Tobacco Company, a New Jersey corporation, because of its dominant relation to the subject-matter of the controversy, as the primary defendant; five other New Jersey corporations (*viz.*, American Snuff Company, American Cigar Company, American Stogie Company, MacAndrews & Forbes Company, and Conley Foil Company), because of their relation to the controversy as the accessory, and the fifty-nine other American corporations as the subsidiary defendants.

The ground of complaint against the American Tobacco Company rested not alone upon the nature and character of that corporation and the power which it exerted directly over the five accessory corporations and some of the subsidiary corporations by stock ownership in such corporations, but also upon the control which it exercised over the subsidiary companies by virtue of stock held in said companies by the accessory companies by stock ownership in which the American Tobacco Company exerted its power of control. The accessory companies were impleaded either because of their nature and character, or because of the power exerted over them through stock ownership by the American Tobacco Company, and also because of the power which they in turn exerted by stock ownership over the subsidiary corporations; and finally the subsidiary corporations were impleaded either because of their nature, or because of the control to which they were subjected in and by virtue of the stock ownership above stated. We append in the

†James B. Duke, Caleb C. Dula, Percival S. Hill, George Arents, Paul Brown, Robert B. Dula, George A. Helme, Robert D. Lewis, Thomas J. Maloney, Oliver H. Payne, Thomas F. Ryan, Robert K. Smith, George W. Watts, George G. Allen, John B. Cobb, William R. Harris, William H. McAlister, Anthony N. Brady, Benjamin N. Duke, H. M. Hanna, Herbert D. Kingsbury, Pierre Lorillard, Rufus L. Patterson, Frank H. Ray, Grant B. Schley, Charles N. Strotz, Peter A. B. Widener, Welford C. Reed (now deceased), and Williamson W. Fuller.

margin a statement showing *the stock[144 control exercised by the principal defendant, the American Tobacco Company, over the five accessory corporations, and also the authority which it directly exercised over certain of the subsidiary corporations, and a list showing the control exercised over the subsidiary corporations as a result of the stock ownership in the accessory corporations, they being in turn controlled, as we have said, by the principal defendant, the American Tobacco Company.†

†Extent of control of American Tobacco Company over the accessory corporations:

American Snuff Company—of 120,000 shares of preferred stock, owns 12,517 shares directly and 11,274 shares by reason of stock control of P. Lorillard Co.; in all, 23,764 shares; of 110,017 shares of common stock, owns 41,214 directly and 34,594 by reason of stock control of P. Lorillard Co.; in all, 75,808 shares.

American Cigar Company—of 100,000 shares of preferred stock owns 89,700 shares directly and 5,000 shares through control of American Snuff Co.; in all, 94,700 shares; of 100,000 shares of common stock, owns directly 77,451 shares.

American Stogie Company—of 108,790 shares of common stock, controls 73,072¾ shares through stock interest in American Snuff Company. The American Stogie Company owns all of the stock—12,500—of the Union American Cigar Company—cigars and stogies.

MacAndrews & Forbes Company— of 37,583 shares of preferred stock (no voting power) owns 7,500 shares; of 30,000 shares of common stock, owns 21,129 shares directly and 983 shares through stock control of the R. J. Reynolds Co.; in all, 22,112 shares.

The Conley Foil Company—of 8,250 shares of stock, directly owns 4,950 shares.

The American Tobacco Company—by stock ownership is the owner outright of the following defendant companies:

S. Anargyros [The S. Anargyros Company owns all the capital stock (10 shares) of the London Cigarette Co.]; F. F. Adams Tobacco Co.; Blackwell's Durham Tobacco Co.; Crescent Cigar & Tobacco Co.; Day and Night Tobacco Co:; Luhrman & Wilbern Tobacco Co.; Nall & Williams Tobacco Co.; Nashville Tobacco Works; R. A. Patterson Tobacco Co.; Monopol Tobacco Works; Spalding & Merrick.

The American Tobacco Co. also has the stock interest indicated in the following defendant corporations:

British-American Tobacco Co.—owns 1,200,000 shares of 1,500,000 shares of preferred stock, and 2,280,012 shares of 3,720,021 shares of common stock.

The Imperial Tobacco Co., etc.—owns 721,457 pounds sterling of 18,000,000 pounds sterling of stock.

The John Bollman Co.—of 2,000 shares of stock, owns 1,020 shares.

F. R. Penn Tobacco Co.—of 1,503 shares of stock, owns 1,002 shares (through Blackwell's Durham Tobacco Co.)

R. P. Richardson, Jr., & Co., Inc.—owns 600 out of 1,000 shares of stock, and $120,000 of $200,000 issue of bonds.

R. J. Reynolds Tobacco Co.—owns 50,000 out of 75,250 shares of stock.

Pinkerton Tobacco Co.—owns 775 out of 1,000 shares of stock.

Reynolds Tobacco Co. (of Bristol, Tennessee)—owns 1,449 shares out of 2,500 shares.

J. W. Carroll Tobacco Co.—owns 2,000 out of 3,000 shares.

P. Lorillard Co.—owns 15,813 out of 20,000 shares of preferred and all the common stock (30,000 shares).

Kentucky Tobacco Product Co.—owns 14 of 1,900 shares preferred, and owns directly 5,264, and, through the American Cigar Co., 355 out of 8,100 shares of common stock. [The Kentucky Tobacco Product Co. owns all the capital stock (100 shares) of the Kentucky Tobacco Extract Co.]

Porto Rican-American Tobacco Co.—owns directly 6,578, and, through the American Cigar Co., 6,576 of 19,984 shares of stock. [The Porto Rican-American Tobacco Co. owns 190 of the 380 shares of preferred, and 300 of the 450 shares of common stock of Ind. Co. of Porto Rico; also owns 2,150 of the 5,000 shares of capital stock of the Porto Rico Leaf Tobacco Co.]

The American Tobacco Company is also interested, as indicated, in the following defendants, supply or machinery companies:

Golden Belt Manufacturing Co. (cotton bags)—owns 6,521 of 7,000 shares.

Mengel Box Co. (wooden boxes)—British-American Tobacco Co. owns 3,637 of 5,000 shares of stock.

[The Mengel Company owns all of the capital stock of the Columbia Box Company and of the Tyler Box Company,—respectively, 1,500 and 250 shares.]

Amsterdam Supply Co.—(agency to purchase supplies)—owns majority of stock, and controls large part of remainder through subsidiary companies.

Thomas Cusack Co.—(bill posting)—owns 1,000 out of 1,500 shares.

Manhattan Briar Pipe Co.—owns all of stock, 3,500 shares.

International Cigar Machinery Co.—of 100,000 shares, owns 33,637 shares directly and 29,902 shares through American Cigar Co.—in all 63,539 shares.

The American Tobacco Company is also interested in the following companies, not named as defendants:

American Machine & Foundry Co.—owns 510 shares directly and remainder (490) through American Cigar Co.

145] *The two foreign corporations were impleaded either because of their nature and character and the operation and effect of contracts or agreements with the American Tobacco *Company, or the power[146 which it exerted over their affairs by stock ownership.

As we shall have occasion hereafter in referring to matters *beyond dispute[147 to set forth the main facts relied upon by the United States as giving rise to the cause of action alleged against all of the defendants, it suffices at this *moment to say[148 that the bill averred the origin and nature

New Jersey Machine Co.—owns 510 shares directly and remainder (490) through American Cigar Co.

Standard Tobacco Stemmer Co.—of 17,300 shares, owns 16,895 shares.

Garson Vending Machine Co.—of 500 shares, owns 250 shares.

The American Snuff Company, in addition to stock, etc., interests in the American Tobacco Co., American Cigar Company, and the Amsterdam Supply Company, has stock interests in the following defendants:

H. Bolander—owns all of stock, 1,350 shares.

De Voe Snuff Co.—owns all of stock, 500 shares. [The De Voe Snuff Co. owns all the capital stock, 400 shares of Skinner & Co., snuff.]

Standard Snuff Co.—owns all of stock, 2,816 shares.

The American Cigar Co., in addition to stock interests in the Amsterdam Supply Co., American Stogie Co., Porto Rican American Tobacco Co., Kentucky Tobacco Product Co., and International Cigar Machinery Co., has the stock interest indicated in the following defendants:

R. D. Burnett Cigar Co.—owns 77 out of 150 shares;

M. Blaskower Co.—owns 1,875 out of 2,500 shares pref. and 1,875 out of 2,500 shares of common.

Cuban Land & Leaf Tobacco Co.—owns all of stock, 1,000 shares. [The Cuban Land, etc., Co., owns 1,320 of the 1,890 shares of stock of the Vuelta Abajo S. S. Co.]

Cliff Weil Cigar Co.—owns 255 out of 500 shares.

Dusel, Goodloe, & Co.—owns 510 out of 750 shares.

Federal Cigar Real Estate Co.—owns all stock, 6,000 shares.

J. J. Goodrum Tobacco Co.—owns 477 out of 600 shares.

Havana-American Co.—owns all stock, 2,500 shares.

Havana Tobacco Co.—owns 700 shares out of 47,038 preferred, 166,800 out of 297,912 common stock, and $3,500,000 of $7,500,000 bonds.

Jordan Gibson & Baum Co., Inc.—owns all preferred and common stock, 250 shares each.

Louisiana Tobacco Co., Limited—owns 375 out of 500 shares.

The J. B. Moos Company—owns all of stock, 2,000 shares.

J. & B. Moos Company—owns all of common stock, 1,000 shares.

Porto Rican Leaf Tobacco Co.—owns 2,500 out of 5,000 shares.

The Smokers' Paradise Corporation—owns all of common stock (250 shares) and 349 of 500 shares preferred.

Havana Tobacco Co. has a stock interest in the following corporations:

H. de Cabanis y Carbajal—all of stock, 15,000 shares.

Hy. Clay and Bock & Co., Lim.—owns 9,749 out of 16,950 shares preferred and 14,687 out of 15,990 shares common.

[The Hy. Clay, etc., Co., is owner of 16,667 shares of the ordinary capital stock of the Havana Cigar & Tobacco Factories, Limited; and also owns 64 shares of the 1,890 shares of the capital stock of the Vuelta Abajo S. S. Co.]

Cuban Tobacco Co.—owns all of stock, 50 shares.

Havana Commercial Co.—owns 55,562 out of 60,000 shares preferred and 124,718 out of 125,00 shares common.

[The Havana Commercial Co. owns all of the capital stock—100 shares—of the M. Valley Co.—cigars.]

Havana Cigar & Tobacco Factories, Lim.—owns 6,774 out of 25,000 shares ordinary stock.

J. S. Muriasy Co.—owns all of stock—7,500 shares.

Blackwell's Durham Tobacco Co.—in addition to a stock interest in the Amsterdam Supply Co., has the stock interest indicated, in the following defendant corporations:

F. P. Penn Tobacco Co.—owns 1,002 out of 1,503 shares.

Scotten-Dillon Co.—owns $10,000 out of $500,000 of stock.

Wells-Whitehead Tobacco Co.—owns all of stock—1,500 shares.

Conley Foil Company—owns all of the capital stock (3,000 shares) of the Johnson Tin Foil & Metal Co.

P. Lorillard Company—has a stock interest in the American Snuff Company and the Amsterdam Suply Co.

R. J. Reynolds Tobacco Co.—in addition to a stock interest in the Amsterdam Supply Company and the MacAndrews & Forbes Company, owns one third of the 5,000 shares of stock of the Lipfert Scales Co.

The British-American Tobacco Co.—in addition to a small interest in the Amsterdam Supply Company, has the following stock interest in certain defendants:

David Dunlop—plug—owns 3,000 of 4,500 shares.

W. S. Mathews & Sons—smoking—owns 3,637 out of 5,000 shares of stock.

T. C. Williams Company—plug—owns all of stock, 4,000 shares.

of the American Tobacco Company and the origin and nature of all the other defendant corporations, whether accessory or subsidiary, and the connection of the individual defendants with such corporations. In effect the bill charged that the individual defendants and the defendant corporations were engaged in a conspiracy in restraint of interstate and foreign trade in tobacco and the products of tobacco, and constituted a combination in restraint of such trade, in violation of the 1st section of the act, and also were attempting to monopolize and were actually a monopolization of such trade, in violation of the 2d section. In support of these charges, general averments were made in the bill as to the wrongful purpose and intent with which acts were committed which it was alleged brought about the alleged wrongful result.

The prayer of the bill was as follows:

Wherefore petitioner prays:

149]· *"1. That the contracts, combinations, and conspiracies in restraint of trade and commerce among the states and with foreign nations, together with the attempts to monopolize and the monopolies of the same hereinbefore described, be declared illegal and in violation of the act of Congress passed July 2, 1890, and subsequent acts, and that they be prevented and restrained by proper orders of the court.

"2. That the agreements, contracts, combinations, and conspiracies entered into by the defendants on or about September 27, 1902, and thereafter, and evidenced among other things by the two written agreements of that date, Exhibits 1 and 2 hereto, be declared illegal, and that injunctions issue restraining and prohibiting defendants from doing anything in pursuance of or in furtherance of the same within the jurisdiction of the United States.

"3. That the Imperial Tobacco Company, its officers, agents, and servants, be enjoined from engaging in interstate or foreign trade and commerce within the jurisdiction of the United States until it shall cease to observe or act in pursuance of said agreements, contracts, combinations, and conspiracies entered into by it and other defendants on or about September 27, 1902, and thereafter, and evidenced, among other things, by the contracts of that date, Exhibits 1 and 2 hereto.

"4. That the British-American Tobacco Company be adjudged an unlawful instrumentality, created solely for carrying into effect the objects and purposes of said contract, combination, and conspiracy entered into on or about September 27, 1902, and thereafter, and that it be enjoined from engaging in interstate or foreign trade and commerce within the jurisdiction of the United States.

"5. That the court adjudge the American Tobacco Company, the American Snuff Company, the American Cigar Company, the American Stogie Company, the Mac-Andrews & Forbes Company, and the Conley Foil Company is each a combination in restraint of interstate and *foreign[150 trade and commerce; and that each has attempted and is attempting to monopolize, is in combination and conspiracy with other persons and corporations to monopolize, and has monopolized, part of the trade and commerce among the several states and with foreign nations; and order and decree that each one of them be restrained from engaging in interstate or foreign commerce, or, if the court should be of opinion that the public interests will be better subserved thereby, that receivers be appointed to take possession of all property, assets, business, and affairs of said defendants and wind up the same, and otherwise take such course in regard thereto as will bring about conditions in trade and commerce among the states and with foreign nations in harmony with law.

"6. That the holding of stock by one of the defendant corporations in another, under the circumstances shown, be declared illegal, and that each of them be enjoined from continuing to hold or own such shares in another, and from exercising any right in connection therewith.

"7. That defendants, each and all, be enjoined from continuing to carry out the purposes of the above-described contracts, combinations, conspiracies, and attempts to monopolize by the means herein described, or by any other, and be required to desist and withdraw from all connection with the same.

"8. That each of the defendants be enjoined from purchasing leaf tobacco or from selling and distributing its manufactured output as a part of interstate and foreign trade and commerce in conjunction or combination with any other defendant, and from taking part or being interested in any agreement or combination intended to destroy competition among them in reference to such purchases or sales.

"9. That petitioner have such other, further, and general relief as may be proper."

As to the answers, it suffices to say that all the individual *and corporate de-[151 fendants other than the foreign corporations denied the charges of wrongdoing and illegal combination, and the corporate defendants in particular in addition averred their right under state charters by virtue of which they existed to own and possess the property which they held, and further averred

that they were engaged in manufacturing, and that any combination amongst them related only to that subject, and therefore was not within the anti-trust act. The two foreign corporations asserted the validity of their corporate organization and of the assailed agreements, and denied any participation in the alleged wrongful combination.

After the taking of much testimony before a special examiner, the case was heard before a court consisting of four judges, constituted under the expediting act of February 11, 1903. [32 Stat. at L. 823, chap. 544, U. S. Comp. Stat. Supp. p. 1211.] In deciding the case in favor of the government, each of the four judges delivered an opinion. 164 Fed. 700. A final decree was entered on December 15, 1908. The petition was dismissed as to the English corporations, three of the subsidiary corporations, the United Cigar Stores Company, and all the individual defendants. It was decreed that the defendants other than those against whom the petition was dismissed had theretofore entered into and were parties to combinations in restraint of trade, etc., in violation of the anti-trust act, and said defendants and each of them, their officers, agents, etc., were restrained and enjoined "from directing or indirectly doing any act or thing whatsoever in furtherance of the objects and purposes of said combinations, and from continuing as parties thereto." It specifically found that each of the defendants, "the American Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company, and MacAndrews & Forbes Company, constitutes and is itself a combination in violation of the said act of Congress." The corporations thus named, their officers, etc., were next 152]restrained *and enjoined "from further directly or indirectly engaging in interstate or foreign trade and commerce in leaf tobacco or the products manufactured therefrom, or articles necessary or useful in connection therewith. But if any of said last-named defendants can hereafter affirmatively show the restoration of reasonably competitive conditions, such defendant may apply to this court for a modification, suspension, or dissolution of the injunction herein granted against it." The decree then enumerated the various corporations which it was found held or claimed to own some or all of the capital stock of other corporations, and particularly specified such other corporations, and then made the following restraining provisions:

"Wherefore each and all of defendants, the American Tobacco Company, the American Snuff Company, the American Cigar Company, P. Lorillard Company, R. J. Reynolds Tobacco Company, Blackwell's Durham Tobacco Company, and Conley Foil Company, their officers, directors, agents, servants, and employees, are hereby restrained and enjoined from acquiring, by conveyance or otherwise, the plant or business of any such corporation wherein any one of them now holds or owns stock; and each and all of said defendant corporations so holding stock in other corporations, as above specified, their officers, directors, agents, servants, and employees, are further enjoined from voting or attempting to vote said stock at any meeting of the stockholders of the corporation issuing the same, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over the acts and doings of such corporation. And it is further ordered and decreed that each and every of the defendant corporations the stock of which is held by any other defendant corporation, as hereinbefore shown, their officers, directors, servants, and agents, be and they are hereby respectively and collectively restrained and enjoined from permitting the stock so held to be voted by any other defendant *holding or claim-[153 ing to own the same, or by its attorneys or agents at any corporate election for directors or officers, and from permitting or suffering any other defendant corporation claiming to own or hold stock therein, or its officers or agents, to exercise any control whatsoever over its corporate acts."

Judgment for costs was given in favor of the petitioner and against the defendants as to whom the petition had not been dismissed, except the R. P. Richardson, Jr., & Company, a corporation which had consented to the decree. The decree also contained a provision that the defendants or any of them should not be prevented "from the institution, prosecution, or defense of any suit, action, or proceeding to prevent or restrain the infringement of a trademark used in interstate commerce, or otherwise assert or defend a claim to any property or rights." In the event of a taking of an appeal to this court, the decree provided that the injunction which it directed "shall be suspended during the pendency of such appeal."

The United States appealed, as did also the various defendants against whom the decree was entered. For the government it is contended: 1. That the petition should not have been dismissed as to the individual defendants. 2. That it should not have been dismissed as to the two foreign corporations,—the Imperial Tobacco Company and the British-American Tobacco Company, and the domestic corporations controlled by the latter, and that, on the contrary, the decree

should have commanded the observance of the anti-trust act by the foreign corporations so far as their dealings in the United States were concerned, and should have restrained those companies from doing any act in the United States in violation of the anti-trust act, whether or not the right to do said acts was asserted to have arisen pursuant to the contracts made outside of or within the United States. 3. The petition should not have been dismissed as to 154]the United Cigar Stores *Company. 4. The final decree should have adjudged defendants parties to unlawful contracts and conspiracies. 5. The final decree should have adjudged that defendants were attempting to monopolize and had monopolized parts of commerce. More particularly, it is urged, it should have adjudged that the American Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company, MacAndrews & Forbes Company, the Conley Foil Company, and the British-American Tobacco Company were severally attempting to monopolize and had monopolized parts of commerce, and that appropriate remedies should have been applied. 6. The decree was not sufficiently specific, since it should have described with more particularity the methods which the defendants had followed in forming and carrying out their unlawful purpose, and should have prohibited the resort to similar methods. 7. The decree should have specified the shares in corporations disclosed by the evidence to be owned by the parties to the conspiracy, and should have enjoined those parties from exercising any control over the corporations in which such stock was held, and the latter, if made defendant, from permitting such control, and should have also enjoined the collecting of any dividends upon the stock. 8. The decree improperly provided that nothing therein should prevent defendants from prosecuting or defending suits; also improperly suspended the injunction pending appeal.

The defendants, by their assignments of error, complain because the petition was not dismissed as to all, and more specifically, (a) because they were adjudged parties to a combination in restraint of interstate and foreign commerce, and enjoined accordingly; (b) because certain defendant corporations holding shares in others were enjoined from voting them or exercising control over the issuing company, and the latter from permitting this; and (c) because the American Tobacco Company. 155]American *Snuff Company, American Cigar Company, American Stogie Company, and the MacAndrews & Forbes Company were adjudged unlawful combinations, and restrained from engaging in interstate and foreign commerce.

The elaborate arguments made by both sides at bar present in many forms of statement the conflicting contentions resulting from the nature and character of the suit and the defense thereto, the decree of the lower court, and the propositions assigned as error to which we have just referred. In so far as all or any of these contentions, as many of them in fact do, involve a conflict as to the application and effect of §§ 1 and 2 of the anti-trust act, their consideration has been greatly simplified by the analysis and review of that act and the construction affixed to the sections in question in the case of Standard Oil Co. v. United States, quite recently decided. [221 U. S. 1, ante, 619, 31 Sup. Ct. Rep. 502.] In so far as the contentions relate to the disputed propositions of fact, we think from the view which we take of the case they need not be referred to, since, in our opinion, the case can be disposed of by considering only those facts which are indisputable, and by applying to the inferences properly deducible from such facts the meaning and effect of the law as expounded in accordance with the previous decisions of this court.

We shall divide our investigation of the case into three subjects: First, the undisputed facts; second, the meaning of the anti-trust law, and its application, as correctly construed, to the ultimate conclusions of fact deducible from the proof; third, the remedies to be applied.

First. Undisputed facts.

The matters to be considered under this heading we think can best be made clear by stating the merest outline of the condition of the tobacco industry prior to what is asserted to have been the initial movement in the combination which the suit assails, and in the light so afforded to briefly recite the history of the assailed acts and contracts. *We shall divide the[156 subject into two periods: (a) the one from the time of the organization of the first or old American Tobacco Company, in 1890, to the organization of the Continental Tobacco Company; and (b) from the date of such organization to the filing of the bill in this case.

Summarizing in the broadest way the conditions which obtained prior to 1890, as to the production, manufacture, and distribution of tobacco, the following general facts are adequate to portray the situation.

Tobacco was grown in many sections of the country having diversity of soil and climate, and therefore was subject to various vicissitudes resulting from the places of production, and consequently varied in quality. The great diversity of use

to which tobaeco was applied in manufaeturing caused it to be that there was a demand for all the various qualities. The demand for all qualities was not loeal, but widespread, extending as well to domestic as to foreign trade; and, therefore all the products were marketed under eompetitive conditions of a peculiarly advantageous nature. The manufaeture of the produet in this eountry in various forms was sueeessfully earried on by many individuals or eoncerns seattered throughout the country, a larger number, perhaps, of the manufacturers being in the vieinage of produetion, and others being advantageously situated in or near the prineipal markets of distribution.

Before January, 1890, five distinet concerns—Allen & Ginter, with faetory at Riehmond, Virginia; W. Duke, Sons & Company, with faetories at Durham, North Carolina, and New York city; Kinney Tobaeco Company, with faetory at New York city; W. S. Kimball & Company, with faetory at Roehester, New York; Goodwin & Company, with faetory at Brooklyn, New York—manufaetured, distributed, and sold in the United States and abroad 95 per cent of all the domestic cigarette and less than 157]8 per eent *of the smoking tobaeco produeed in the United States. There is no doubt that these faetories were competitors in the purehase of the raw product whieh they manufaetured, and in the distribution and sale of the manufaetured produets. Indeed, it is shown that prior to 1890 not only had normal and ordinary eompetition existed between the faetories in question, but that the competition had been fieree and abnormal. In January, 1890, having agreed upon a eapital stoek of $25,000,000, all to be divided amongst them, and who should be direetors, the eoneerns referred to organized the Amerieau Tobaeeo Company in New Jersey, "for trading and manufaeturing," with broad powers, and conveyed to it the assets and businesses ineluding good will and right to use the names of the old eoneerns; and thereafter this eorporation carried on the business of all. The $25,000,000 of stoek of the tobaeco company was allotted to the eharter members as follows: Allen & Ginter, $3,000,000 preferred, $4,500,000 common; W. Duke, Sons & Company, $3,000,000 preferred, $4,500,000 common; Kinney Tobaeeo Company, $2,000,000 preferred, $3,000,000, common; W. S. Kimball & Company, —$1,000,000 preferred, $1,500,000 common; and Goodwin & Company, $1,000,000 preferred, $1,500,000 common.

There is a charge that the valuation at whieh the respeetive properties were capitalized in the new corporation was enormously in exeess of their aetual value. We, however, put that subjeet aside, sinee we propose only to deal with faets whieh are not in eontroversy.

Shortly after the formation of the new eorporation, the Goodwin & Company factory was closed, and the direetors ordered "that the manufaeture of all tobaeeo cigarettes be eoncentrated at Richmond." The new eorporation in 1890, the first year of its operation, manufaetured about two and one half billion cigarettes, that is, about 96 or 97 per eent of the total domestie output, and about five and one-half million pounds of smoking tobaeeo out *of[158 a total domestie produet of nearly seventy million pounds.

In a little over a year after the organization of the company, it inereased its eapital stoek by $10,000,000. The purpose of this inerease is inferable from the considerations whieh we now state.

There was a firm known as Pfingst, Doerhoefer, & Company, consisting of a number of partners, who had been long and sueeessfully carrying on the business of manufacturing plug tobaeeo in Louisville, Kentueky, and distributing it through the ehannels of interstate eommeree. In January, 1891, this firm was eonverted into a corporation known as the National Tobaeeo Works, having a eapital stoek of $400,000, all of whieh was issued to the partners. Almost immediately thereafter, in the month of February, the Amerieau Tobaeeo Company became the purchaser of all the eapital stoek of the new eorporation, paying $600,000 cash and $1,200,000 in stoek of the Amerieau Tobaeeo Company. The members of the previously existing firm bound themselves by contraet with the Amerieau Tobaeeo Company to enter its serviee and manage the business and property sold, and eaeh further agreed that for ten years he would not engage in earrying on, direetly or indirectly, or permit or suffer the use of his name in eonnection with the carrying on, of the tobaeeo business in any form.

In April following, the Amerieau Tobaeeo Company bought out the business of Philip Whitloek, of Riehmond, Virginia, who was engaged in the manufacture of eheroots and cigars, and with the exelusive right to use the name of Whitlock. The consideration for this purehase was $300,000, and Whitloek agreed to beeome an employee of the Amerieau Tobaeeo Company for a number of years, and not to engage for twenty years in the tobaeeo business.

In the month of April the Amerieau Tobaeeo Company also aequired the business of Marburg Brothers, a well-known firm loeated at Baltimore, Maryland, and engaged *in the manufaeture and dis-[159

tribution of tobacco, principally smoking and snuff. The consideration was a cash payment of $164,637.65 and stock to the amount of $3,075,000. The members of the firm also conveyed the right to the use of the firm name, and agreed not to engage in the tobacco business for a lengthy period.

Again, in the same month, the American Tobacco Company bought out a tobacco firm of old standing, also located in Baltimore, as G. W. Gail & Ax, engaged principally in manufacturing and selling smoking tobacco, buying with the business the exclusive right to use the name of the firm or the partners, and the members of the firm agreed not to engage in the tobacco business for a specified period. The consideration for this purchase was $77,582.66 in cash and stock to the amount of $1,760,000. The plant was abandoned soon after.

The result of these purchases was manifested at once in the product of the company for the year 1891, as will appear from a note in the margin.† It will be seen that as to cheroots, smoking tobacco, fine cut tobacco, snuff and plug tobacco, the company had become a factor in all branches of the tobacco industry.

Referring to the occurrences of the year [160]1891, as in all *respects typical of the occurrences which took place in all the other years of the first period, that is, during the years 1892, 1893, 1894, 1895, 1896, 1897, and 1898, we content ourselves with saying that it is undisputed that between February, 1891, and October, 1898, including the purchases which we have specifically referred to, the American Tobacco Company acquired fifteen going tobacco concerns doing business in the states of Kentucky, Louisiana, Maryland, Michigan, Missouri, New York, North Carolina, and Virginia. For ten of the plants an all-cash consideration of $6,410,235.26 was paid, while the payments for the remaining five aggregated in cash $1,115,100.95 and in stock $4,123,000. It is worth noting that the last purchase, in October, 1898, was of the Drummond Tobacco Company, a Missouri corporation dealing principally in plug, for which a cash consideration was paid of $3,457,500.

The corporations which were combined for the purpose of forming the American Tobacco Company produced a very small portion of plug tobacco. That an increase in this direction was contemplated is manifested by the almost immediate increase of the stock and its use for the purpose of acquiring, as we have indicated, in 1891 and 1892, the ownership and control of concerns manufacturing plug tobacco and the consequent increase in that branch of production. There is no dispute that as early as 1893 the president of the American Tobacco Company, by authority of the corporation, approached leading manufacturers of plug tobacco and sought to bring about a combination of the plug tobacco interests, and upon the failure to accomplish this, ruinous competition, by lowering the price of plug below its cost, ensued. As a result of this warfare, which continued until 1898, the American Tobacco Company sustained severe losses aggregating more than four millions of dollars. The warfare produced its natural result, not only because the company acquired *dur-[161 ing the last two years of the campaign, as we have stated, control of important plug tobacco concerns, but others engaged in that industry came to terms. We say this because in 1898, in connection with several leading plug manufacturers, the American Tobacco Company organized a New Jersey corporation styled the Continental Tobacco Company, for "trading and manufacturing," with a capital of $75,000,000, afterwards increased to $100,000,000. The new company issued its stock and took transfers to the plants, assets, and businesses of five large and successful competing plug manufacturers.†

The American Tobacco Company also con-

†The output of the American Tobacco Company for 1891 was—

	Number.	Pounds.
Cigarettes	2,788,778,000	.....
Cheroots and little cigars	40,009,000	.....
Smoking	.....	13,813,355
Fine cut	.....	560,633
Snuff	.....	383,162
Plug	.....	4,442,774
Total output for the United States, 1891—		
Cigarettes	3,137,318,596	.....
Smoking	.....	76,708,300
Fine cut	.....	16,968,870
Plug and twist	.....	166,177,915
Snuff	.....	10,674,241

†P. J. Sorg Co., having factory at Middletown, Ohio, who received preferred stock $4,350,000, common stock $4,525,000, and cash $224,375.

John Finzer & Brothers, having factory at Louisville, Kentucky, who received preferred stock $2,250,000, common stock $3,050,000, and cash $550,000.

Daniel Scotten & Co., having factory at Detroit, Michigan, who received preferred stock $1,911,100, and common stock $3,012,500.

P. H. Mayo & Bros., having factory at Richmond, Va., who received preferred stock $1,250,000, common stock $1,925,000, and cash $66,125.

John Wright Co., having factory at Richmond, Va., who received preferred stock $495.000, common stock $495,000, and cash $4,116.67.

veyed to this corporation, at large valuations, the assets, brands, real estate, and good will pertaining to its plug tobacco business, including the National Tobacco Works, the James G. Butler Tobacco Company, Drummond Tobacco Company, and Brown Tobacco Company, receiving as consideration $30,274,200 of stock (one half common and one half preferred), $300,000 cash, and an additional sum for losses sustained in the plug business during 1898, $840,035. Mr. Duke, the president of the American Tobacco Company, also became president of the Continental Company.

Under the preliminary agreement which was made, looking to the formation of the 162]Continental Tobacco *Company, that company acquired from the holders all the $3,000,000 of the common stock of the P. Lorillard Company in exchange for $6,000,000 of its stock, and $1,581,300 of the 2,000,000 preferred in exchange for notes aggregating a sum considerably larger. The Lorillard Company, however, although it thus passed practically under the control of the American Tobacco Company by virtue of its ownership of stock in the Continental Company, was not liquidated, but its business continued to be conducted as a distinct corporation, its goods being marked and put upon the market just as if they were the manufacture of an independent concern.

Following the organization of the Continental Tobacco Company, the American Tobacco Company increased its capital stock from thirty-five millions of dollars to seventy millions of dollars, and declared a stock dividend of 100 per cent on its common stock; that is, a stock dividend of $21,000,000.

As the facts just stated bring us to the end of the first period which, at the outset, we stated it was our purpose to review, it is well briefly to point out the increase in the power and control of the American Tobacco Company and the extension of its activities to all forms of tobacco products which had been accomplished just prior to the organization of the Continental Tobacco Company. Nothing could show it more clearly than the following: At the end of that time, the company was manufacturing 86 per cent or thereabouts of all the cigarettes produced in the United States, above 26 per cent of all the smoking tobacco, more than 22 per cent of all plug tobacco, 51 per cent of all little cigars, 6 per cent each of all snuff and fine cut tobacco, and over 2 per cent of all cigars and cheroots.

A brief reference to the occurrences of the second period, that is, from and after the organization of the Continental Tobacco Company up to the time of the bringing of this *suit, will serve to make evident[163 that the transactions in their essence had all the characteristics of the occurrences of the first period.

In the year 1899 and thereafter, either the American or Continental Companies, for cash or stock, at an aggregate cost of fifty millions of dollars ($50,000,000), bought and closed up some thirty competing corporations and partnerships theretofore engaged in interstate and foreign commerce as manufacturers, sellers, and distributers of tobacco and related commodities, the interested parties covenanting not to engage in the business. Likewise the two corporations acquired for cash, by issuing stock, and otherwise, control of many competing corporations, now going concerns, with plants in various states, Cuba and Porto Rico, which manufactured, bought, sold, and distributed tobacco products or related articles throughout the United States and foreign countries, and took from the parties in interest covenants not to engage in the tobacco business.

The plants thus acquired were operated until the merger in 1904, to which we shall hereafter refer, as a part of the general system of the American and Continental companies. The power resulting from and the purpose contemplated in making these acquisitions by the companies just referred to, however, may not be measured by considering alone the business of the company directly acquired, since some of those companies were made the vehicles as representing the American or Continental Company for acquiring and holding the stock of other and competing companies, thus amplifying the power resulting from the acquisitions directly made by the American or Continental Company, without ostensibly doing so. It is besides undisputed that in many instances the acquired corporations, with the subsidiary companies over which they had control through stock ownership, were carried on ostensibly as independent concerns, disconnected *from either the Ameri-[164 can or the Continental Company, although they were controlled and owned by one or the other of these companies. Without going into details on these subjects, for the sake of brevity, we append in the margin a statement of the corporations thus acquired, with the mention of the competing concerns which such corporations acquired.†

*It is of the utmost importance to[165

†Monopol Tobacco Works (New York, N. Y.)—Capital $40,000—cigarettes and smoking tobacco. In 1899 the American Tobacco Co. acquired all the shares for $250,000, and it is now a selling agency.

Luhrman & Wilbern Tobacco Company (Middletown, Ohio)—Capital $900,000—

observe that the acquisitions made by the subsidiary corporations in some cases likewise show the remarkable fact stated above; that is, the disbursement of enormous 166]amounts of money to *acquire plants, which, on being purchased, were not utilized, but were immediately closed. It is also to be remarked, that the facts stated in the memorandum in the margin show on their face a singular identity between the conceptions which governed the transactions of this latter period with those which evidently existed at the very birth of the original organization of the American Tobacco Company, as exemplified by the transactions in the first period. A statement of particular transactions outside of those previously referred to as having occurred during the period in question will serve additionally to make the situation clear. And to accomplish this purpose we shall, as briefly as may be consistent with clarity, separately refer to the facts concerning the or-167]ganization during the *second period of the five corporations which were named as defendants in the bill, as heretofore stated, and which, for the purpose of designation, we have hitherto classified as accessory defendants, such corporations being the American Snuff Company, American Cigar Company, American Stogie Company, Mac-Andrews & Forbes Company (licorice), and Conley Foil Company.

(1) *The American Snuff Company.*

As we have seen, the American Tobacco Company, at the commencement of the first period, produced a very small quantity of snuff. Its capacity, however, in that regard was augmented, owing particularly to the formation of the Continental Tobacco Company and the acquisition of the Lorillard Company, by which it came to be a serious factor as a snuff producer. There shortly ensued an aggressive competition in the snuff business between the American Tobacco Company, with the force acquired from the vantage ground resulting from the dominancy of its expanded organization, and others in the trade operating independently of that organization. The result was identical with that which had previously arisen from like conditions in the past.

In March, 1900, there was organized in New Jersey a corporation known as the American Snuff Company, with a capital of $25,000,000, one half preferred and one half common, which took over the Snuff business of the P. Lorillard Company, Continental Company, and the American Tobacco Company, with that of a large competitor, *viz.*: the Atlantic Snuff Company. The stock of the new company was thus apportioned: Atlantic Snuff Company, preferred, $7,500,-

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scrap tobacco. This business was formerly carried on by a partnership.

Mengel Box Company (Louisville, Ky.)—Capital $2,000,000—boxes for packing tobacco. This company has acquired the stock ($150,000) of Columbia Box Company and of Tyler Box Company ($25,000), both at St. Louis.

The Porto Rican-American Tobacco Company (Porto Rico)—Capital $1,799,600. In 1899 the American Company caused the organization of the Porto Rican-American Tobacco Company, which took over the partnership business Rucabado y Portela,—manufacturer of cigars and cigarettes,—with covenants not to compete. The American Tobacco Company and American Cigar Company each hold $585,300 of the stock; the balance is in the hands of individuals.

Kentucky Tobacco Product Company (Louisville, Ky.)—Capital $1,000,000. In 1899 the Continental Company acquired control of the Louisville Spirit-Cured Tobacco Co., engaged in curing and treating tobacco and utilizing the stems for fertilizers. By agreement, the Kentucky Tobacco Product Company was organized in New Jersey, with $1,000,000 capital, $450,000 issued to the old stockholders, and $550,000 to Continental Company as consideration for agreement to supply stems.

Golden Belt Manufacturing Company (North Carolina)—Capital, $700,000—cotton bags and containers. In 1899 the American Tobacco Company acquired the business of this corporation, which was formed to take over a going business.

The Conley Foil Company (New York)—Tinfoil combination—Capital, $825,000. In December, 1899, the American Tobacco Company secured control of the business of John Conley & Son (Partnership), New York, N. Y., manufacturers of tinfoil, an essential for packing tobacco products. By agreement the Conley Foil Company was incorporated in New Jersey "for trading and manufacturing," etc., with $250,000 capital (afterwards $375,000 and $825,000)—which took over the firm's business and assets, etc., and the American Tobacco Company became owner of the majority shares. The Conley Foil Company has acquired all the stock of the Johnson Tinfoil & Metal Company—a defendant—of St. Louis, a leading competitor, and they supply, under fixed contracts, the tinfoil used by defendants.

R. J. Reynolds Tobacco Company (Winston-Salem, North Carolina). In 1899 the Continental Tobacco Company acquired control of the R. J. Reynolds Tobacco Company, one of the largest manufacturers of plug—output in 1898, 6,000,000 pounds. By agreement, a new corporation (with same name) was organized in New Jersey and capitalized at $5,000,000 (afterwards $7,525,000), which took over the business and assets of the old one. The Continental Company immediately acquired the majority shares, and the American Company now

000, common, $25,000,000; P. Lorillard Company, preferred, $1,124,700, common, $3,459,400; the American Tobacco Company, preferred, $1,177,800, common, $3,227,500; Continental Tobacco Company, preferred, $197,500, common, $813,100. The stock issued to Continental Tobacco Company and 168]the *defendants P. Lorillard Company and the American Tobacco Company is still held by the latter, and they have at all times had a controlling interest in the snuff company. All the companies, together with their officers and directors, covenanted that they would not thereafter engage as competitors in the tobacco business or the manufacture, sale, or distribution of snuff.

Among the assets transferred by the Atlantic Snuff Company to American Snuff Company were all the shares ($600,000) of W. E. Garrett & Sons, Inc., then and now one of the oldest and very largest producers of snuff, for a long time and still engaged at Yorkland, Delaware, in interstate and foreign commerce in tobacco and its products, and which controlled through stock ownership the Southern Snuff Company, Memphis, Tennessee, Dental Snuff Company, Lynchburg, Virginia, and Stewart-Ralph Snuff Company, Clarksville, Tennessee. The separate existence of W. E. Garrett & Sons, Inc., has been preserved and its business conducted under the corporate name.

In March, 1900, the American Snuff Company acquired all the shares of George W. Helme Company, one of the oldest and largest producers of snuff and actively engaged at Helmetta, New Jersey, in interstate and foreign commerce in competition with defendants, by issuing in exchange therefore $2,000,000 preferred stock and $1,000,000 common; and it thereafter took a conveyance of all assets of the acquired company, and now operates the plant under its own name.

As a result of the transaction just stated, it came to pass that the American Tobacco Company, which had, at the end of the first period, only a very small percentage of the snuff manufacturing business, came virtually to have the dominant control as a manufacturer of that product.

2. *Conley Foil Company—manufacturers of tinfoil, an essential for packing tobacco products.*

In December, 1899, the American Tobacco Company secured control of the business of John Conley & Sons, a *partnership[169 of New York city. By agreement, the Conley Foil Company was incorporated in New York "for trading and manufacturing," etc., with $250,000 capital, ultimately increased to $825,000. The corporation took over the business and assets of the firm, and the American Tobacco Company became owner

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holds $5,000,000 of stock. The separate organization has been preserved.

There was acquired in the name of the new Reynolds Company, with covenants against competition, the following plants:

In 1900, T. L. Vaughn & Company, partnership, of Winston, N. C.; consideration, $90,506; Brown Brothers Company, a North Carolina corporation, Winston, N. C.; consideration, $67,615; and P. H. Hanes & Company and B. F. Hanes & Company, Winston, N. C., partnership; consideration, $671,950.

In 1905, Rucker & Witten Tobacco Company, Martinsville, Va.; consideration, $512,898.

In 1906, D. H. Spencer & Company, Martinsville, Va.; consideration, $314,255.

(All of the foregoing plants were closed as soon as purchased.)

A majority of the $400,000 capital stock in the Lipfert-Scales Company, of Winston, N. C., a corporation largely engaged in the manufacture of plug tobacco and interstate and foreign commerce in leaf tobacco and its products, was acquired by the Reynolds Company. The separate organization of the Lipfert-Scales Company is preserved and the business carried on under its corporate name.

The R. J. Reynolds Tobacco Company also holds $98,300 stock of the MacAndrews & Forbes Company and $9,600 of the Amsterdam Supply Company.

Blackwell's Durham Tobacco Company (Durham, N. C.)—capital, $1,000,000. In 1899 the American Tobacco Company procured for $4,000,000 all the stock of Blackwell's Durham Tobacco Company at Durham, N. C., manufacturer and distributer of tobacco products. Thereupon the Blackwell's Durham Tobacco Company, of New Jersey, capital, $1,000,000 all owned by the American, was organized and took over the assets of the old company, then under receivership. Its separate organization has been preserved.

The Durham Company has acquired control of the following competitors—Reynold's Tobacco Company; F. R. Penn Tobacco Company; and Wells-Whitehead Tobacco Company.

The following companies came also under the control of the American Tobacco Company through acquired stock ownership:

S. Anargyros—capital $650,000—Turkish cigarettes. In 1890 the American Tobacco Company procured the organization of corporation of S. Anargyros, which took over that individual's going business and has since controlled it. Through this company the business in Turkish cigarettes is largely conducted.

The John Bollman Company (San Francisco)—capital, $200,000—cigarettes. In 1900 the American Tobacca Company procured organization of the John Rollman Company, which took over the business of the former concern in exchange for stock. Its separate organization has been preserved.

of a majority of the shares of stock. The Conley Foil Company has acquired all the shares of stock of the Johnson Tinfoil & Metal Company, of St. Louis, a leading competitor, and they supply under fixed contracts at remunerative prices the tinfoil used by the defendants, which constitutes the major part of the total production in the United States.

3. *American Cigar Company.*

Prior to 1901 the American and Continental Tobacco Companies manufactured, sold, and distributed cigars, stogies, and cheroots. In the year stated the companies determined to engage in the business upon a larger scale. Under agreement with Powell, Smith, & Company, large manufacturers and dealers in cigars, they caused the incorporation in New Jersey of the American Cigar Company "for trading and manufacturing," etc., to which all three conveyed their said business, and it has since carried on the same. The American and Continental companies each acquired 46½ per cent of the shares, and Powell, Smith, & Company 7 per cent; the original capitalization was $10,000,000 (afterwards $20,000,000), and more than three fourths is owned by the former. The cigar company acquired many competitors (partnerships and corporations) engaged in interstate and foreign commerce, taking the parties covenants against engaging in the tobacco business; and it has also procured the organization of controlled corporations which have acquired competing manufacturers, jobbers, and distributers in the United States, Cuba, and Porto Rico. It manufacturers, sells, and distributes a considerable percentage of domestic cigars; is the dominating factor 170]in the tobacco business, *foreign and domestic, in Cuba and Porto Rico, and is there engaged in tobacco planting. It also controls corporate jobbers in California, Alabama, Virginia, Pennsylvania, Georgia, Louisiana, New Jersey, and Tennessee.

4. *The MacAndrews & Forbes Company —manufacturers of licorice.*

There is no question that licorice paste is an essential ingredient in the manufacture of plug tobacco, and that one who is debarred from obtaining such paste would therefore be unable to engage in or carry on the manufacture of such product. The control over this article was thus secured: In May, 1902, the Continental Company secured control of MacAndrews and Forbes Company of Newark, New Jersey, and organized "for trading and manufacturing" a corporation known as the MacAndrews & Forbes Company, with a capital of $7,000,000, $4,000,000 preferred and $3,000,000 common, which took over the business of MacAndrews and Forbes and another large competitor. The Continental Company acquired two thirds of the common stock by agreeing to purchase its supply of paste from the new company. The American Tobacco Company, at the time of the filing the bill, was the owner of $2,112,900 of the common stock and $750,000 preferred. By various purchases and agreements the MacAndrews & Forbes Company acquired, substantially, the business of all competitors. Thus, in June, 1902, it purchased the business of the Stamford Mfg. Company, of Stamford, Connecticut, and incorporated the National Licorice Company, which acquired the business of Young & Smylie and F. B. & V. P. Scudder, and the National Company agreed with MacAndrew & Forbes not to produce licorice for tobacco manufacturers. In 1906 all the stock in the J. S. Young Company, ($1,800,000), which had been organized to take over the business of the J. S. Young Company of Baltimore, Maryland, was acquired by the MacAndrews & Forbes Company. The MacAndrews & Forbes Company use in excess *of 95[171 per cent of the licorice root consumed in the United States.

5. *American Stogie Company.*

In May, 1903, the American Cigar Company and the American and Continental Tobacco Companies caused the American Stogie Company to be incorporated in New Jersey, with $11,979,000 capital, which immediately took over the stogie and tobie business of the companies named in exchange for $8,206,275 stock, and then, in the usual ways, acquired the business of others in the manufacture, sale, and distribution of such products, with covenants not to compete. It acquired in exchange for $3,647,725 stock all shares of United States Cigar Company (which had previously acquired and owned the business of important competitors), and subsequently took the conveyance of the plant and assets. The majority shares always have been held by defendant, the American Cigar Company.

As we think the legitimate inferences deducible from the undisputed facts which we have thus stated will be sufficient to dispose of the controversy, we do not deem it necessary to expand this statement so as to cause it to embrace a recital of the undisputed facts concerning the entry of the American Tobacco Company into the retail tobacco trade through the acquisition of a controlling interest in the stock of what is known as the United Cigar Stores Company, as well as to some other subjects which, for the sake of brevity, we likewise pass over, in order to come at once to a statement concerning the foreign companies.

The English companies.

In September, 1901, the American Tobacco Company purchased for $5,347,000 a Liverpool (England) corporation, known as Ogden's Limited, there engaged in manufacturing and distributing tobacco products. A trade conflict which at once ensued caused many of the English manufacturers to combine into an incorporation known as the 172]*Imperial Tobacco Company of Great Britain & Ireland, capital 15,000,000, afterwards increased to 18,000,000, pounds sterling. The trade war was continued between this corporation and the American Tobacco Company, with a result substantially identical with that which had hitherto, as we have seen, arisen from such a situation.

In September, 1902, the Imperial and the American companies entered into contracts (executed in England) stipulating that the former should limit its business to the United Kingdom, except purchasing leaf in the United States (it buys 54,000,000 pounds annually); that the American companies should limit their business to the United States, its dependencies and Cuba; and that the British-American Tobacco Company, with capital of 6,000,000 pounds sterling apportioned between them, should be organized, take over the export business of both, and operate in other countries, etc. This arrangement was immediately put into effect, and has been observed.

The Imperial Company holds one third and the American Company two thirds of the capital stock of the British American Tobacco Company, Limited. The latter company maintains a branch office in New York city, and the vice president of the American Tobacco Company is a principal officer. This company uses large quantities of domestic leaf, partly exported to various plants abroad, and about half manufactured here and then exported. By agreement, all this is purchased through the American Tobacco Company. In addition to many plants abroad, it has warehouses in various states and plants at Petersburg, Virginia, and Durham, North Carolina, where tobacco is manufactured and then exported.

The purchase of necessary leaf tobacco in the United States by the Imperial Company is now made through a resident general agent, and is exported as a part of foreign commerce.

Not to break the continuity of the narra- 173]tive of facts, we *have omitted in the proper chronological order to state the facts relative to what was known as the Consolidated Tobacco Company. We now particularly refer to that subject.

The Consolidated Tobacco Company.

In June, 1901, parties largely interested in the American and Continental companies caused the incorporation in New Jersey of the Consolidated Tobacco Company, capital $30,000,000 (afterwards $40,000,000), with broad powers and perpetual existence; to do business throughout the world, and to guarantee securities of other companies, etc. A majority of shares was taken by a few individuals connected with the old concerns: A. N. Brady, J. B. Duke, A. H. Payne, Thomas Ryan, W. C. Whitney, and P. A. B. Widener. J. B. Duke, president of both the old companies, became president of the Consolidated. Largely in exchange for bonds, the new company acquired substantially all the shares of common stock of the old ones. Its business, of holding and financing, was continued until 1904, when, with the American and Continental Companies, it was merged into the present American Tobacco Company.

By proceedings in New Jersey, October, 1904, the (old) American Tobacco Company, Continental Tobacco Company, and Consolidated Tobacco Company were merged into one corporation, under the name of the American Tobacco Company, the principal defendant here. The merged company, with perpetual existence, was capitalized at $180,000,000 ($80,000,000 preferred, ordinarily without power to vote).

The powers conferred by the charter are stated in the margin.†

*Prior to the merger the consolidated [174 Tobacco Company, a majority of whose $40,000,000 share capital was held by J. B. Duke, Thomas F. Ryan, William C. Whitney, Anthony N. Brady, Peter A. B. Widener, and Oliver H. Payne, had acquired, as already stated, nearly all common shares of both old American and Continental Com-

†To buy, manufacture, sell, and otherwise deal in tobacco and the products of tobacco in any and all forms; . . . to guarantee dividends on any shares of the capital stock of any corporation in which said merged corporation has an interest as stockholder; . . . to carry on any business operations deemed by such merged corporation to be necessary or advisable in connection with any of the objects of its incorporation, or in furtherance of any thereof, or tending to increase the value of its property or stock; . . . to conduct business in all other states, territories, possessions, and dependencies of the United States of America, and in all foreign countries; . . . to purchase or otherwise acquire and hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of the shares of the capital stock or of any bonds, securities, or other evidences of indebtedness created by any other corporation or corporations of this or any other state or government, and to issue its own obligations in payment or exchange therefor. . . .

panies, and thereby control. The preferred shares, however, were held by many individuals. Through the method of distribution of the stock of the new company in exchange for shares in the old American and in the Continental Company, it resulted that the same six men in control of the combination through the Consolidated Tobacco Company continued that control by ownership of stock in the merged or new American Tobacco Company. The assets, property, etc., of the old Companies, passed to the American Tobacco Company (merged), which has since carried on the business.

The record indisputably discloses that after this merger the same methods which were used from the beginning continued to be employed. Thus, it is beyond dispute: First, that since the organization of the new American Tobacco Company that company has acquired four large tobacco concerns, that restrictive covenants against engaging in the tobacco business were taken from the sellers, and that the plants were 175]not continued in operation, but *were at once abandoned. Second, that the new company has besides acquired control of eight additional concerns, the business of such concerns being now carried on by four separate corporations, all absolutely controlled by the American Tobacco Company, although the connection as to two of these companies with that corporation was long and persistently denied.

Thus, reaching the end of the second period, and coming to the time of the bringing of the suit, brevity prevents us from stopping to portray the difference between the condition in 1890 when the (old) American Tobacco Company was organized by the consolidation of five competing cigarette concerns and that which existed at the commencement of the suit. That situation and the vast power which the principal and accessory corporate defendants and the small number of individuals who own a majority of the common stock of the new American Tobacco Company exert over the marketing of tobacco as a raw product, its manufacture, its marketing when manufactured, and its consequent movement in the channels of interstate commerce, indeed, relatively, over foreign commerce, and the commerce of the whole world, in the raw and manufactured products, stand out in such bold relief from the undisputed facts which have been stated as to lead us to pass at once to the second fundamental proposition which we are required to consider. That is, the construction of the anti-trust act, and the application of the act, as rightly construed, to the situation as proven in consequence of having determined the ultimate and final inferences properly deducible from the undisputed facts which we have stated.

The construction and application of the anti-trust act.

If the anti-trust law is applicable to the entire situation here presented, and is adequate to afford complete relief for the evils which the United States insists that situation presents, it can only be because that law will be given a *more comprehensive[176 application than has been affixed to it in any previous decision. This will be the case because the undisputed facts as we have stated them involve questions as to the operation of the anti-trust law not hitherto presented in any case. Thus, even if the ownership of stock by the American Tobacco Company in the accessory and subsidiary companies, and the ownership of stock in any of those companies among themselves, were held, as was decided in the Standard Oil Company Case, to be a violation of the act, and all relations resulting from such stock ownership were therefore set aside, the question would yet remain whether the principal defendant, the American Tobacco Company, and the five accessory defendants, even when devested of their stock ownership in other corporations, by virtue of the power which they would continue to possess, even although thus stripped, would amount to a violation of both the 1st and 2d sections of the act. Again, if it were held that the corporation, the existence whereof was due to a combination between such companies and other companies, was a violation of the act, the question would remain whether such of the companies as did not owe their existence and power to combinations, but whose power alone arose from the exercise of the right to acquire and own property, would be amenable to the prohibitions of the act. Yet further: Even if this proposition was held in the affirmative, the question would remain whether the principal defendant, the American Tobacco Company, when stripped of its stock ownership, would be, in and of itself, within the prohibitions of the act, although that company was organized and took being before the anti-trust act was passed. Still further, the question would yet remain whether particular corporations which, when bereft of the power which they possessed as resulting from stock ownership, although they were not inherently possessed of a sufficient residuum of power to cause them to be, in *and of themselves, either a restraint[177 of trade or a monopolization or an attempt to monopolize, should nevertheless be restrained because of their intimate connection and association with other corpora-

tions found to be within the prohibitions of the act. The necessity of relief as to all these aspects, we think, seemed to the government so essential, and the difficulty of giving to the act such a comprehensive and coherent construction as would be adequate to enable it to meet the entire situation, led to what appears to us to be in their essence a resort to methods of construction not compatible one with the other. And the same apparent conflict is presented by the views of the act taken by the defendants when their contentions are accurately tested. Thus, the government, for the purpose of fixing the illegal character of the original combinations which organized the old American Tobacco Company, asserts that the illegal character of the combination is plainly shown because the combination was brought about to stay the progress of a flagrant and ruinous trade war. In other words, the contention is that, as the act forbids every contract and combination, it hence prohibits a reasonable and just agreement made for the purpose of ending a trade war. But, as thus construing the act by the rule of the letter which kills would necessarily operate to take out of the reach of the act some of the accessory and many subsidiary corporations, the existence of which depends not at all upon combination or agreement or contract, but upon mere purchasers of property, it is insisted in many forms of argument that the rule of construction to be applied must be the spirit and intent of the act, and therefore its prohibitions must be held to extend to acts even if not within the literal terms of the statute, if they are within its spirit, because done with an intent to bring about the harmful results which it was the purpose of the statute to prohibit. So as to the defendants. While it is argued on the one hand that the forms by which various properties [178] *were acquired, in view of the letter of the act, exclude many of the assailed transactions from condemnation, it is yet urged that, giving to the act the broad construction which it should rightfully receive, whatever may be the form, no condemnation should follow, because, looking at the case as a whole, every act assailed is shown to have been but a legitimate and lawful result of the exertion of honest business methods, brought into play for the purpose of advancing trade, instead of with the object of obstructing and restraining the same. But the difficulties which arise from the complexity of the particular dealings which are here involved and the situation which they produce, we think grows out of a plain misconception of both the letter and spirit of the anti-trust act. We say of the letter, because, while seeking by a narrow rule of the letter to include things which it is deemed would otherwise be excluded, the contention really destroys the great purpose of the act, since it renders it impossible to apply the law to a multitude of wrongful acts which would come within the scope of its remedial purposes by resort to a reasonable construction, although they would not be within its reach by a too narrow and unreasonable adherence to the strict letter. This must be the case, unless it be possible in reason to say that, for the purpose of including one class of acts which would not otherwise be embraced, a literal construction, although in conflict with reason, must be applied, and for the purpose of including other acts which would not otherwise be embraced, a reasonable construction must be resorted to. That is to say, two conflicting rules of construction must at one and the same time be applied and adhered to.

The obscurity and resulting uncertainty, however, are now but an abstraction, because it has been removed by the consideration which we have given quite recently to the construction of the anti-trust act in the Standard Oil Case. In that case it was held, without departing from *any pre- [179] vious decision of the court, that as the statute had not defined the words "restraint of trade," it became necessary to construe those words,—a duty which could only be discharged by a resort to reason. We say the doctrine thus stated was in accord with all the previous decisions of this court, despite the fact that the contrary view was sometimes erroneously attributed to some of the expressions used in two prior decisions (the Trans-Missouri Freight Asso. and Joint Traffic Cases, 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, and 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25). That such view was a mistaken one was fully pointed out in the Standard Oil Case, and is additionally shown by a passage in the opinion in the Joint Traffic Case, as follows (171 U. S. 568): "The act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it." Applying the rule of reason to the construction of the statute, it was held in the Standard Oil Case that, as the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the anti-trust act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly re-

stricting competition, or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held not that acts which the statute prohibited could be removed from the control of its prohibitions 180]by a finding *that they were reasonable, but that the duty to interpret, which inevitably arose from the general character of the term "restraint of trade," required that the words "restraint of trade" should be given a meaning which would not destroy the individual right to contract, and render difficult, if not impossible, any movement of trade in the channels of interstate commerce,—the free movement of which it was the purpose of the statute to protect. The soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt. Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is so plainly required in order to give effect to the remedial purposes which the act under consideration contemplates, and to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve, is illustrated by the record before us. In truth, the plain demonstration which this record gives of the injury which would arise from, and the promotion of the wrongs which the statute was intended to guard against which would result from, giving to the statute a narrow, unreasoning, and unheard-of construction, as illustrated by the record before us, if possible serves to strengthen our conviction as to the correctness of the rule of construction —the rule of reason—which was applied in the Standard Oil Case, the application of which rule to the statute we now, in the most unequivocal terms, re-express and reaffirm.

Coming, then, to apply to the case before us the act as interpreted in the Standard Oil and previous cases, all the difficulties suggested by the mere form in which the assailed transactions are clothed become of no moment. This follows because, although it was held in the Standard *Oil Case[181 that, giving to the statute a reasonable construction, the words "restraint of trade" did not embrace all those normal and usual contracts essential to individual freedom, and the right to make which was necessary in order that the course of trade might be free, yet, as a result of the reasonable construction which was affixed to the statute, it was pointed out that the generic designation of the 1st and 2d sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held that, in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape, by any indirection, the prohibitions of the statute.

Considering, then, the undisputed facts which we have previously stated, it remains only to determine whether they establish that the acts, contracts, agreements, combinations, etc., which were assailed, were of such an unusual and wrongful character as to bring them within the prohibitions of the law. That they were, in our opinion so overwhelmingly results from the undisputed facts that it seems only necessary to refer to the facts as we have stated them to demonstrate the correctness of this conclusion. Indeed, the history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon *the fears or play upon the[182 cupidity of competitors would make success possible. We say these conclusions are inevitable, not because of the vast amount of property aggregated by the combination, not because, alone, of the many corporations which the proof shows were united by resort to one device or another. Again, not alone because of the dominion and control over the tobacco trade which actually exists, but because we think the conclusion of wrongful purpose and illegal combination is overwhelmingly established by the following considerations: (a) By the fact that the very first organ-

ization or combination was impelled by a previously existing fierce trade war, evidently inspired by one or more of the minds which brought about and became parties to that combination. (b) Because, immediately after that combination and the increase of capital which followed, the acts which ensued justify the inference that the intention existed to use the power of the combination as a vantage ground to further monopolize the trade in tobacco by means of trade conflicts designed to injure others, either by driving competitors out of the business or compelling them to become parties to a combination,—a purpose whose execution was illustrated by the plug war which ensued and its results, by the snuff war which followed and its results, and by the conflict which immediately followed the entry of the combination in England, and the division of the world's business by the two foreign contracts which ensued. (c) By the ever-present manifestation which is exhibited of a conscious wrongdoing by the form in which the various transactions were embodied from the beginning, ever changing, but ever in substance the same. Now the organization of a new company, now the control exerted by the taking of stock in one or another or in several, so as to obscure the result actually attained, nevertheless uniform, in their manifestations of the purpose to restrain others and to monopolize and retain 183]power in the hands of the *few who, it would seem, from the beginning, contemplated the mastery of the trade which practically followed. (d) By the gradual absorption of control over all the elements essential to the successful manufacture of tobacco products, and placing such control in the hands of seemingly independent corporations serving as perpetual barriers to the entry of others into the tobacco trade. (e) By persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them, but in order to close them up and render them useless for the purposes of trade. (f) By the constantly recurring stipulations, whose legality, isolatedly viewed, we are not considering, by which numbers of persons, whether manufacturers, stockholders, or employees, were required to bind themselves, generally for long periods, not to compete in the future. Indeed, when the results of the undisputed proof which we have stated are fully apprehended, and the wrongful acts which they exhibit are considered, there comes inevitably to the mind the conviction that it was the danger which it was deemed would arise to individual liberty and the public well-being from acts like those which this record exhibits, which led the legislative mind to conceive and to enact the anti-trust act,—considerations which also serve so clearly to demonstrate that the combination here assailed is within the law as to leave no doubt that it is our plain duty to apply its prohibitions.

In stating summarily, as we have done, the conclusions which, in our opinion, are plainly deducible from the undisputed facts, we have not paused to give the reasons why we consider, after great consideration, that the elaborate arguments advanced to affix a different complexion to the case are wholly devoid of merit. We do not, for the sake of brevity, moreover, stop to examine and discuss the various propositions urged in the argument at bar for the purpose of demonstrating that the subject-matter of the combination which we find to exist, and the *combination itself, are not[184 within the scope of the anti-trust law, because, when rightly considered, they are merely matters of intrastate commerce, and therefore subject alone to state control. We have done this because the want of merit in all the arguments advanced on such subjects is so completely established by the prior decisions of this court, as pointed out in the Standard Oil Case, as not to require restatement.

Leading as this does to the conclusion that the assailed combination in all its aspects—that is to say, whether it be looked at from the point of view of stock ownership or from the standpoint of the principal corporation and the accessory or subsidiary corporations, viewed independently, including the foreign corporations in so far as by the contracts made by them they became co-operators in the combination—comes within the prohibitions of the 1st and 2d sections of the anti-trust act, it remains only finally to consider the remedy which it is our duty to apply to the situation thus found to exist.

The remedy.

Our conclusion being that the combination as a whole, involving all its co-operating or associated parts, in whatever form clothed, constitutes a restraint of trade within the 1st section, and an attempt to monopolize or a monopolization within the 2d section of the anti-trust act, it follows that the relief which we are to afford must be wider than that awarded by the lower courts, since that court merely decided that certain of the corporate defendants constituted combinations in violation of the 1st section of the act, because of the fact that they were formed by the union of previously competing concerns, and that the other defendants not dismissed from the action were parties to such combinations, or pro-

moted their purposes. We, hence, in determining the relief proper to be given, may not model our action upon that granted by the court below, but, in order to en-
185]able us to *award relief coterminous with the ultimate redress of the wrongs which we find to exist, we must approach the subject of relief from an original point of view. Such subject necessarily takes a two-fold aspect,—the character of the permanent relief required, and the nature of the temporary relief essential to be applied pending the working out of permanent relief in the event that it be found that it is impossible, under the situation as it now exists, to at once rectify such existing wrongful condition. In considering the subject from both of these aspects three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition, either by way of stock ownership or otherwise, of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning. Mindful of these considerations, and to clear the way for their application, we say at the outset, without stopping to amplify the reasons which lead us to that conclusion, we think that the court below clearly erred in dismissing the individual defendants, the United Cigar Stores Company, and the foreign corporations and their subsidiary corporations.

Looking at the situation as we have hitherto pointed it out, it involves difficulties in the application of remedies greater than have been presented by any case involving the anti-trust law which has been hitherto considered by this court: First, Because in this case it is obvious that a mere decree forbidding stock ownership by one part of the combination in another part or entity thereof would afford no adequate measure of relief, since differ-
186]ent *ingredients of the combination would remain unaffected, and by the very nature and character of their organization would be able to continue the wrongful situation which it is our duty to destroy. Second. Because the methods of apparent ownership by which the wrongful intent was, in part, carried out, and the subtle devices which, as we have seen, were resorted to for the purpose of accomplishing the wrong contemplated, by way of ownership or otherwise, are of such a character that it is difficult, if not. impossible, to formulate a remedy which could restore in their entirety the prior lawful conditions. Third. Because the methods devised by which the various essential elements to the successful operation of the tobacco business from any particular aspect have been so separated under various subordinate combinations, yet, so unified by way of the control worked out by the scheme here condemned, are so involved that any specific form of relief which we might now order in substance and effect might operate really to injure the public, and, it may be, to perpetuate the wrong. Doubtless it was the presence of these difficulties which caused the United States, in its prayer for relief, to tentatively suggest, rather than to specifically demand, definite and precise remedies. We might at once resort to one or the other of two general remedies,—(a) the allowance of a permanent injunction restraining the combination as a universality, and all the individuals and corporations which form a part of or co-operate in it in any manner or form from continuing to engage in interstate commerce until the illegal situation be cured,—a measure of relief which would accord in substantial effect with that awarded below to the extent that the court found illegal combinations to exist; or (b) to direct the appointment of a receiver to take charge of the assets and property in this country of the combination in all its ramifications, for the purpose of preventing a continued violation of the law, and thus working out, by a sale of the *property of the combina-[187
tion or otherwise, a condition of things which would not be repugnant to the prohibitions of the act. But, having regard to the principles which we have said must control our action, we do not think we can now direct the immediate application of either of these remedies. We so consider as to the first because, in view of the extent of the combination, the vast field which it covers, the all-embracing character of its activities concerning tobacco and its products, to at once stay the movement in interstate commerce of the products which the combination or its co-operating forces produce or control might inflict infinite injury upon the public by leading to a stoppage of supply and a great enhancement of prices. The second, because the extensive power which would result from at once resorting to a receivership might not only do grievous injury to the public, but also cause widespread and perhaps irreparable loss to many innocent people. Under these circumstances, taking into mind the

complexity of the situation in all of its aspects, and giving weight to the many-sided considerations which must control our judgment, we think, so far as the permanent relief to be awarded is concerned, we should decree as follows: 1st. That the combination, in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately, be decreed to be in restraint of trade and an attempt to monopolize and a monopolization within the 1st and 2d sections of the anti-trust act. 2d. That the court below, in order to give effective force to our decree in this regard, be directed to hear the parties, by evidence or otherwise, as it may be deemed proper, for the purpose of ascertaining and determining upon some plan or method of dissolving the combination and of recreating, out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law. 3d. That for the ac-
188]complishment *of these purposes, taking into view the difficulty of the situation, a period of six months is allowed from the receipt of our mandate, with leave, however, in the event, in the judgment of the court below, the necessities of the situation require, to extend such period to a further time not to exceed sixty days. 4th. That in the event, before the expiration of the period thus fixed, a condition of disintegration in harmony with the law is not brought about, either as the consequence of the action of the court in determining an issue on the subject, or in accepting a plan agreed upon, it shall be the duty of the court, either by way of an injunction restraining the movement of the products of the combination in the channels of interstate or foreign commerce, or by the appointment of a receiver, to give effect to the requirements of the statute.

Pending the bringing about of the result just stated, each and all of the defendants, individuals as well as corporations, should be restrained from doing any act which might further extend or enlarge the power of the combination, by any means or device whatsoever. In view of the considerations we have stated, we leave the matter to the court below to work out a compliance with the law without unnecessary injury to the public or the rights of private property.

While in many substantial respects our conclusion is in accord with that reached by the court below, and while also the relief which we think should be awarded in some respects is coincident with that which the court granted, in order to prevent any complication, and to clearly define the situation, we think, instead of affirming and modifying, our decree, in view of the broad nature of our conclusions, should be one of reversal and remanding, with directions to the court below to enter a decree in conformity with this opinion, and to take such further steps as may be necessary to fully carry out the directions which we have given.

And it is so ordered.

*Mr. Justice **Harlan** concurred in[189 part and dissented in part:

I concur with many things said in the opinion just delivered for the court, but it contains some observations from which I am compelled to withhold my assent.

I agree most thoroughly with the court in holding that the principal defendant, the American Tobacco Company, and its accessory and subsidiary corporations and companies, including the defendant English corporations, constitute a combination which, "in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately," is illegal under the anti-trust act of 1890 [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200], and should be decreed to be in restraint of interstate trade and an attempt to monopolize and a monopolization of part of such trade.

The evidence in the record is, I think, abundant to enable the court to render a decree containing all necessary details for the suppression of the evils of the combination in question. But the case is sent back, with *directions* further to hear the parties, by evidence or otherwise, "for the purpose of ascertaining and determining upon some plan or method of dissolving the combination, *and* of *recreating* out of the elements *now* composing it, a new condition" which shall not be repugnant to law. The court, in its opinion, says of the present combination that its illegal purposes are overwhelmingly established by many facts; among others, "by the ever-present manifestation which is exhibited of a *conscious wrongdoing* by the form in which the various transactions were embodied from the beginning, ever changing, but ever in substance the same. Now the organization of a new company, now the control exerted by the taking of stock in one or another, or in several, so as to obscure the result actually attained, nevertheless uniform in their manifestations of the purpose to restrain *others, and to monopolize and[190 retain power in the hands of the few, who, it would seem, from the beginning contemplated the mastery of the trade which practically followed. By the gradual absorp-

tion of control over all the elements essential to the successful manufacture of tobacco products, and placing such control in the hands of seemingly independent corporations, serving as perpetual barriers to the entry of others into the tobacco trade." The court further says of this combination and monopoly: "The history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence, from the beginning, of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade, by driving competitors out of business, which were ruthlessly carried out, upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible."

But it seems that the course I have suggested is not to be pursued. The case is to go back to the circuit court in order that, out of the elements of the old combination, a new condition may be "re-created" that will not be in violation of the law. I confess my inability to find, in the history of this combination, anything to justify the wish that a new condition should be "re-created" out of the mischievous elements that compose the present combination, which, together with its component parts, have, without ceasing, pursued the vicious methods pointed out by the court. If the proof before us—as it undoubtedly does—warrants the characterization which the court has made of this monster combination, why cannot all necessary directions be now given as to the terms of the decree? In my judgment, there is enough in the record to enable this court to formulate specific directions as to what the decree should contain. Such 191]directions would *not only end this litigation, but would serve to protect the public against any more conscious wrongdoing by those who have persistently and "ruthlessly," to use this court's language, pursued illegal methods to defeat the act of Congress.

I will not say what, in my opinion, should be the form of the decree, nor speculate as to what the details ought to be. It will be time enough to speak on that subject when we have the decree before us. I will, however, say now that, in my opinion, the decree below should be affirmed as to the tobacco company and its accessory and subsidiary companies, and reversed on the cross appeal of the government.

But my objections have also reference to those parts of the court's opinion reaffirming what it said recently in the Standard Oil Case [221 U. S. 1, ante, 619, 31 Sup. Ct. Rep. 502], about the former decisions of this court touching the anti-trust act. We are again reminded, as we were in the Standard Oil Case, of the necessity of applying the "rule of reason" in the construction of this act of Congress,—an act expressed, as I think, in language so clear and simple that there is no room whatever for construction.

Congress, with full and exclusive power over the whole subject, has signified its purpose to forbid *every* restraint of interstate trade, in whatever form, or to whatever extent; but the court has assumed to insert in the act, by construction merely, words which made Congress say that it means only to prohibit the "undue" restraint of trade.

If I do not misapprehend the opinion just delivered, the court insists that what was said in the opinion in the Standard Oil Case was in accordance with our previous decisions in the Trans-Missouri and Joint Traffic Cases, 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25, if we resort to *reason*. This statement surprises me quite as much as would a statement that black was white or white was black. It is scarcely just to the majority in those two cases for the *court at this late[192 day to say or to intimate that they interpreted the act of Congress without regard to the "rule of reason," or to assume, as the court now does, that the act was, for the first time, in the Standard Oil Case, interpreted in the "light of reason." One thing is certain, "rule of reason," to which the court refers, does not justify the perversion of the plain words of an act in order to defeat the will of Congress.

By every conceivable form of expression, the majority, in the Trans-Missouri and Joint Traffic Cases, adjudged that the act of Congress did not allow restraint of interstate trade to any extent or in any form, and three times it expressly rejected the theory, which had been persistently advanced, that the act should be construed as if it had in it the word "unreasonable" or "undue." But now the court, in accordance with what it denominates the "rule of reason," in effect inserts in the act the word "undue," which means the same as "unreasonable," and thereby makes Congress say what it did not say; what, as I think, it plainly did not intend to say; and what, since the passage of the act, it has explicitly refused to say. It has steadily refused to amend the act so as to tolerate a restraint of interstate commerce

even where such restraint could be said to be "reasonable" or "due." In short, the court now, by judicial legislation, in effect amends an act of Congress relating to a subject over which that department of the government has exclusively cognizance. I beg to say that, in my judgment, the majority, in the former cases, were guided by the "rule of reason;" for it may be assumed that they knew quite as well as others what the rules of reason require when a court seeks to ascertain the will of Congress as expressed in a statute. It is obvious from the opinions in the former cases, that the majority did not grope about in darkness, but in discharging the solemn duty put on them they stood out in the full glare of the "light of reason," 193]and felt and said, time and again, *that the court could not, consistently with the Constitution, and would not, usurp the functions of Congress by indulging in judicial legislation. They said in express words, in the former cases, in response to the earnest contentions of counsel, that to insert by construction the word "unreasonable" or "undue" in the act of Congress would be *judicial legislation*. Let me say, also, that as we all agree that the combination in question was illegal under *any* construction of the anti-trust act, there was not the slightest necessity to enter upon an extended argument to show that the act of Congress was to be read as if it contained the word "unreasonable" or "undue." All that is said in the court's opinion in support of that view is, I say with respect, *obiter dicta*, pure and simple.

These views are fully discussed in the dissenting opinion delivered by me in the Standard Oil Case. I will not repeat what is therein stated, but it may be well to cite an additional authority. In the Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550, the court was asked to sustain the constitutionality of the statute there involved. But the statute could not have been sustained except by inserting in it words not put there by Congress. Mr. Justice Miller, delivering the unanimous judgment of the court, said: "If we should, in the case before us, undertake to make by *judicial construction* a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do." This language was cited with approval in Employer's Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 502, 52 L. ed. 297, 310, 28 Sup. Ct. Rep. 141. I refer to my dissenting opinion in the Standard Oil Case as containing a full statement of my views of this particular question.

For the reasons stated, I concur in part with the court's opinion and dissent in part.

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*HANNIBAL BRIDGE COMPANY[194 and the Wabash Railroad Company, Plffs. in Err.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 194–208.)

Commerce — bridges — alterations — notice.

1. A notice to a bridge company to make certain alterations in a bridge over an interstate water way, conformably to the act of March 3, 1899 (30 Stat. at L. 1121, chap. 425), § 18, enacted to secure navigation against unreasonable obstructions, is not insufficient as the basis of a criminal prosecution in case of noncompliance because it bears the signature of the Assistant Secretary of War, instead of the Secretary himself, who is the official named in the statute as the one to give such notice, where the communication shows upon its face that it was from the War Department, and from the Secretary of War, and that the latter, without abrogating his authority under the statute, only used the hand of the Assistant Secretary in order to give the owners of the bridge notice of what was required of them.

[For other cases, see Commerce, II. c, in Digest Sup. Ct. 1908.]

Commerce — Federal control over bridges.

2. A bridge over the Mississippi river, constructed under the authority of the special act of Congress of July 25, 1866 (14 Stat. at L. 244, chap. 246), which expressly reserves the right of alteration or amendment so as to prevent or remove all material obstructions to navigation by the constructon of bridges, is subject to the provisions of the river and harbor act of March 3, 1899, § 18, empowering the Secretary of War, when satisfied, after a hearing of the parties interested, that a bridge over a navigable water way of the United States is an unreasonable obstruction to navigation, to require such changes or alterations as will render navigation reasonably free, easy, and unobstructed.

[For other cases, see Commerce, II. c, in Digest Sup. Ct. 1908.]

[No. 100.]

NOTE.—On the power of Congress to regulate commerce—see notes to State v. Indiana & O. Oil, Gas & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

Argued April 17, 1911. Decided May 15, 1911.

IN ERROR to the District Court of the United States for the Eastern District of Missouri to review a conviction for noncompliance with an order of the Secretary of War, directing alterations in a bridge over an interstate water way. Affirmed.

The facts are stated in the opinion.

Mr. **Wells H. Blodgett** argued the cause, and, with Messrs. James L. Minnis and George A. Mahan filed a brief for plaintiff in error the Wabash Railroad Company:

The special act of Congress approved July 25th, 1866, under which the bridge was erected, and which reserved to Congress the power to require changes in the structure, was not repealed, or in anywise affected by the subsequent general law of March 3, 1899, under which this proceeding was instituted.

South Carolina v. Stoll, 17 Wall. 436, 21 L. ed. 655; Rodgers v. United States, 185 U. S. 87, 46 L. ed. 818, 22 Sup. Ct. Rep. 582; Sedgw. Stat. & Const. Law, 123; Bishop, Written Law, § 112–B; Commissioners v. Board of Public Works, 39 Ohio St. 628; State ex rel. Fosdick v. Perrysburg, 14 Ohio St. 472.

The bridge having been erected in accordance with the act of July 26, 1866, it thereupon became a lawful structure, and must necessarily continue so until that act shall be amended. What Congress has made lawful, only Congress can make unlawful.

United States v. Keokuk & H. Bridge Co. 45 Fed. 178.

The alterations to be made in the bridge were not described, in the notice, with such certainty as to enable the defendants to know when they had complied therewith.

Ibid.; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 876; United States v. Cruikshank, 92 U. S. 557, 23 L. ed. 593; McConville v. Jersey City, 39 N. J. L. 38; Louisville & N. R. Co. v. Railroad Commission, 19 Fed. 679.

If this were a suit on a contract to build a "long pier," a "proper guard fence," or a "good house," there could be no decree for specific performance, because of insufficient description of the work to be performed.

Bishop, Contr. § 316; Beach, Contr. § 76.

The office of "Assistant Secretary of War" is not mentioned in § 18, and criminal statutes cannot be enlarged by construction; nor can new or additional words be read into them.

United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37; United States v. Harris, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609; The Enterprise, 1 Paine, 32, Fed. Cas. No. 4,499.

The parties owning and operating the bridge were not given "a reasonable opportunity to be heard," in the sense in which those words are employed in the act of March 3, 1899.

People ex rel. Keech v. Thompson, 94 N. Y. 451; People ex rel. New York v. Nichols, 79 N. Y. 582.

There was a fatal variance between material allegations of the information and the proof; the allegation being that the Secretary of War gave the notice, and the proof being that the "Assistant Secretary of War" gave the notice.

United States v. Cantril, 4 Cranch, 167, 2 L. ed. 584; United States v. Hardyman, 13 Pet. 176, 10 L. ed. 113.

Mr. **R. Burnham Moffat** argued the cause and filed a brief for plaintiff in error the Hannibal Bridge Company.

Assistant Attorney General **Harr** argued the cause and filed a brief for defendant in error:

The power conferred upon the Secretary of War by § 18 of the act of March 3, 1899, may be exercised with respect to the Hannibal Bridge, although constructed pursuant to the act of July 25, 1866.

Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Monongahela Bridge Co. v. United States, 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356.

United States v. Keokuk & H. Bridge Co. 45 Fed. 178, upon which plaintiffs in error rely in support of their contention as to the inapplicability of § 18 of the act of March 3, 1899, to the Hannibal bridge, has been overruled by this court.

Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Monongahela Bridge Co. v. United States, 216 U. S. 177, 194, 54 L. ed. 435, 442, 30 Sup. Ct. Rep. 356.

Even if it were held that § 18 of the act of March 3, 1899, does not apply to a bridge constructed pursuant to the act of July 25, 1866, the action of the Secretary of War in respect to the Hannibal bridge and the proceedings in this case are none the less authorized and valid because the Hannibal bridge was not constructed in accordance with the act of July 25, 1866.

Hannibal & St. J. R. Co. v. Missouri River Packet Co. 125 U. S. 260, 269, 270, 31 L. ed. 731, 735, 8 Sup. Ct. Rep. 874.

The notice to alter, signed by the Assistant Secretary of War, met the requirements of § 18 of the act of March 3, 1899, which provides for notice by the Secretary of

War, and there was, therefore, no variance between the information and the proof.

Miller v. New York, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228; Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264; Wolsey v. Chapman, 101 U. S. 755, 769, 25 L. ed. 915, 920.

In the absence of any proof to the contrary, it must be assumed that the statements contained in the notice were true and that the Assistant Secretary was authorized by the Secretary to send the same.

United States v. Peralta, 19 How. 343, 347, 15 L. ed. 678, 680; Parish v. United States, 100 U. S. 500, 25 L. ed. 763; United States v. Adams, 24 Fed. 351; John Shillito Co. v. McClung, 2 C. C. A. 526, 6 U. S. App. 128, 51 Fed. 868; Re Huttman, 70 Fed. 699; Re Billings, 23 Ct. Cl. 167.

If there were any doubt on the subject, the ratification of the Secretary was equivalent to an original authority.

United States v. Heinszen, 206 U. S. 370, 382, 384, 51 L. ed. 1098, 1102, 1103, 27 Sup. Ct. Rep. 742, 11 A. & E. Ann. Cas. 688.

The hearing seems to have been identical in all substantial respects with those in Union Bridge Co. v. United States, 204 U. S. 364, 369, 51 L. ed. 523, 528, 27 Sup. Ct. Rep. 367, and Monongahela Bridge Co. v. United States, 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356.

The inquiry as to whether a bridge is a reasonable obstruction to navigation is a legislative, and not a judicial, one.

Newport & C. Bridge Co. v. United States, 105 U. S. 475, 480, 481, 26 L. ed. 1145, 1147, 1148.

The action of Congress in requiring the alteration of bridges across navigable water ways of the United States, to meet the needs of navigation, is not the exercise of the power of eminent domain, but of the police power, to the exercise of which uncompensated obedience is required.

Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367. See also Japanese Immigrant Case (Yamata v. Fisher) 189 U. S. 86, 47 L. ed. 721, 23 Sup. Ct. Rep. 611; Cooley, Const. Lim. § 496, note; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Hibben v. Smith, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88; Cooley, Taxn. 3d ed. p. 59; King v. Mullins, 171 U. S. 429, 43 L. ed. 224, 18 Sup. Ct. Rep. 925.

Mr. Justice **Harlan** delivered the opinion of the court:

This is a criminal information against the Hannibal Bridge Company, the Wabash Railroad Company, and the Missouri Pacific Railway Company, under the 18th section of the river and harbor appropriation act of Congress of March 3d, 1899 (30 Stat. at L. 1121, chap. 425).

That section is as follows: "Whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable water ways of the United States, is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such *bridge by rafts, steamboats, or other[200 water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice, he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If, at the end of such time, the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required from the Secretary of War, and within the time prescribed by him, wilfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and *every month* such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed: Provided, that in any case arising under the provisions of this section, an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court, either by the United States or by the defendants."

Proceeding under the above statute, certain vessel owners, masters, pilots, and others interested in the navigation of the Mississippi river, represented to the Secretary *of War, by petition, that the[201

bridge over that river at Hannibal, Missouri had become and was an unreasonable obstruction to free navigation by reason of the location of the then-existing draw openings, the entire absence of guide-fences or sheer booms, and the presence of artificial deposits of stone about the piers of the bridge, which they believed had increased the current through the draw openings to a dangerous extent. The Secretary was asked by the petitioners to exercise the powers granted to him by the above act, and after due hearing of all interested persons or corporations, require such alterations to be made in and about the bridge as would render navigation through it reasonably free, easy, and unobstructed.

The matter was referred by the War Department to an officer of the Engineer Corps of the Army, for report. That officer, after examination, reported that, from personal observation and experience, especially during the great flood of June, 1903, he was satisfied that the bridge was an unreasonable obstruction to navigation, by reason of the wrong location of the draw spans, the absence of guard fences or sheer booms, and the deposit of riprap in considerable quantities about the piers and abutments. The report recommended certain changes in order that navigation through the bridge might be reasonably safe, easy, and unobstructed. In these recommendations the Chief of Engineers concurred. "The character of this bridge as an unreasonable obstruction to navigation is," the report stated, "so generally understood, and has been so well established by former hearings, that further hearings would appear to be superfluous; but, as the alteration of the structure so as to make it reasonably safe for navigation will be expensive, and on that account will probably be antagonized by its owners, I believe it would be best to hold another hearing, at which all parties in interest may be heard: the said new hearing to take place as soon as practicable."

202] *Subsequently, under date of March 10th, 1906, there was issued by the War Department an official communication to the bridge company, as follows: "Take notice that, whereas, the *Secretary of War* has good reason to believe that the drawbridge commonly known as the Wabash Railway bridge, owned or operated by the Hannibal Bridge Company (and by the Wabash Railroad Company), *inter alia*, across the Mississippi river at Hannibal, Missouri, is an unreasonable obstruction to the free navigation of the said Mississippi river (which is one of the navigable water ways of the United States) on account of unsuitable location of the draw spans and protection crib, the lack of suitable guard fences or sheer booms, and the presence of obstructing riprap around the piers, there being difficulty in passing the draw openings or draw spans of such bridge by rafts, steamboat, or other water craft; and whereas, the following alterations, which have been recommended by the Chief of Engineers, are required to render navigation through it reasonably free, easy, and unobstructed, to wit: (Here follow specifications of proposed alterations) . . . And whereas, to March 15, 1907, is a reasonable time in which to alter the said bridge as described above. Now, therefore, in obedience to, and by virtue of, § 18 of an act of Congress of the United States entitled, 'An Act Making Appropriations for the Construction, Repair, and Preservation of Certain Public Works on Rivers and Harbors, and for Other Purposes,' approved March 3, 1899 (30 Stat. at L. 1153, chap. 425, U. S. Comp. Stat. 1901, p. 3545), the *Secretary of War* hereby notifies the said Hannibal Bridge Company to alter the said bridge as described above, and prescribes that said alterations shall be made and completed on or before March 15, 1907."

Similar notices were given to the Wabash Railroad Company and the Missouri Pacific Railway Company, respectively, each notice being signed by "Robert Shaw Oliver, Asst. Secretary of War."

*Such a hearing as that notice re-[203 quired was had at Rock Island, Illinois, before an engineer officer designated by the War Department, the parties interested having been previously notified of the time, place, and object of the hearing. It appears also that notice of the hearing was given through newspapers published at St. Paul, St. Louis, and Hannibal. Among those present at the hearing were numerous river men, masters, and pilots. The bridge company was also present by counsel and participated in the investigation. After the hearing was concluded, the engineer officer who presided made a report to the Chief Engineer, in which he said: "The law and the orders of the Department have been fully complied with; every opportunity has been given the representatives of this bridge to present their full views; the bridge to-day is an illegal structure; it is an unreasonable obstruction to the present navigation of the Mississippi river; there is great difficulty in passing its draw openings at high stages; the continuance of existing conditions is liable at any moment to lead to an appalling disaster and great loss of life; previous recommendations as to alterations necessary in this bridge to render navigation through it reasonably

free, easy, and unobstructed are concurred in."

He further said: That "the bridge is an unreasonable obstruction, and that there is difficulty in passing its draw, seems overwhelmingly shown by the statements and affidavits of those competent to give opinions on such a subject. The river pilots are almost unanimous in their views regarding this bridge."

It should be here stated that, so far as the record shows, no objection was made by the bridge company as to the manner in which the hearing was conducted.

Subsequently, under date of March 10th, 1906, in an official notice to the bridge company, signed by "Robert Shaw Oliver, Asst. Secretary of War," the Secretary of War (Mr. Taft) expressed his approval of the 204]recommendations *of the Chief of Engineers, and directed the bridge company, on or before March 15th, 1907, to make the alterations suggested by that officer. Later on, the bridge company requested a hearing before the Secretary of War himself. The Secretary assented to another hearing being had, but said that it must be held before the Judge Advocate General of the Army. After seasonable notice to the parties interested in the navigation of the river, the latter officer heard the case anew, and reported to the Secretary of War that the case was covered by the act of March 3d, 1899, and that the action theretofore taken by the War Department should be adhered to. The Secretary of War formally approved the report of the Judge Advocate General, and directed the Chief of Engineers to "act accordingly."

The bridge company failed or refused to make the required alterations of the bridge. Then followed the information in question, the Wabash Railroad Company and the Missouri Pacific Railway Company being made codefendants with the bridge company on the ground that they owned or controlled the bridge.

There were two counts in the information; the first count, charging the defendants with having wilfully failed and refused to make the above alterations in the bridge, within the time prescribed by the Secretary of War, and to comply with the order of that officer; the second count, charging the wilful failure and refusal of the defendants to make such alterations within one month after the time allowed by the Department.

A demurrer to the information was overruled, and plea of not guilty entered. The jury found the bridge company and the Wabash Railroad Company each guilty, but, by direction of the court, it returned a verdict of not guilty as to the Missouri Pacific Railway Company. Judgment was rendered in favor of the United States against the bridge company for $2,500 on each count of the information. *A[205 like judgment was rendered against the Wabash Railroad Company.

The assignments of error are very numerous. But we feel constrained to say that no one of them causes a serious doubt as to the correctness of the judgment sought to be reviewed. The court has heretofore held, upon full consideration, that Congress had full authority, under the Constitution, to enact § 18 of the act of March 3d, 1899, and that the delegation to the Secretary of War of the authority specified in that section was not a departure from the established constitutional rule that forbids the delegation of strictly legislative or judicial powers to an executive officer of the government. All that the act did was to impose upon the Secretary the duty of attending to such details as were necessary in order to carry out the declared policy of the government as to the free and unobstructed navigation of those waters of the United States over which Congress, in virtue of its power to regulate commerce, had paramount control. It is also firmly settled that such alterations of bridges over the navigable waters of the United States as the Chief of Engineers recommended, and as the Secretary of War required to be made after notice and hearing the parties interested, was not a taking of the property of the owners of such bridges, within the meaning of the Constitution. Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Monongahela Bridge Co. v. United States, 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356; Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349.

What the Secretary did in relation to the bridge here in question seems to have been in substantial, if not in exact, accordance with the statute. He was officially informed through the Engineer Corps, that the complaints that came to him from many sources as to the Hannibal bridge were sufficient to require such action on his part as the statute authorized. He ordered a hearing, first causing notice to be given to the parties interested of the time and *place of the hearing. We[206 cannot doubt from the record that the hearing was adequate and was fairly conducted. The result of the hearing was a recommendation, concurred in by the Chief of Engineers, that certain alterations of the bridge were demanded by the public interests. There was a second hearing, with a

like result. Then the Secretary acted, and directed the making of such alterations in the bridge as had been found to be necessary. Of the character and extent of those alterations the bridge company was notified by an official communication from the War Department. It is true that that communication was signed by the Assistant Secretary of War, and not by the Secretary himself. And that fact is relied upon to invalidate the entire proceeding. There is no merit in this objection. The communication signed by the Assistant Secretary shows, upon its face, that it was from the War Department and from the Secretary of War, and that the Secretary, without abrogating his authority under the statute, only used the hand of the Assistant Secretary in order to give the owners of the bridge notice of what was required of them under the statute. It is physically impossible for the head of an executive department to sign, himself, every official communication that emanates from his department.

Equally without merit is the objection that the nature and character of the required alterations were not sufficiently indicated. This is a mistake. The communication from the War Department was full and adequate. The owners of the bridge could have had no reasonable doubt as to what was expected and required of them.

The defendants also insist that their bridge was constructed under the authority of a special act of Congress of July 25th, 1866 (14 Stat. at L. 244, chap. 246), and that its maintenance, as constructed, is not affected by a subsequent general appropriation act, like the one of which the above § 18 forms a part. This view cannot be sus-
207]tained. The *act of July 25th, 1866, expressly reserves the right to alter or amend it so as to prevent or remove all material obstructions to the navigation of said river by the construction of bridges. In the Union Bridge Case, above cited, it appeared that the bridge was required by the Secretary of War to be altered, at the expense of the owners. The point was made that the bridge having been originally erected under the authority of the state of Pennsylvania, and without objection from the general government, the power of the Secretary and of Congress did not go so far as the government claimed. But this court said: "Although the bridge, when erected under the authority of a Pennsylvania charter, may have a lawful structure, and although it may not have been an unreasonable obstruction to commerce and navigation *as then carried on*, it must be taken, under the cases cited and upon principle, not only that the company, when exerting the power conferred upon it by the state, did so with knowledge of the paramount authority of Congress to regulate commerce among the states, but that it erected the bridge subject to the possibility that Congress might, at some future time, when the public interest demanded, exert its power by appropriate legislation to protect navigation against unreasonable obstructions. Even if the bridge, in its original form, was an unreasonable obstruction to navigation, the mere failure of the United States, at the time, to intervene by its officers or by legislation and prevent its erection, could not create an obligation on the part of the government to make compensation to the company, if, at a subsequent time, and for public reasons, Congress should forbid the maintenance of bridges that had become unreasonable obstructions to navigation. It is for Congress to determine when it will exert its power to regulate interstate commerce. Its mere silence or inaction when individuals or corporations, under the authority of a state, place unreasonable obstructions in the water ways *of the[208 United States, cannot have the effect to cast upon the government an obligation not to exert its constitutional power to regulate interstate commerce except subject to the condition that compensation be made or secured to the individuals or corporation who may be incidentally affected by the exercise of such power. The principle for which the bridge company contends would seriously impair the exercise of the beneficent power of the government to secure the free and unobstructed navigation of the water ways of the United States."

We have said enough to dispose of every essential question made in the case, or which requires notice.

Judgment affirmed.

NORTHERN PACIFIC RAILWAY COMPANY, Albion McDonald, and Agnes Auchard, as Administratrix with the Will Annexed of David Auchard, Deceased, Appts.,

v.

JOHN TRODICK.

(See S. C. Reporter's ed. 208–220.)

Public lands — railroad land grants — occupancy in good faith.

1. Unsurveyed public land within the place limits of the grant of July 2, 1864 (13 Stat. at L. 365, chap. 217), to the Northern Pacific Railroad Company, which, at the time of the definite location of the

NOTE.—As to land grants to railroads—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

line, was actually occupied by a settler intending in good faith to acquire title under the homestead laws as soon as the land should be surveyed, was excepted from the operation of the land grant, although such occupancy was not evidenced by a record of any kind.

[For other cases, see Public Lands, 209–227, in Digest Sup. Ct. 1908.]

Public lands — railway land grants — occupancy — delay in filing.

2. A delay beyond the time fixed by the act of May 14, 1880 (21 Stat. at L. 140, chap. 89, U. S. Comp. Stat. 1901, p. 1392), within which a homesteader must file his application after a survey of the land, cannot inure to the benefit of a railway company claiming the land under the land grant of July 2, 1864, on the theory that it had acquired an interest therein by the mere definite location of its land at a time when the land was in the actual occupancy of the homestead settler.

[For other cases, see Public Lands, 184–188, in Digest Sup. Ct. 1908.]

[No. 117.]

Argued April 11, 1911. Decided May 15, 1911.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which reversed a decree of the Circuit Court for the District of Montana, dismissing the bill in a suit to enforce an equitable title to land patented to a railway company. Affirmed.

See same case below, 90 C. C. A. 653, 164 Fed. 913.

The facts are stated in the opinion.

Mr. **Charles Donnelly** argued the cause, and, with Mr. Charles W. Bunn, filed a brief for appellants:

The grant to the Northern Pacific Railroad Company was *in præsenti*. Upon filing map of definite location, title attached, as of the date of the grant, to the specific lands granted within the place limits. Patents, though instruments of further assurance, were not necessary to the completeness of that title; and ejectment could be maintained by the railroad company, if the lands had been identified by survey, even though no patent had issued.

St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 5, 35 L. ed. 79, 11 Sup. Ct. Rep. 389; Deseret Salt Co. v. Tarpey, 142 U. S. 251, 35 L. ed. 1002, 12 Sup. Ct. Rep. 158; Northern P. R. Co. v. Colburn, 164 U. S. 387, 41 L. ed. 480, 17 Sup. Ct. Rep. 98; Tarpey v. Madsen, 178 U. S. 227, 44 L. ed. 1047, 20 Sup. Ct. Rep. 849.

The question whether an odd-numbered section within primary limits had passed to the railroad company, or had been excepted from the grant by reason of a homestead or other claim upon it, must be determined by the records of the Land Department; and only by an entry of record in that Department could the good faith of the claimants be manifested.

Lansdale v. Daniels, 100 U. S. 113, 116, 25 L. ed. 587, 588; Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629, 644, 28 L. ed. 1122, 1127, 5 Sup. Ct. Rep. 566; Whitney v. Taylor, 158 U. S. 85, 94, 39 L. ed. 906, 909, 15 Sup. Ct. Rep. 796; Northern P. R. Co. v. Colburn, 164 U. S. 383, 386, 41 L. ed. 479, 480, 17 Sup. Ct. Rep. 98; Tarpey v. Madsen, 178 U. S. 216, 44 L. ed. 1042, 20 Sup. Ct. Rep. 849; United States v. Chicago, M. & St. P. R. Co. 218 U. S. 233, 54 L. ed. 1015, 31 Sup. Ct. Rep. 7.

Because of the failure of the settler to follow up his settlement by entry in the Land Office within the time required by law, the title of the railroad company became absolute.

Natoma Water & Min. Co. v. Bugbey, 96 U. S. 165, 24 L. ed. 621, 13 Mor. Min. Rep. 211; Buxton v. Traver, 130 U. S. 232, 32 L. ed. 920, 9 Sup. Ct. Rep. 509.

The occupant of surveyed land within primary limits has no right as against the railroad company, unless his entry is of record when the map of definite location is filed; his rights are fixed absolutely by the condition of the record at that time.

Northern P. R. Co. v. Colburn, 164 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98; United States v. Chicago, M. & St. P. R. Co. 218 U. S. 233, 54 L. ed. 1015, 31 Sup. Ct. Rep. 7.

Why is there any less necessity for such a rule in the case of lands unsurveyed when the map of definite location is filed?

It is said that if the railroad company, at any time between definite location and the death of Lemline, had sought to eject him, it must have failed in the action. It is a sufficient answer to this argument to say that while the land was unsurveyed the railroad company could not have maintained ejectment or any other action at law (Northern P. R. Co. v. Hussey, 9 C. C. A. 463, 15 U. S. App. 391, 61 Fed. 235; United States v. Montana Lumber & Mfg. Co. 196 U. S. 573, 49 L. ed. 604, 25 Sup. Ct. Rep. 367). Until the odd numbered sections were defined by survey, they were within the jurisdiction of the Land Department (Humbird v. Avery, 195 U. S. 480, 49 L. ed. 286, 25 Sup. Ct. Rep. 123); and, though

On rights acquired by homestead settlements and entries on public land—see note to McCune v. Essig, 59 C. C. A. 434.

As to bona fide purchasers of public lands—see note to United States v. Detroit Timber & Lumber Co. 67 C. C. A. 13.

it has been held in Northern P. R. Co. v. Hussey, supra, that the railroad company might maintain an equitable action to enjoin waste, the courts could not entertain an action at law to determine who was entitled to possession of them.

If, previous to the settler's death, he had bargained away such possessory rights as he had in the land, it is surely unreasonable to hold that it is excepted from the grant by reason of its occupation in good faith, with an intention to enter when survey should have been completed, in the face of evidence absolutely disqualifying the occupant as an entryman, and conclusively negativing any intention to enter.

Prosser v. Gilley, 34 Land Dec. 46.

In such a suit as this, complaint must succeed not upon the weakness of his adversary's title, but upon the strength of his own; and unless it affirmatively appears that he is entitled to the land, he cannot prevail.

Bohall v. Dilla, 114 U. S. 47, 29 L. ed. 61, 5 Sup. Ct. Rep. 782; Sparks v. Pierce, 115 U. S. 408, 29 L. ed. 428, 6 Sup. Ct. Rep. 102; Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249.

Mr. **Thomas J. Walsh** argued the cause and filed a brief for appellee:

Inasmuch as the land was occupied under a bona fide homestead claim at the time of the filing of the map of the definite location of the road, the grant did not attach to it at all.

Nelson v. Northern P. R. Co. 188 U. S. 108, 47 L. ed. 406, 23 Sup. Ct. Rep. 302.

Upon the subsequent determination of the claim outstanding against any particular tract at the time ofthe definite location of the road, without such claim culminating in a patent, the grant to the railroad company did not open and embrace it.

Northern P. R. Co. v. Sanders, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671; Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112.

The homesteader or pre-emption claimant on unsurveyed lands cannot make any filing in the Land Office, nor record there, of his claim; and he cannot be prejudiced by the fact that he is afforded no opportunity, under the law, to make a record.

Nelson v. Northern P. R. Co. 188 U. S. 108, 47 L. ed. 406, 23 Sup. Ct. Rep. 302; Oregon & C. R. Co. v. United States, 189 U. S. 103, 47 L. ed. 726, 23 Sup. Ct. Rep. 615.

Appellee's right to the land, except against claims initiated intervening the filing of the survey and his own application to enter, would not be prejudiced by any delay.

Whitney v. Taylor, 158 U. S. 85, 39 L. ed. 906, 15 Sup. Ct. Rep. 796; Lansdale v. Daniels, 100 U. S. 113, 25 L. ed. 587; Re McNeal, 6 Land Dec. 653; Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 485; Re Chicago St. P. M. & O. R. Co. 9 Land Dec. 221; Re Raymond, 2 Land Dec. 854; 1 Lindley, Mines, 390.

Mr. Justice **Harlan** delivered the opinion of the court:

In this suit, involving the title to the southeast quarter of section 35, township 15 north, range 4 west, in the state of Montana, the defendants McDonald and Auchard, now appellants, claim title under a patent issued by the United States to the Northern Pacific Railway Company, successor to the Northern Pacific Railroad Company to which a grant of lands was made by the act of Congress of *July 2d, 1864,[210 13 Stat. at L. 365, chap. 217. The plaintiff, Trodick, seeks to obtain a decree adjudging that the title, under the patent, be held in trust for him, his contention being that he is the real, equitable owner of the land by virtue of the homestead laws of the United States, and that no patent therefor could rightfully have been issued to the railroad company. The circuit court of the United States dismissed the bill, with costs to defendants. But the circuit court of appeals reversed the decree, with directions to give judgment for the plaintiff.

The facts in the case are few and are substantially undisputed.

By the 3d section of the act of 1864, Congress made a grant of public lands to the Northern Pacific Railroad Company in these words (so far as it is necessary to state them): "That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other

claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time [of definite location], any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or 211]pre-empted, *or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." 13 Stat. at L. 365, chap. 217.

The company filed its map of definite location on July 6th, 1882, but one Lemline was then in the actual occupancy of the land as a residence. He settled upon it in 1877, and thereafter made claim to it as his homestead, intending from the outset to acquire title under the laws of the United States as soon as the land was surveyed. He continuously resided on the land until his death, which did not occur until 1889. A short time prior to his death, Lemline sold the improvements he made on the land to the plaintiff, Trodick. This he had the right to do, although he did not hold the title. Catholic Bishop v. Gibbon, 158 U. S. 155, 39 L. ed. 931, 15 Sup. Ct. Rep. 779. The latter took possession of the land on the death of Lemline. The lands had not been surveyed when Lemline died or when Trodick went into possession. They were not surveyed until August 10th, 1891. Trodick applied on January 10th, 1896, to make homestead entry of the land, but his application was rejected "without prejudice to his right to apply for a hearing to determine the status of the land, July 6th, 1882, when the right of the company became effective." In the letter or opinion of the Commissioner of the Land Office, addressed to the local register and receiver, under date of December 24th, 1898, it was said: "He [Trodick] applied for a hearing August 10, 1896, whereupon notice issued, citing the parties in interest to appear at your office September 21, 1896. The hearing was continued from time to time until April 16, 1897, when both parties were represented. It appears from the evidence adduced that one Martin Lemline established his residence on the land, with his family, in 1877, continued to reside there 212]until his *death, some time in 1891, and his improvements on the premises were of the estimated value of $1,000. Mr. Trodick settled on the land in 1891, and since then has continuously resided there. The material question for determination in this case is this: Did the settlement claim of Mr. Lemline *except the land from the operation of the grant* to the company? It is undoubtedly true that the land was occupied by Mr. Lemline when the right of the company attached, that he was qualified to make entry of the same, and settled there with the intention of doing so, as the circumstances indicate. Had he lived until the plat of survey was filed in your office, he or his wife would, without doubt, have been allowed to perfect the claim by them initiated prior to July 6th, 1882. Since Mr. Lemline had no claim *of record*, and the claim of Trodick had its inception subsequent to the definite location of the road, it must be held that the land inured to the grant. Northern P. R. Co. v. Colburn, 164 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98. Your action is therefore approved and the application of Trodick is accordingly rejected, subject to the usual right of appeal within sixty days."

In 1896 the railroad company contracted to sell the land to Auchard, and in 1899 conveyed to him by warranty deed. Subsequently, January 10th, 1903, a patent was issued to the railroad company.

The former decisions of this court clearly sustain the decree rendered by the circuit court of appeals. According to the provisions of the act of 1864, the railroad company could not acquire any vested interest in the granted lands—even such as were within the primary or place limits—until it made a definite location of its line, evidenced by an accepted map of location; nor would such location be of any avail as to lands, even in place limits, which, at the time of definite location, were occupied by a *homestead settler* intending, in good faith, to acquire title under the laws of the United States. Lemline, we *have[213 seen, was in the actual occupancy of the lands as a homestead settler when the railroad company definitely located its line. Therefore, the lands *did not pass* by the grant of 1864, *but were excepted from its operation*, and no right of the railroad *attached* to the lands when its line was definitely located.

In St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 5, 35 L. ed. 77, 79, 11 Sup. Ct. Rep. 389, a case arising under the Northern Pacific grant of 1864, it was distinctly held that "land which, *previously to definite location*, had been reserved, sold, granted, or otherwise appropriated, or upon which there was a pre-emption 'or other claim or right,' *did not pass by the grant* of Congress." In United States v. Northern P. R. Co. 152 U. S. 284, 296, 38 L. ed. 443, 448, 14 Sup. Ct. Rep. 598, the court, referring to the same grant, said: "The act of 1864 granted to the Northern Pacific Railroad Company *only* public land,

. . . free from pre-emption *or* other claims or rights *at the time its line of road was definitely fixed* and a plat thereof filed in the office of the Commissioner of the General Land Office."

In Northern P. R. Co. v. Sanders, 166 U. S. 620, 629, 41 L. ed. 1139, 1142, 17 Sup. Ct. Rep. 671, it was said that the act of July 2d, 1864, under which the railroad company claims title, *excluded* from the grant "all lands that were not, *at the time the line of the road was definitely fixed*, free from pre-emption or other claims or rights."

In United States v. Oregon & C. R. Co. 176 U. S. 28, 50, 44 L. ed. 358, 367, 20 Sup. Ct. Rep. 261, the court held that the "Northern Pacific Railroad Company could take no lands except such as were *unappropriated* at the time its line was definitely fixed."

In Nelson v. Northern P. R. Co. 188 U. S. 109, 121–124, 130, 47 L. ed. 406, 412, 413, 415, 23 Sup. Ct. Rep. 302, the court again construed the act of 1864. That was the case of one who went upon and occupied certain lands within the place limits, before the definite location of the railroad line, with the bona fide purpose to acquire title under the laws of the United States. This court said: "It results that the rail-[214]road company did not *acquire any *vested* interest in the land here in dispute in virtue of its map of general route or the withdrawal order based on such map; and if such land was not 'free from pre-emption or other claims or rights,' or was 'occupied by homestead settlers' at the date of the definite location on December 8, 1884, it did not pass by the grant of 1864. Now, prior to that date, that is, in 1881, Nelson, who is conceded to have been qualified to enter public lands under the homestead act of May 20, 1862 [12 Stat. at L. 392, chap. 75, U. S. Comp. Stat. 1901, p. 1388], went upon *and occupied this land*, and has continuously *resided* thereon. The land was not surveyed until 1893, but as soon as it was surveyed, he attempted to enter it under the homestead laws of the United States, but his application was rejected, solely because, in the judgment of the local land officers, it conflicted with the grant to the Northern Pacific Railroad Company. He was not a mere trespasser, but went upon the land in good faith, and, as his conduct plainly showed, with a view to residence thereon, not for the purposes of speculation, and with the intention of taking the benefit of the homestead law by perfecting his title under that law, whenever the land was surveyed. And for fourteen years before the railroad company, by an *ex parte* proceeding, and without notice to him, so far as the record shows, obtained from the Land Office a recognition of its claim, and for sixteen years before this action was brought, he maintained an actual residence on this land. It is so stipulated in this case. As the railroad had not acquired any vested interest in the land when Nelson went upon it, *his continuous occupancy of it, with a view, in good faith, to acquire it under the homestead laws as soon as it was surveyed*, constituted, in our opinion, a *claim* upon the land within the meaning of the Northern Pacific act of 1864; and as that claim existed *when the railroad company definitely located its line*, the land was, by the express words of that act, *excluded from the grant*." Again, in the same case, there appear these pertinent observations, applicable *in the discus-[215 sion here: "If it be said that Nelson's claim was that of mere occupancy, unattended by formal entry or application for the land, the answer is that that was a condition of things for which he was not in anywise responsible, and his rights, in law, were not lessened by reason of that fact. *The land was not surveyed until twelve years after he took up his residence on it, and under the homestead law he could not initiate his right by formal entry of record until such survey.* He acted with as much promptness as was possible under the circumstances. . . . So far we have proceeded on the ground that, as the act of 1864 granted to the railroad company the alternate sections to which, at the time of definite location, the United States had full title, not reserved, sold, granted, or appropriated, *and* which were *free* from pre-emption or other claims or rights at date of definite location, and authorized the company to select other lands in lieu of those then found to be 'occupied by homestead settlers,' Congress *excluded from the grant* any land so occupied with the intention to perfect the title under the homestead laws whenever the way to that end was opened by a survey."

To the same effect are numerous decisions in the Land Department by different Secretaries of the Interior. Those decisions are cited in the Nelson Case, 188 U. S. 126 to 131.

In view of the authorities cited, it must be taken that, by reasons of Lemline's actual occupancy of them as a bona fide homestead settler, at the time of the definite location of the railroad line, these lands were *excepted from the grant*, and the railroad company did not acquire and could not acquire any interest in them *by reason of such location*. So that the issuing of a patent to it in 1903, based on such location, was wholly without authority of law. So far as the railroad company was concerned, the way was open to Trodick, who had purchased the improvements from Lem-

line and was in actual possession of the lands as a residence, to carry out his origi-
216]nal purpose to make application *to enter them under the homestead laws, and thus acquire full technical title in himself. He made such an application in 1896, the railroad company not having at that time any claims whatever upon the land; for it acquired nothing, as to these lands, by the definite location of its line. He was admittedly qualified to enter lands under the laws of the United States, but his application was disregarded solely on the ground that, when the railroad line was definitely located, Lemline had no claim "of record," and Trodick's application to the land office was after the date of such location. This was error of law, as the authorities above cited—particularly the Nelson Case—show. Lemline's entry and occupancy did not need, as between himself and the railroad company, to be evidenced by a record of any kind, for the reason, if there was no other, that the lands which he settled upon with the purpose of acquiring title under the laws of the United States, had not at that time been surveyed. He was not responsible for the delay in surveying, any more than was the homesteader in the Nelson Case, for the neglect to survey. He was entitled under the circumstances, having made his application in proper form, and the railroad company having acquired no interest under the definite location of its line, to wait until the land was surveyed, and in the meantime to stand upon his occupancy, accompanied, as such occupancy was, with a bona fide intention to acquire title and to reside upon the lands. His claim on the land could not be postponed or defeated by the fact that the railroad company had assumed, without right, at a prior date, to assert a claim to the lands as having passed by the grant and to have become its property, on the definite location of its line.

Some reliance is placed on the delay occurring after the survey of the lands before Trodick made his homestead application,—the statute of May 14th, 1880, chap. 89, 21 Stat. at L. 140, U. S. Comp. Stat. 1901, p. 1392, prescribing a certain period
217]within which the homesteader *should act after the survey of the lands. But that delay was immaterial as affecting the rights of the homestead applicant, because no rights of others had intervened intermediate the survey and Trodick's formal application. A similar question arose in Whitney v. Taylor, 158 U. S. 85, 97, 39 L. ed. 906, 910, 15 Sup. Ct. Rep. 796, and it was thus disposed of: "It is true that § 6 of the act of 1853 (10 Stat. at L. 246, chap. 145) provides 'that where unsurveyed lands are claimed by pre-emption, the usual notice of such claim shall be filed within three months after the return of the plats of surveys to the land offices.' But it was held in Johnson v. Towsley, 13 Wall. 72, 87, 20 L. ed. 483, 488, that a failure to file within the prescribed time did not vitiate the proceeding, neither could the delay be taken advantage of by one *who had acquired no rights prior to the filing.* As said in the opinion in that case (p. 90): 'If no other party has made a settlement or has given notice of such intention, then no one has been injured by the delay beyond three months, and if, at any time after the three months, while the party is still in possession, he makes his declaration, and this is done *before anyone else has initiated a right of pre-emption by settlement or declaration,* we can see no purpose in forbidding him to make his declaration, or in making it void when made. And we think that Congress intended to provide for the protection of the first settler by giving him three months to make his declaration, and for all other settlers by saying, if this is not done within three months, anyone else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right.' See also Lansdale v. Daniels, 100 U. S. 113, 117, 25 L. ed. 587, 589, where it is said: 'Such a notice, if given before the time allowed by law, is a nullity; but the rule is otherwise where it is filed subsequent to the period prescribed by the amendatory act, as, in the latter event, it is held to be operative and sufficient unless some other person had previously commenced a settlement and given the required notice of claim.' The delay in filing, therefore, had *no ef-
218]fect upon the validity of the declaratory statement."

In McNeal's Case, 6 Land Dec. 653, Secretary Vilas referred to the act of May 14th, 1880 (21 Stat. at L. 140, chap. 89, U. S. Comp. Stat. 1901, p. 1392), which related to settlers on public lands, and provided that their rights should relate back to the date of settlement, the same as if he settled under the pre-emption laws. The entry in that case was canceled by the Commissioner. The Secretary said: *"There being no intervening claim,* I see no reason why his rights may not relate back to the time of his settlement, even though he did not file for the land within three months thereafter, in strict accordance with the requirements of the act of May 14, 1880." We may add that the Commissioner of the General Land Office made no objection, in this case, to Trodick's application on the ground of his delay in mak-

ing formal application. His decision, in effect, conceded that the application was not objectionable, and was not to be denied. except on the ground that Lemline, who preceded Trodick in interest, had no claim "*of record*," and that Trodick's formal application was not made until after the location of the railroad line. It is not for the railroad company to which was wrongfully issued a patent to make an objection to Trodick's claim which the Land Office would not make. The authorities cited show that the ground assigned by the Commissioner was wholly untenable, as matter of law, in that he assumed that the railroad company acquired an interest in the land by the mere location of its line when Lemline was, at the time, in actual occupancy as a homestead settler.

Attention is called to the decision, at the present term, of United States v. Chicago, M. & St. P. R. Co. [218 U. S. 233, 54 L. ed. 1015, 31 Sup. Ct. Rep. 7]. That case, it is contended, is authority for the proposition that the railroad company, upon the definite location of its line, under a land-grant act, acquired a vested interest in the lands granted, unless there was at the time some claim on the land "of record." It is true the opinion in that case referred to the stipulation between 219]*the parties, to the effect that, at the time of the definite location of the road, "none of the lands described in the bill of complaint had been covered by any homestead entry, pre-emption, declaratory statement, or warrant location or other existing claims of record in the office of the Commissioner of the General Land Office," and then proceeded: "In that view, and if this were the whole case, then, beyond all question, the law would be in favor of the railway company; for the grant of 1864 was one *in præsenti* for the purposes therein mentioned, and according to the settled doctrines of this court, the beneficiary of the grant was entitled to the lands granted in place limits which had not been appropriated or reserved by the United States for any purpose, or to which a homestead or pre-emption right had not attached *prior to the definite location of the road* proposed to be aided. The grant plainly included odd-numbered sections, within 10 miles on each side of the road, which were part of the public domain, not previously appropriated or set apart for some specific purpose at the time of the definite location." The above words "of record," it is supposed, show that the court intended to modify the doctrines that a bona fide settlement upon unsurveyed lands, within place limits, which were entered upon and occupied in good faith as a residence, before the railway company located its line, with the intention of acquiring title after such lands shall have been surveyed, gave the homesteader a "claim" on the lands which excepted them from the grant to the railroad company. But this is an error. The words referred to were only intended to describe one class of the claims, the attaching of which to lands specified in an act of Congress, prior to definite location, had the effect to except them from the granting act. There was no purpose to modify the principles of the Nelson Case.

It will serve no useful purpose to extend this discussion of the cases cited, on behalf of the company, which, it is alleged, *distinguished this from the Nelson[220 Case. The facts bring the present case within the ruling of that case, and we adhere to the principles there announced.

We are of opinion, that, as between the railroad company and the appellee, the latter has the better right to the land, and that the Land Office incorrectly held that the company was entitled to a patent. That was an error of law which was properly connected by the reversal in the circuit Court of Appeals of the decree of the Circuit Court, with directions to render a final decree recognizing Trodick's ownership of the lands in controversy, and adjudging that the title, under the patent, was held in trust for him. The judgment of the Circuit Court of Appeals is affirmed.

UNITED STATES, Plff. in Err.,
v.
WILLIAM B. HAMMERS.

(See S. C. Reporter's ed. 220–229.)

Statutes — departmental construction — assignability of desert land entry.

The Federal courts will accept as controlling the decision of the Land Department that the use of the words "assignors" and "assigns" in the amendment of the act of March 3, 1891 (26 Stat. at L. 1096, chap. 561, U. S. Comp. Stat. 1901, p. 1549), to the desert land act of March 3, 1877 (19 Stat. at L. 377, chap. 107, U. S. Comp. Stat. 1901, p. 1548), evidenced the intention of Congress to remove the restrictions of the earlier act upon the assignment of a desert land entry, and was not merely in recognition of the right that every entryman has under the public land laws of the United States to make an assignment after

Note.—On the conclusiveness and effect of the decisions of Land Department—see notes to Hartman v. Warren, 22 C. C. A. 38; Carson City Gold & S. Min. Co. v. North Star Min. Co. 28 C. C. A. 344; and Uinta Tunnel Min. & Transp. Co. v. Creede & C. C. Min. & Mill. Co. 57 C. C. A. 207.

he has acquired the equitable title to the land embraced within his entry.

[For other cases, see Statutes, 286–288, in Digest Sup. Ct. 1908.]

[No. 314.]

Argued April 12 and 13, 1911. Decided May 15, 1911.

IN ERROR to the District Court of the United States for the Southern District of California to review an order sustaining a demurrer to an indictment for perjury in connection with the first annual proof in support of a desert land entry. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Mr. **Ernest Knaebel** argued the cause and filed a brief for plaintiff in error:

The terms "assignor" and "assignment" are technically appropriate when referred to the entryman's right as it exists prior to final proof and payment, but decidedly less appropriate when applied to the equitable ownership which he acquires by fulfilling every condition.

Interstate Land Co. v. Maxwell Land Grant Co. 41 Fed. 279, affirmed in 139 U. S. 569, 35 L. ed. 278, 11 Sup. Ct. Rep. 656; Cowles v. Rieketts, 1 Iowa, 585; Franklin v. Kelley, 2 Neb. 88.

The interpretation by the court below renders the words "assigns" and "assignors" practically useless. The equitable fee acquired by full compliance with the law imports complete beneficial ownership, with unrestricted *jus disponendi*. When the patent is earned, it is practically issued. The land ceases to be a part of the public domain, and is subject to be alienated and taxed as other lands are.

Carroll v. Safford, 3 How. 461, 11 L. ed. 680; Witherspoon v. Duncan, 4 Wall. 210, 18 L. ed. 339; Myers v. Croft, 13 Wall. 291, 20 L. ed. 562; Quinby v. Conlan, 104 U. S. 420, 427, 26 L. ed. 800, 802; Stark v. Starr, 6 Wall. 402, 419, 18 L. ed. 925, 930; Wirth v. Branson, 98 U. S. 118, 25 L. ed. 86; Deffebach v. Hawke, 115 U. S. 392, 405, 29 L. ed. 423, 427, 6 Sup. Ct. Rep. 95; Benson Min. & Smelting Co. v. Alta Min. & Smelting Co. 145 U. S. 428, 36 L. ed. 762, 12 Sup. Ct. Rep. 877, 17 Mor. Min. Rep. 488; French v. Spencer, 21 How. 228, 16 L. ed. 97; United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 337, 50 L. ed. 499, 505, 26 Sup. Ct. Rep. 282.

The trial court's interpretation of the words "assigns," "assignors," and "assignment" involves an unreasonable restriction upon the right to dispose of the equitable fee.

Meyers v. Croft, 13 Wall. 291, 20 L. ed. 562; American Hill Quartz Mine, Sickels, Min. Law & Dec. 377, 385; Copp's U. S. Mineral Lands, 254.

Valuable property rights conferred by and earned from the government are accompanied by the right of assignment, unless there be some statutory prohibition, or evident policy, to the contrary. The law discourages restraint on alienation.

Beley v. Naphtaly, 169 U. S. 353, 363, 42 L. ed. 775, 778, 18 Sup. Ct. Rep. 354; Myers v. Croft, 13 Wall. 291, 296, 20 L. ed. 562, 563; Adams v. Church, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512; Williamson v. United States, 207 U. S. 425, 458, 52 L. ed. 278, 294, 28 Sup. Ct. Rep. 163; United States v. Biggs, 211 U. S. 507, 519, 53 L. ed. 305, 309, 29 Sup. Ct. Rep. 181; Phillips v. Carter, 135 Cal. 604, 87 Am. St. Rep. 152, 67 Pac. 1031; Rose v. Nevada & G. V. Wood & Lumber Co. 73 Cal. 385, 15 Pac. 19.

The construction of the amended act by the Land Department should be adopted.

United States v. Moore, 95 U. S. 760, 763, 24 L. ed. 588, 589; Schell v. Fauché, 138 U. S. 562, 572, 34 L. ed. 1040, 1043, 11 Sup. Ct. Rep. 376; Brown v. United States, 113 U. S. 568, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648; United States v. Johnston, 124 U. S. 236, 253, 31 L. ed. 389, 396, 8 Sup. Ct. Rep. 446; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 366, 33 L. ed. 363, 367, 10 Sup. Ct. Rep. 112; Midway Co. v. Eaton, 183 U. S. 602, 609, 46 L. ed. 347, 353, 22 Sup. Ct. Rep. 261; McMichael v. Murphy, 197 U. S. 304, 312, 49 L. ed. 766, 769, 25 Sup. Ct. Rep. 460; United States v. Cerecedo Hermanos y Compania, 209 U. S. 337, 339, 52 L. ed. 821, 822, 28 Sup. Ct. Rep. 532.

Messrs. Oscar A. Trippet, J. M. Eshleman, Le Compte Davis, and William C. Prentiss filed a brief as *amici curiæ:*

Every interest acquired in public land is assignable and transferable, unless prohibited by statute; and no words allowing assignment are necessary.

Simms v. Guthrie, 9 Cranch, 19, 3 L. ed. 642; Thredgill v. Pintard, 12 How. 24, 13 L. ed. 877; French v. Spencer, 21 How. 228, 16 L. ed. 97; Maxwell v. Moore, 22 How. 185, 16 L. ed. 251; Myers v. Croft, 13 Wall. 291, 20 L. ed. 562; Hussey v. Smith, 99 U. S. 20, 25 L. ed. 314; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 649, 26 L. ed. 875, 880, 11 Mor. Min. Rep. 673; Telfener v. Russ, 145 U. S. 522, 531, 36 L. ed. 800, 805, 12 Sup. Ct. Rep. 930; Beley v. Naphtaly, 169 U. S. 353, 363, 42 L. ed. 775, 779, 18 Sup. Ct. Rep. 354; Rose v. Nevada & G. V. Wood & Lumber Co. 73 Cal. 385, 15 Pac. 19; St. Louis Min. & Mill. Co. v. Montana Min. Co. 171 U.

S. 651, 43 L. ed. 320, 19 Sup. Ct. Rep. 61, 19 Mor. Min. Rep. 575; Montgomery v. Pacific Coast Land Bureau, 94 Cal. 284, 28 Am. St. Rep. 122, 29 Pac. 640; Phillips v. Carter, 135 Cal. 604, 87 Am. St. Rep. 152, 67 Pac. 1031; Arnold v. Christy, 4 Ariz. 19, 33 Pac. 619; Knight v. Leary, 54 Wis. 459, 11 N. W. 600; M'Elyea v. Hayter, 2 Port. (Ala.) 148, 27 Am. Dec. 645; Adams v. Church, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512; Webster v. Luther, 163 U. S. 331, 41 L. ed. 179, 16 Sup. Ct. Rep. 963; Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; United States v. Biggs, 211 U. S. 507, 53 L. ed. 305, 29 Sup. Ct. Rep. 181.

Where the construction of a public land statute has become well settled and established by the practice and decisions of the Land Department, and has become a rule of property, it will not be disturbed by the courts except for most cogent reasons, or to prevent palpable injustice.

Brown v. United States, 113 U. S. 568, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648; Edwards v. Darby, 12 Wheat. 206, 6 L. ed. 603; United States v. Moore, 95 U. S. 763, 24 L. ed. 589; United States v. Pugh, 99 U. S. 265, 25 L. ed. 322; 2 Ops. Atty. Gen. p. 558; United States v. Union P. R. Co. 37 Fed. 551; United States v. Johnston, 124 U. S. 236, 31 L. ed. 389, 8 Sup. Ct. Rep. 446; Schell v. Fauché, 138 U. S. 572, 34 L. ed. 1043, 11 Sup. Ct. Rep. 376.

The legislature intends that all the language in a statute shall have effect, and the courts will treat none of it as surplusage, unless there is no way to give it effect.

Gates v. Salmon, 35 Cal. 578, 95 Am. Dec. 139; San Diego v. Potter, 153 Cal. 288, 95 Pac. 146; Montclair Twp. v. Ramsdell, 107 U. S. 147, 27 L. ed. 431, 2 Sup. Ct. Rep. 391; Ogden v. Strong, 2 Paine, 584, Fed. Cas. No. 10,460; United States v. Warner, 4 McLean, 463, Fed. Cas. No. 16,643; Cook v. Hamilton County, 6 McLean, 112, Fed. Cas. No. 3,157; Re Matthews, 109 Fed. 615; United States v. York, 131 Fed. 323; Dolan v. United States, 69 C. C. A. 274, 133 Fed. 440; People ex rel. Freligh v. Matsell, 94 N. Y. 179; Jermyn v. Scranton, 212 Pa. 598, 62 Atl. 29; French v. Teschemaker, 24 Cal. 557; People v. King, 28 Cal. 265; San Diego v. Granniss, 77 Cal. 511, 19 Pac. 875.

Mr. L. H. Valentine argued the cause, and, with Mr. Nathan Newby, filed a brief for defendant in error:

Intent to amend, modify, or repeal any provision of the act of 1877 must be made clearly to appear by the terms of the amendatory act.

Turner v. Turner, 108 Fed. 785, 36 Cyc. Law & Proc. p. 1153; United States v. Healey, 160 U. S. 136, 40 L. ed. 369, 16 Sup. Ct. Rep. 247; United States v. Hampton, 41 C. C. A. 625, 101 Fed. 714; Chicago, M. & St. P. R. Co. v. United States, 127 U. S. 406, 32 L. ed. 180, 8 Sup. Ct. Rep. 1194.

The court will not insert words or phrases into a statute so as to give it a different meaning from that conveyed by the plain and unambiguous terms employed by the legislature.

Newhall v. Sanger, 92 U. S. 765, 23 L. ed. 770.

The word "assigns," in § 7, must refer to a person or persons to whom the entryman has assigned after he has completed the work of reclamation and cultivation, and has paid the additional $1 per acre. He has then earned the patent and acquired the equitable title to the land, and may assign and transfer that equitable title to any person or association of persons before obtaining the patent.

Hawley v. Diller, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986; Benson Min. & Smelting Co. v. Alta Min. & Smelting Co. 145 U. S. 428, 36 L. ed. 762, 12 Sup. Ct. Rep. 877, 17 Mor. Min. Rep. 488; Quinby v. Conlan, 104 U. S. 420, 26 L. ed. 800; Deffeback v. Hawke, 115 U. S. 393, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; United States v. Freyberg, 32 Fed. 195.

It is against the policy of the United States to permit assignment or transfer of an entry upon nonmineral lands before the entryman has earned the patent and thereby acquired the equitable title.

Salina Stock Co. v. United States, 29 C. C. A. 181, 56 U. S. App. 494, 85 Fed. 339; United States v. Mackintosh, 29 C. C. A. 176, 56 U. S. App. 483, 85 Fed. 333; United States v. Budd, 144 U. S. 163, 36 L. ed. 387, 12 Sup. Ct. Rep. 575; Myers v. Croft, 13 Wall. 291, 20 L. ed. 562; United States v. Brace, 149 Fed. 869; Morehouse v. Phelps, 21 How. 294, 16 L. ed. 140; Hall v. Russell, 101 U. S. 503, 25 L. ed. 829.

The construction put upon the desert land laws by the Department of the Interior cannot prevail against the clearly correct legal interpretation of those laws.

Webster v. Luther, 163 U. S. 342, 41 L. ed. 182, 16 Sup. Ct. Rep. 963; United States v. Grand Rapids & I. R. Co. 154 Fed. 136; United States v. Tanner, 147 U. S. 661, 37 L. ed. 321, 13 Sup. Ct. Rep. 436; Houghton v. Payne, 194 U. S. 88, 48 L. ed. 888, 24 Sup. Ct. Rep. 590.

Mr. Justice McKenna delivered the opinion of the court:

This case is here to review an order sustaining a demurrer to an indictment found against defendant in error, herein called defendant.

Omitting the repetitions and accentuations which are usually found in indictments, the following are the facts stated in the indictment in this case: On the 14th of August, 1907, one Granville M. Boyer made a desert land entry for certain lands under the public land laws of the United States, and particularly under and by virtue of the act of Congress approved March 3, 1877 (19 Stat. at L. 377, chap. 107, U. S. Comp. Stat. 1901, p. 1548), the land being then open to entry, settlement, and reclamation, and he having the proper qualifications under the laws. The record was number 3,903. On the 26th of August he assigned, by an instrument in writing, his entry and his interest in the land which was the subject thereof to one Beulah Rose Beckler, she being a citizen of the 222]United *States. She filed the assignment with the register and receiver of the United States land office of the Los Angeles, California, land district.

On the 30th of January, 1908, and while entry No. 3,903 was pending before the register and receiver, Beulah Rose Beckler, "in pretended compliance" with the public land laws of the United States and the rules and regulations of the General Land Office of the Department of the Interior relating to desert land entries, applied at the office of one Daniel Elder, clerk of the superior court of Imperial county, within the southern division of the southern district of California, to make her first yearly proof of improvement, irrigation, reclamation, and cultivation of the land, with the intention of thereafter obtaining a patent from the United States therefor. Elder was an officer authorized to receive such proof and to administer oaths to witnesses.

Defendant appeared and gave testimony in such proceeding and subscribed the same, swearing that the statements therein were true.

The specific details of his testimony are not necessary to the points of law which are involved. It is enough to say that it is set out in the indictment with particularity, and showed that the improvements required by the desert land laws were made, and it is charged that the testimony was wilfully and corruptly given, he knowing it to be false. And it was further charged that the testimony was filed with the register and receiver as part of the proceedings in relation to the entry.

The indictment was demurred to on the ground that it did not state facts sufficient to constitute an offense against the United States. The demurrer was sustained.

The question of law in the case is the materiality of defendant's affidavit; and that again depends upon whether the desert land laws authorized an assignment of the entry.

*These propositions have been argued[223 at great length. Besides oral argument, a brief of 71 pages is presented by the United States, which is replied to by one of 132 pages, and supported by one of 135 pages, and there are supplemental briefs besides. In our view, however, the case does not require so much expansion, and for its general discussion we may refer to the able opinion of the court below. We disagree, it is true, with that learned court, but the grounds of our disagreement can be briefly stated.

We may assume that under the desert land act of 1877, an entry was not assignable. The contention of the government, however, is, opposing that of the defendant, that by the additions made by §§ 5 and 7 of the act of 1891 (26 Stat. at L. 1096, chap. 561, U. S. Comp. Stat. 1901, p. 1549), to the desert land law, an entry is assignable. These sections read as follows:

"Sec. 5. That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land, as aforesaid, the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and *extent of such[224 improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid, the lands shall revert to the United States, and

the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be canceled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: Provided, that proof be further required of the cultivation of one eighth of the land.

"Sec. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and the receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre of said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold, by assignment or otherwise, prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands, but this section shall not apply to entries made or initiated prior to the approval of this act. Provided, however, That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to contest, as provided by the law relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands and moneys paid therefor shall be forfeited to the United States."

The learned district court, in its discus-225]sion, stated *that the following proposition is established: "Where an applicant for public lands of any sort has done all that the law requires to entitle him to a patent, he is justly regarded as its equitable owner, and may, at any time thereafter, transfer his equitable estate, although the legal title be in the government,"—citing, among other cases, Myers v. Croft, 13 Wall. 291, 20 L. ed. 562; Deffeback v. Hawke, 115 U. S. 393, 29 L. ed. 424, 6 Sup. Ct. Rep. 95; and this ownership and right of assignment, the court concluded, §§ 5 and 7 only recognized. In other words, did not grant or create a new right but referred to a right already existing; and that therefore the act of 1891 did not authorize an assignment of the land by an entryman until he had acquired such equitable title by the performance by him, and by him only, of the conditions prescribed.

It was conceded that the Interior Department had uniformly placed upon the act of 1891 a different construction in five decisions, the earliest of which was rendered on December 22, 1895, and the last in June, 1900, and it was also conceded that the rule often authoritatively announced is that "where a court is doubtful about the meaning of an act of Congress, the construction placed upon the act by the Department charged with its enforcement is in the highest degree persuasive, if not controlling." Such decision, however, it was said, only determined in cases of doubt; and, as the court found no ambiguity in the act, decided against the ruling of the Department and the contention of the government. It recognized the force of such a uniform practice in the Land Office, and of the fact which was urged upon its attention, that a large number of reclamations had been effected by assignees in the very valley where the entry in controversy had been made, and said that such fact and practice would resolve doubts in favor of the government, if it (the court) had any.

We do not find the act of 1891 as clear as the learned district court did, and must give to decisions of the Land *Depart-[226 ment the weight to which in such case, the court acknowledged, they are entitled.

The act of 1891 was an amendment of the act of 1877, and made a change in the latter act, and a change in the provisions of an act usually indicates, or is intended to indicate, a change of purpose, to enlarge or restrict the provisions of the prior law. This very natural presumption seems to be contested by defendant. We say "seems," because it may be that it is only its application in the present case which is questioned. Counsel say the "intent to amend, modify, or repeal any provision of the act of 1877 must be made clearly to appear by the terms of the amendatory act." In support of this it is urged that the dominant purpose of the act of 1877 was that an entryman should personally reclaim the land in the manner prescribed by the act, and because of the purpose, and to secure it, the courts and the Department had ruled that before reclamation the entryman had no rights which he could transfer. Counsel therefore deny that a change was made in the act of 1877 by the act of 1891, and urge that where a statute which had been construed by the courts has been re-enacted

in the same, or substantially the same, terms, the legislature is presumed to have adopted the construction as part of the law unless a different intention is expressly declared. But was there a substantial re-enactment of the act of 1877 by the act of 1891? In the act of 1877, the word "assignors" did not appear at all, and the act required, it is contended, that reclamation should be personally made by the entryman. To this requirement the opening words of § 5 of the act of 1891 present a contrast. It reads: "That no land shall be patented to any person under this act unless *he or his assignors* [italics ours] shall have expended in the necessary irrigation, reclamation, and cultivation thereof . . . three dollars per acre [for the purpose aforesaid] . . ." The meaning of these 227]words, considered *alone, is clear. An entryman or his assignors may make reclamation. It is said, however, that the words which follow them explain them and take all ambiguity from them. It is provided that "within one year after making entry . . . the party so entering shall expend not less than one dollar per acre," and that *he* (italics ours) "shall in like manner" expend the same sum during the second and third year. "Said party," it is further provided, "shall file the proofs of such expenditure," and at the expiration of the third year a map or plan showing the character and extent of such improvements. And again: "If any party fail to file the proofs, the entry shall be canceled." It is finally provided that nothing in the section contained shall prevent the claimant from making *his* final proof and receive *his* patent at an earlier date than that prescribed for the performance of the conditions required. These provisions, it is insisted, designate the entry and entryman, and only him. This is made indubitable, it is urged, by the use of the pronouns "he" and "his," excluding every other person, and requiring the expenditure and improvements to be made by him individually. But the opening sentences of the section are to be accounted for, and these are, to repeat, "That no land shall be patented to any person under this act unless *he or his assignors* shall have expended in the necessary irrigation, reclamation, and cultivation thereof . . . at least three dollars per acre. . . ." And the word "assigns" is also used in § 7. Counsel feel the necessity of accounting for the provision and to give it a meaning that will neither contradict nor make doubtful that for which they contend. Their explanation is "that Congress used the words 'or his assignors' in § 5, and 'or his assigns' in § 7, only in recognition of the right that every entryman has under any of the public land laws of the United States to make an assignment after he has acquired the equitable title to the land embraced within *his[228 entry." In other words, as observed by the court below, a new right was not created, but a right already existing was incidentally referred to. In aid of this conclusion, and in opposition to the contention made by the government that "assignors" designated persons who may legally do the things prescribed in § 5 before the equitable title vests, it is answered that an applicant can have more than one assignor, but they must be assignors of perfected entries, perfected by the performance of the conditions by the respective entrymen. Examples are given under the practice which obtained in the Land Department prior to 1908 (an act of that year limits the assignment to one) of issuing patents to an applicant who had taken assignment of more than one entry if the aggregate area of the land embraced in the entries did not exceed 320 acres. But, to support this view, reliance is had upon decisions made after the act of 1891, and which, it is admitted, "apply to assignments made before the vesting of equitable title, as permitted by the Land Office since 1891." That, it is insisted, is not material, so far as the point is concerned. But manifestly it is material. To support and give force to a practice of the Land Department under the act of 1891, to impugn its construction of the act, is certainly confusing. We cannot assume that the Land Department did not know what it was about, and made its practice under the act oppose its construction of the act. But it may be granted that there is strength in the argument, and in that based on the words of the statute. They are, however, opposed by arguments of equal, if not greater, strength. Conceding, then, that the statute is ambiguous, we must turn as a help to its meaning, in deed, in such case, as determining its meaning, to the practice of the officers whose duty it was to construe and administer it. They may have been consulted as to its provisions, may have suggested them, indeed have written them. At any rate, their practice, almost coincident *with its enactment, and the[229 rights which have been acquired under the practice, make it determinately persuasive.

We are constrained, therefore, to reverse the order of the District Court sustaining the demurrer, and remand the case for further proceedings.

Reversed.

CHARLES WEST, Attorney General of the State of Oklahoma, Appt.,
v.
KANSAS NATURAL GAS COMPANY, the Marnet Mining Company, and A. W. Lewis.

(See S. C. Reporter's ed. 229–262.)

Commerce — subjects of — natural gas.

1. Natural gas, when reduced to possession, is a commodity which belongs to the owner of the land, and may be the subject of both intrastate and interstate commerce.

[What is commerce, see Commerce, I. b, in Digest Sup. Ct. 1908.]

Commerce — state regulation — prohibiting transportation of natural gas — police power.

2. Prohibiting the construction of pipe lines for natural gas, or the transportation of the gas by such lines except by domestic corporations, whose charters shall provide that the gas shall only be transported between points in the state, and shall not be transported to, nor delivered to, any person or corporation engaged in transporting or furnishing gas to points outside of the state, and giving to such domestic corporations the exclusive right of eminent domain and the use of the highways, all of which is attempted by Okla. Laws 1907, chap. 67,—unconstitutionally interferes with interstate commerce, and cannot be justified as an exercise of the police power of the state to conserve its natural resources.

[Prohibiting or restricting interstate commerce, see Commerce, III. b, in Digest Sup. Ct. 1908.]

[No. 916.]

Argued April 4 and 5, 1911. Decided May 15, 1911.

APPEAL from the Circuit Court of the United States for the Eastern District of Oklahoma to review a decree entered in a consolidated suit, enjoining the enforcement of a state statute prohibiting interstate transportation of natural gas. Affirmed.

See same case below on demurrer, 172 Fed. 545.

The facts are stated in the opinion.

Mr. **Charles West**, Attorney General of Oklohoma, and Mr. **Charles B. Ames** argued the cause and filed a brief for appellant:

The ruling principle of the Oklahoma statute is conservation, not commerce; and the due process clause is the single issue.

Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 15 L.R.A. 505, 29 N. E. 1062; Northwestern Teleph. Exch. Co. v. St. Charles, 154 Fed. 386; Western U. Telcg. Co. v. Pennsylvania R. Co. 195 U. S. 540, 49 L. ed. 312, 25 Sup. Ct. Rep. 133, 1 A. & E. Ann. Cas. 517; Wilson v. Hudson County Water Co. 76 N. J. Eq. 543, 76 Atl. 560.

An ulterior public advantage may justify a comparatively insignificant taking of private property.

Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 A. & E. Ann. Cas. 1171; Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 A. & E. Ann. Cas. 1174; Offield v. New York, N. H. & H. R. Co. 203 U. S. 372, 51 L. ed. 231, 27 Sup. Ct. Rep. 72; Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; Noble State Bank v. Haskell, 219 U. S. 104, ante, 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186.

Special climatic conditions justify taking for public use.

Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 A. & E. Ann. Cas. 1171.

Special topographical conditions likewise justify such taking.

Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 A. & E. Ann. Cas. 1174; Offield v. New York, N. H. & H. R. Co. 203 U. S. 372, 51 L. ed. 231, 27 Sup. Ct. Rep. 72.

The peculiar mineralogical character of oil, gas, and water likewise is important.

Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, ante, 369, 31 Sup. Ct. Rep. 337; Katz v. Walkinshaw, 141 Cal. 116, 64 L.R.A. 236, 99 Am. St. Rep. 35, 74 Pac. 766, 70 Pac. 663; Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, 14 A. & E. Ann. Cas. 560; Kansas v. Colorado, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552.

Note.—On the nature of property in mineral, oil, or gas—see notes to Williamson v. Jones, 25 L.R.A. 222, and Ohio Oil Co. v. Indiana, 44 L. ed. U. S. 729.

On natural gas as an article of commerce—see note to Jamieson v. Indiana Natural Gas & Oil Co. 12 L.R.A. 652.

On constitutionality of statutes to prevent waste of subterranean water, natural gas, or oil—see Hathorn v. Natural Carbonic Gas Co. 23 L.R.A.(N.S.) 436.

On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

The state may restrain the reckless, *i. e.*, conservation.

Holden v. Hardy, 169 U. S. 397, 42 L. ed. 792, 18 Sup. Ct. Rep. 383.

Conservation is upheld though other rights are thereby limited.

McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248; Manchester v. Massachusetts, 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559; Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Kansas v. Colorado, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552; Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127; Georgia v. Tennessee Copper Co. 206 U. S. 230, 51 L. ed. 1038, 27 Sup. Ct. Rep. 618, 11 A. & E. Ann. Cas. 488; Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed 828, 28 Sup. Ct. Rep. 529, 14 A. & E. Ann. Cas. 560; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, ante, 369, 31 Sup. Ct. Rep. 337; Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co. 155 Ind. 545, 53 L.R.A. 134, 58 N. E. 706, 21 Mor. Min. Rep. 102; Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 15 L.R.A. 505, 29 N. E. 1062; Townsend v. State, 147 Ind. 624, 37 L.R.A. 294, 62 Am. St. Rep. 477, 47 N. E. 19; Given v. State, 160 Ind. 552, 66 N. E. 750; State v. Ohio Oil Co. 150 Ind. 21, 47 L.R.A. 627, 49 N. E. 809; Jamieson v. Indiana Natural Gas & Oil Co 128 Ind. 555, 12 L.R.A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76; Wilson v. Hudson County Water Co. 76 N. J. Eq. 543, 76 Atl. 560; Welch v. Swasey, 193 Mass. 364, 23 L.R.A.(N.S.) 1160, 118 Am. St. Rep. 523, 79 N. E. 745; Wadleigh v. Gilman, 12 Me. 403, 28 Am. Dec. 188; Salem v. Maynes, 123 Mass. 372; American Print Works v. Lawrence, 23 N. J. L. 9; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Karasek v. Peier, 22 Wash. 419, 50 L.R.A. 345, 61 Pac. 33; Smith v. Morse, 148 Mass. 407, 19 N. E. 393; St. Louis v. Gault, 179 Mo. 8, 63 L.R.A. 778, 77 S. W. 876; Summerville v. Pressley, 33 S. C. 56, 8 L.R.A. 854, 26 Am. St. Rep. 659, 11 S. E. 545; Katz v. Walkinshaw, 141 Cal. 116, 63 L.R.A. 326, 99 Am. St. Rep. 35, 74 Pac. 766, 70 Pac. 663; Ex parte Elam, 6 Cal. App. 233, 91 Pac. 811; Windsor v. State, 103 Md. 611, 12 L.R.A.(N.S.) 869, 64 Atl. 288; Opinion of Justices, 103 Me. 506, 19 L.R.A.(N.S.) 422, 69 Atl. 627, 13 A. & E. Ann. Cas. 745; Com. v. Tewksbury, 11 Met. 55.

There is no unlimited use to oil, gas, or water under land, except for use connected with land.

Forbell v. New York, 164 N. Y. 522, 51 L.R.A. 695, 79 Am. St. Rep. 666, 58 N. E. 644; Hathorn v. Natural Carbonic Gas Co. 194 N. Y. 326, 23 L.R.A.(N.S.) 436, 128 Am. St. Rep. 555, 87 N. E. 504, 16 A. & E. Ann. Cas. 989.

The act is valid as an exercise of the state's police power in its control over the use of its highways for transportation purposes.

(a) The state's highways are its public property.

St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 101, 37 L. ed. 380, 384, 13 Sup. Ct. Rep. 485; Atty. Gen. v. Shrewsbury K. Bridge Co. L. R. 21 Ch. Div. 752, 51 L. J. Ch. N. S. 746, 46 L. T. N. S. 687, 30 Week. Rep. 916, 1 Eng. Rul. Cas. 567; Richmond v. Southern Bell Teleph. & Teleg. Co. 174 U. S. 764, 43 L. ed. 1163, 19 Sup. Ct. Rep. 782; Memphis v. Postal Teleg. Cable Co. 139 Fed. 707; 3 Elliott, Railroads, 2d ed. § 1076.

(b) The right to use the highways in maintaining a gas pipe line,—a permanent plant,—is a franchise.

New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Foster Lumber Co. v. Arkansas Valley & W. R. Co. 20 Okla. 583, 30 L.R.A.(N.S.) 231, 95 Pac. 224, on rehearing, 20 Okla. 595, 30 L.R.A. (N.S.) 238, 100 Pac. 1110; State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co. 18 Ohio St. 262; Gibbs v. Consolidated Gas Co. 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 248; Purnell v. Mclane, 98 Md. 589, 56 Atl. 830; Pittsburg, C. & St. L. R. Co. v. Hood, 36 C. C. A. 423, 94 Fed. 618; Hardman v. Cabot, 60 W. Va. 664, 7 L.R.A.(N.S.) 506, 55 S. E. 756, 9 A. & E. Ann. Cas. 1030; Ward v. Triple State Natural Gas & Oil Co. 115 Ky. 723, 74 S. W. 709.

(c) This being true, the right must either be acquired by grant or by condemnation.

Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 439; Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 308.

(d) The right has not been granted by the state, and the appellees do not assert any right by grant.

(e) The right of eminent domain is not granted to foreign corporations. This right may be lawfully granted to domestic corporations, and withheld from foreign.

Beale, Foreign Corp. § 115; State ex rel. Burlington & M. River R. Co. v. Scott, 22 Neb. 628, 36 N. W. 121; Trestor v. Mis-

souri P. R. Co. 23 Neb. 242, 36 N. W. 503; State ex rel. Leese v. Chicago, B. & Q. R. Co. 25 Neb. 156, 2 L.R.A. 564, 41 N. W. 152; Koenig v. Chicago, B. & Q. R. Co. 27 Neb. 699, 43 N. W. 423; Holbert v. St. Louis, K. C. & N. R. Co. 45 Iowa, 23; Evansville & H. Traction Co. v. Hudson Bridge Co. 72 C. C. A. 539, 141 Fed. 51; Foltz v. St. Louis & S. F. R. Co. 8 C. C. A. 635, 19 U. S. App. 576, 60 Fed. 316.

(f) The right of eminent domain for purposes of interstate commerce might be granted by the United States.

Beale, Foreign Corp. § 115, note; Union P. R. Co. v. Burlington & M. River R. Co. 1 McCrary, 452, 3 Fed. 106.

But the United States have not granted it for the purpose here involved.

(g) The right claimed by appellees, being a franchise, and not having been granted either by the state or the United States, cannot be exercised without condemnation; and as the power of eminent domain has neither been granted by the state nor by the United States, the right cannot be acquired by condemnation. Therefore the appellees have not the right by the state's volition, nor have they the power to take it without the state's volition.

(h) The appellees claim the right by grant from the owners of the abutting land.

For highway purpose, including all transportation, the state has control regardless of the fee.

Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 224.

And the abutter cannot grant the right to appellees.

State ex rel. Coleman v. Kansas Natural Gas, Oil, Pipe-Line & Improv. Co. 71 Kan. 508, 114 Am. St. Rep. 507, 80 Pac. 962; Morris & E. R. Co. v. Newark, 10 N. J. Eq. 352; Young v. Harrison, 6 Ga. 130; Dyer v. Tuskaloosa Bridge Co. 2 Port. (Ala.) 296, 27 Am. Dec. 655; Lewis, Em. Dom. § 91c–911; Lewis, Em. Dom. 3d ed. §§ 117–128.

The state's control of transportation is superior to the right of the abutter.

Cheney v. Barker, 198 Mass. 356, 16 L.R.A.(N.S.) 436, 84 N. E. 492; Snively v. Washington Twp. 218 Pa. 249, 12 L.R.A. (N.S.) 918, 67 Atl. 465; Sauer v. New York, 206 U. S. 536, 548, 51 L. ed. 1176, 1182, 27 Sup. Ct. Rep. 686.

(i) The state, having control of the public highways, may grant privileges to its own citizens, and refuse them to others, including foreign corporation.

McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248; Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 15 L.R.A. 505, 29 N. E. 1062.

The act is valid as an exercise of the state's police power in creating and controlling its own corporations.

Noble State Bank v. Haskell, 219 U. S. 104, ante, 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186.

The appellees, not being domestic corporations, therefore have not the right to construct gas pipe lines in Oklahoma, and therefore are not affected by the provisions of the law restricting domestic corporations in the conduct of their business, and therefore have no right to complain of the law or any of its provisions.

New York ex rel. Hatch v. Reardon, 204 U. S. 153, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736; Lee v. New Jersey, 207 U. S. 67, 52 L. ed. 106, 28 Sup. Ct. Rep. 22; Abilene Nat. Bank v. Dolley, 32 L.R.A.(N.S.) 1065, 102 C. C. A. 607, 179 Fed. 461.

The act does not regulate interstate commerce, but only affects it indirectly, just as it might be affected by the denial of the right of eminent domain to foreign corporations, or the refusal to grant a city franchise to an interstate pipe line company or an interstate telephone company.

Northwestern Teleph. Exch. Co. v. St. Charles, 154 Fed. 386; Comsumers' Gas Trust Co. v. Harless, 131 Ind. 446, 15 L.R.A. 505, 29 N. E. 1062; Wilson v. Hudson County Water Co. 76 N. J. Eq. 543, 76 Atl. 567.

Messrs. **D. T. Watson** and **John G. Johnson** argued the cause, and, with Messrs. John J. Jones and E. L. Scarritt, filed a brief for appellees:

The right of a citizen of the United States to carry on interstate commerce is a privilege guaranteed by the Federal Constitution, and is enjoyed without distinction by corporations engaged in interstate commerce, as well as by individuals.

Crutcher v. Kentucky, 141 U. S. 47, 57, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 21, 54 L. ed. 355, 363, 30 Sup. Ct. Rep. 190; Vance v. W. A. Vandercook Co. 170 U. S. 438, 455, 42 L. ed. 1100, 1106, 18 Sup. Ct. Rep. 674; Pullman Co. v. Kansas, 216 U. S. 56, 69, 54 L. ed. 378, 386, 30 Sup. Ct. Rep. 232; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 204, 29 L. ed. 158, 162, 5 Inters. Com. Rep. 826, 5 Sup. Ct. Rep. 826; Stockton v. Baltimore & N. Y. R. Co. 1 Inters. Com. Rep. 411, 32 Fed. 14.

The rule that a state has power to exclude a foreign corporation from doing business within its territory does not apply to foreign corporations which are engaged in interstate commerce. The state may not exclude such corporations, or demand a license, or directly burden or interfere with their interstate business.

Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 118, 34 L. ed. 394, 396, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Horn Silver Min. Co. v. New York, 143 U. S. 305, 314, 315, 36 L. ed. 164, 168, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 27, 54 L. ed. 355, 366, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 67, 54 L. ed. 378, 386, 30 Sup. Ct. Rep. 232.

An attempt by a state to select the articles of commerce which may or may not enter into interstate trade, or to prohibit any articles of commerce located in the state from so doing, is a regulation of commerce which is void.

Leisy v. Hardin, 135 U. S. 100, 108, 34 L. ed. 128, 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 36; Mobile County v. Kimball, 102 U. S. 691, 697, 26 L. ed. 238, 239; Welton v. Missouri, 91 U. S. 275, 279, 23 L. ed. 347, 349; Woodruff v. Parham, 8 Wall. 123, 140, 19 L. ed. 382, 387; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 469, 470, 24 L. ed. 527, 529; Schollenberger v. Pennsylvania, 171 U. S. 1, 12, 13, 43 L. ed. 49, 53, 18 Sup. Ct. Rep. 757.

A state statute prohibiting the exportation of private property out of the state is void as an attempt to regulate interstate commerce.

Reid v. Colorado, 187 U. S. 137, 151, 47 L. ed. 108, 115, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745; Hall v. De Cuir, 95 U. S. 485, 488, 24 L. ed. 547, 548; Welton v. Missouri, 91 U. S. 275, 281, 23 L. ed. 347, 349; Cooke, Commerce Clause of Fed. Const. § 61; State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 120 Ind. 576, 6 L.R.A. 579, 2 Inters. Com. Rep. 758, 22 N. E. 778; Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co. 155 Ind. 545, 53 L.R.A. 134, 58 N. E. 706, 21 Mor. Min. Rep. 102; Ohio Oil Co. v. Indiana, 177 U. S. 190, 205, 44 L. ed. 729, 737, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Benedict v. Columbus Constr. Co. 49 N. J. Eq. 23, 23 Atl. 485; Cooley, Const. Lim. 7th ed. p. 858; Jackson Min. Co. v. Auditor General, 32 Mich. 488, 14 Mor. Min. Rep. 182; McNaughton Co. v. McGirl, 20 Mont. 124, 38 L.R.A. 367, 63 Am. St. Rep. 610, 49 Pac. 651.

A state may not exercise its police powers in such a manner as to prohibit or directly interfere with interstate commerce.

Brennan v. Titusville, 153 U. S. 289, 302, 38 L. ed. 719, 723, 14 Sup. Ct. Rep. 829; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 471, 24 L. ed. 527, 530; Guy v. Baltimore, 100 U. S. 434, 443, 25 L. ed. 743, 746; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 464, 30 L. ed. 237, 241, 6 Sup. Ct. Rep. 1114; Leisy v. Hardin, 135 U. S. 100, 108, 34 L. ed. 128, 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Henderson v. New York, 92 U. S. 259, 23 L. ed. 543; Schollenberger v. Pennsylvania, 171 U. S. 1, 12, 43 L. ed. 49, 53, 18 Sup. Ct. Rep. 757; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 618, 626, 42 L. ed. 879, 882, 18 Sup. Ct. Rep. 488; Gibbons v. Ogden, 9 Wheat. 1, 210, 6 L. ed. 23, 73; Jacobson v. Massachusetts, 197 U. S. 12, 25, 49 L. ed. 647, 649, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431.

In all commercial regulations the United States forms a single nation.

Cohens v. Virginia, 6 Wheat. 264, 413, 414, 5 L. ed. 257, 293; Chinese Exclusion Case, 130 U. S. 581, 604, 32 L. ed. 1068, 1075, 9 Sup. Ct. Rep. 623; Downes v. Bidwell, 182 U. S. 244, 377, 45 L. ed. 1088, 1141, 21 Sup. Ct. Rep. 770; Legal Tender Cases, 12 Wall. 533, 20 L. ed. 306; Crandall v. Nevada, 6 Wall. 35, 43, 18 L. ed. 745, 747; Passenger Cases, 7 How. 283, 492, 12 L. ed. 702, 789; Baltimore & O. R. Co. v. Maryland, 21 Wall. 456, 474, 22 L. ed. 678, 684; Stockton v. Baltimore & N. Y. R. Co. 1 Inters. Com. Rep. 411, 32 Fed. 17; Martin v. Hunter, 1 Wheat. 304, 324, 4 L. ed. 97, 102; M'Culloch v. Maryland, 4 Wheat. 316, 404, 405, 4 L. ed. 579, 601.

To require, as a condition of obtaining the privilege of crossing the highways, the surrender of the constitutional right to engage in interstate commerce, is in violation of the Federal Constitution, and renders the requirement of permission to cross highways unconstitutional and void.

Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Barron v. Burnside, 121 U. S. 186, 200, 30 L. ed. 915, 919, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; Pullman Co. v. Kansas, 216 U. S. 56, 62, 54 L. ed. 378, 384, 30 Sup. Ct. Rep. 232.

A state law which, though in other respects valid, operates so as to discriminate against interstate commerce, is in violation of the commerce clause of the Federal Constitution.

Pullman Co. v. Kansas, 216 U. S. 56, 65, 69, 54 L. ed. 378, 385, 386, 30 Sup. Ct. Rep. 232.

A state cannot prohibit a corporation which has acquired the right of way by purchase from abutting owners, from con-

structing or operating its pipe lines across and beneath its highways for the purpose of interstate commerce.

Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 26, 54 L. ed. 355, 365, 30 Sup. Ct. Rep. 190; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 120, 34 L. ed. 394, 397, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 9, 24 L. ed. 708, 710; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 689, 27 L. ed. 442, 447, 2 Sup. Ct. Rep. 185.

The owner of natural gas has the constitutional right to sell his gas in the most favorable market.

Slaughter-House Cases, 16 Wall. 36, 127, 21 L. ed. 394, 425; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co. 156 Ind. 679, 59 N. E. 169, 60 N. E. 1080, 21 Mor. Min. Rep. 194.

Cases involving statutes dealing with game, waters of streams, and the atmosphere proceed upon a wholly different principle.

Geer v. Connecticut, 161 U. S. 519, 526, 527, 529, 530, 532, 40 L. ed. 793, 796, 797. 798, 16 Sup. Ct. Rep. 600; Georgia v. Tennessee Copper Co. 206 U. S. 230, 237, 51 L. ed. 1038, 1044, 27 Sup. Ct. Rep. 618, 11 A. & E. Ann. Cas. 488; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, 14 A. & E. Ann. Cas. 560, 70 N. J. Eq. 711, 14 L.R.A. (N.S.) 197, 118 Am. St. Rep. 754, 65 Atl. 489, 10 A. & E. Ann. Cas. 116.

Mr. Justice **McKenna** delivered the opinion of the court:

This appeal brings up for review the decree entered in the circuit court of the United States for the eastern district of Oklahoma in four suits consolidated by stipulation of the parties.

The suits had the common purpose of attacking the constitutional validity of a statute of Oklahoma, enacted in 1907, which is referred to as chapter 67 of the Session Laws of 1907. It is inserted in the margin 240] in full.† All *of the bills have the same foundation; that is, the right to buy, sell and transport natural gas in interstate commerce notwithstanding the provision of the statute.

The suits were numbered in the court below 856, 857, 858, *and 859. In 856[241 the Kansas Natural Gas Company was complainant. It is a corporation of the state of Delaware, and is engaged in the business of purchasing and distributing natural gas to consumers. It is a contract *for the[242 purchase of all the gas that can be produced from a certain well in Washington county, Oklahoma, and has acquired by purchase the right of way over the land upon which the well is located for the laying of a pipe line for the transportation of the gas, and proposes to extend its trunk pipe lines from the present southern terminus thereof in the state of Kansas, southward across the Oklahoma state line to the well. It also proposes to construct lateral and branch lines from the trunk line so extended, for the purpose of gathering and receiving such gas as it may be able to purchase from the owners of other wells. Its line will not be used in any way for local traffic, but only for the transportation of the gas from the wells in Oklahoma into the states of Kansas and Missouri.

*In No. 857, the Marnet Mining Com-[243 pany, a corporation of West Virginia, is complainant. For the purpose of transporting from the producers of gas in the state of Oklahoma to purchasers and consumers in Kansas and Missouri, it has purchased a right of way over certain lands in the state, and proposes to construct a system of pipe lines to be used exclusively in such interstate transportation, and not in any way for local traffic.

In No. 858, A. W. Lewis, a citizen and resident of the state of Ohio, is complainant. He is the owner of an oil and gas lease by which he has acquired the right to construct wells on a certain tract of land in Oklahoma, and to take gas therefrom for the period of fifteen years. He has constructed a well, in accordance with his lease, which *is capable of producing many[244 millions of cubic feet of gas per day, which, being in excess of the local demand, he is unable to sell in the state; and he alleges that, being prevented from transporting it from the state, he has suffered great loss

†Chapter 67. Pipe Lines—Regulating Gas and Oil Pipe Lines. Article. 1.

An Act Regulating the Laying, Constructing, and Maintaining and Operation of Gas Pipe Lines for the Transportation of Natural Gas within the State of Oklahoma, Defining the Modes of Procedure for the Exercise of the Right of Eminent Domain for Such Purposes, Providing for the Inspection and Supervision of the Laying of Such Pipe Lines, and Limiting the Gas Pressure Therein, and Providing Penalties for the Violation Thereof.

Be it enacted by the people of the state of Oklahoma:

Section 1. Any firm, copartnership, association, or combination of individuals may become a body corporate under the laws

and damage, and is deprived of his property without compensation.

In No. 859, O. A. Bleakley, a citizen and resident of Pennsylvania, is complainant. He has received from the Secretary of the Interior a right of way over the land of certain Indians over a designated route, paying to the Indian agent, by law and the rules and regulations of the Interior Department, the value of such right of way and the damages which the owners of the land over which he will pass for the laying and maintaining of a pipe line for the exclusive purpose of transporting natural gas from Oklahoma to Kansas.

It is alleged in the bills that a great number of wells have been drilled in the state at great expense, which are capable of producing more than 1,000,000,000 cubic feet of gas per day; that such amount is more than necessary for the demands of the people of the state, and the excess of supply is required to meet the wants of those residing in Missouri and Kansas. This want, it is alleged, may be supplied through the distributing plants now constructed and those contemplated by complainants, but that under the present conditions the owners are required to cease development work, and to keep large and valuable wells capped and inoperative, to their great injury and damage. It is alleged that in constructing lines for such transportation it will not be necessary to go along the highways of the state, but only across or over them; and that the lines to be constructed will be private lines, will endanger the lives and property of no one, and will be constructed in

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of this state for the purpose of producing, transmitting, or transporting natural gas to points within this state by complying with the general corporation laws of the state of Oklahoma, and with this act.

Sec. 2. No corporation organized for the purpose of, or engaged in, the transportation or transmission of natural gas within this state, shall be granted a charter or right of eminent domain, or right to use the highways of this state, unless it shall be expressly stipulated in such charter that it shall only transport or transmit natural gas through its pipe lines to points within this state; that it shall not connect with, transport to, or deliver natural gas to individuals, associations, copartnerships, companies, or corporations engaged in transporting or furnishing natural gas to points, places, or persons outside of this state.

Sec. 3. Foreign corporations formed for the purpose of, or engaged in the business of, transporting or transmitting natural gas by means of pipe lines, shall never be licensed or permitted to conduct such business within this state.

Sec. 4. No association, combination, copartnership, or corporation shall have or exercise the right of eminent domain within this state for the purpose of constructing or maintaining a gas pipe line or lines within this state, or shall be permitted to take private or public property for their use within this state, unless expressly granted such power in accordance with this act.

Sec. 5. The laying, constructing, building, and maintaining a gas pipe line or lines for the transportation or transmission of natural gas along, over, under, across, or through the highways, roads, bridges, streets, or alleys in this state, or of any county, city, municipal corporation, or any other private or public premises within this state, is hereby declared an additional burden upon said highway, bridge, road, street, or alley, and any other private or public premises, may only be done when the right is granted by express charter from the state, and shall not be constructed, maintained, or operated until all damages to adjacent owners are ascertained and paid as provided by law.

Sec. 6. All pipe lines for the transportation or transmission of natural gas in this state shall be laid under the direction and inspection of proper persons skilled in such business, to be designated by the chief mining inspector for such duty, and the expenses of such inspection and supervision shall be borne and paid for by the parties laying and constructing such pipe lines for the transportation or transmission of natural gas.

Sec. 7. No pipe line for the transportation or transmission of natural gas shall be subjected to a greater pressure than 300 pounds to the square inch, except for the purpose of testing such lines, and gas pumps shall not be used on any gas pipe line for the transportation or transmission of natural gas, or used on or in any gas well within this state.

Sec. 8. Any corporation granted the right under the provisions of this act to exercise the right of eminent domain, or use the highways of this state to construct or maintain a gas pipe line or lines for the transportation or transmission of natural gas to points within this state, which shall transport or transmit any natural gas to a point outside of or beyond this state, or shall connect with or attempt to connect with or threaten to connect with any gas pipe line furnishing, transporting, or transmitting gas to a point outside of or beyond this state, shall by each or all of said acts forfeit all right granted it or them by the charter from this state, and said forfeiture shall extend back to the time of the commission of said act or said acts in violation of this act; and such act or acts shall of themselves work a forfeiture of any and all rights of any and every kind and character which may be or may have been granted by the state for the transportation or transmission of natural gas within this state, and all the property of said corporation and all the property at any time belonging to said corporation, at any time used in the construction, maintaining, or operation

just conformity with all reasonable rules and regulations of the state.

It is averred that each of the defendants 245]is charged, by *virtue of his office, to execute the laws and Constitution of the state, and that he has undertaken to enforce the act hereinbefore referred to by proceedings in courts and by force of arms, and it is his intent and avowed purpose to prevent the transportation of gas beyond the limits of the state. The particular acts are set forth.

The bills pray discovery, that the act above referred to be declared void as being in conflict with § 8, article 1, and the 14th Amendment of the Constitution of the United States, and that the defendants be enjoined from the things attributed to them. General relief is also prayed.

Demurrers were filed to the bills, which were overruled (172 Fed. 545), and the defendants answered.

It was subsequently stipulated that the causes be consolidated and that appellant file an amended answer in each of the cases, and the answers of the other defendants be withdrawn. It will only be necessary to consider the amended answer, not, however, its details either of denial or averment, but only of certain facts especially relied on. These are: The present daily capacity of the gas wells of the state is approximately 1¼ billion cubic feet, the daily consumption being more than can be safely taken from them "without rapidly destroying their efficiency and depleting this great natural resource of the state." The gas area of the state is found in oil-producing sand, and the experience of all other natural gas fields demonstrates that the gas found in and taken from such sand is of much shorter duration than that found in purely gas sand, and if the acts of complainants be permitted "the field will be exhausted in a very short time." While it is true that the gas in Oklahoma is found in a gas and

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of said gas pipe line or lines, shall, in due course of law, be forfeited to and be taken into the possession of the state through its proper officer, and in said action there shall be a right to the state of the appointment of a receiver, either before or after the judgment, to be exercised at the option of the state, and the officer taking possession of said property shall immediately disconnect said pipe line or lines at a proper point in this state from any pipe line or lines going out of or beyond the state. And said property shall be sold as directed by the court having jurisdiction of said proceedings, and the proceeds of said sale shall be applied, first to the payment of the cost of such proceeding, and the remainder, if any, paid into the school fund of the state, and said charter under which said act or acts were committed shall be revoked, and no charter for the transportation or transmission of natural gas shall ever be granted to any corporation having among its stockholders any person who was one of the stockholders of said corporation whose charter has or may have been forfeited as aforesaid, and if any such charter shall have been granted, and thereafter a person shall become a stockholder thereof who was one of the stockholders of the corporation whose charter has been or may have been forfeited, as herein provided, the charter of said corporation, one of whose stockholders is as last named, shall therefore be forfeited and revoked. Provided, that any person who may be denied the right to become a stockholder as above prescribed may be granted the right to become such stockholder by the corporation commission, when such person shows to such commission that he was not a party to the former violation of this act.

Sec. 9. No pipe lines for the transportation or transmission of natural gas shall be laid upon private or public property when the purpose of such line is to transport or transmit gas for sale to the public until the same is properly inspected as provided in this act; and before any gas pipe line company shall furnish or sell gas to the public, it shall secure from the inspector a certificate showing that said line is laid and constructed in accordance with this act, and under the inspection of the proper officer; provided that nothing in this act shall be construed to prevent persons drilling for oil and gas from laying surface lines to transport or transmit gas to wells which are being drilled within this state, and further provided, that factories in this state may transport or transmit gas through pipe lines for their own use for factories located wholly within this state, upon securing the right of way from the state over or along the highways and from property owners to their lands.

Sec. 10. That no person, firm, or association or corporation shall ever be permitted to transmit or transport natural gas by pipe lines in this state, or in this state construct or operate a pipe line for the transmission of natural gas, except such persons, firms, associations, or corporations be incorporated as in this act provided, except as in § 9 of this act, and provided further that all persons, firms, corporations, associations, and institutions now doing the business of transportation or transmission [of] natural gas in this state and otherwise complying with this act are hereby permitted to incorporate under the provisions of this act within ten days after the passage and approval of the same.

Sec. 11. All acts and parts of acts in conflict with this act are hereby repealed.

Sec. 12. An existing emergency is hereby declared by the legislature for the preservation of the public peace, health, and safety of the state.

Sec. 13. This act shall take effect from and after its passage and approval, as provided by law.

Approved December 21, 1907.

oil-producing sand which extends underneath large contiguous areas of land, every well takes from this unbroken area and diminishes the producing capacity of every other well and of the entire field, the acts of 246]the complainants, if permitted, *will greatly damage and injure the entire field and take the property of all other owners therein, and "that the act of the legislature of the state of Oklahoma, alleged in the bill to be unconstitutional, was an effort on the part of the legislature of the state to preserve the natural gas field of the state from destructive waste."

Certain cities of the states, which, by reason of their proximity to the gas field, should be supplied with gas, are not now supplied with it, and will never be if complainants are allowed to transport it from Oklahoma without regulation by laws of the state, and the population of the state is now 1,750,000, and is growing more rapidly than that of any other state in the Union. On account of the general prairie character of the state, it is without domestic fuel except coal and natural gas. Its supply of coal is growing rapidly more costly to produce, that the petroleum oil produced is practically transported from the state, "and that, substantially, the only natural, practical, usable fuel, both for domestic and industrial use, is natural gas."

The complainants may and are actually in the process of erecting enormous pumping stations outside of the state, which "might reasonably and would inevitably render entirely useless all the present lines (gas) in Oklahoma, and take away from the cities and towns of Oklahoma the entire practical use of their sole and natural fuel, because when gas is removed by the limited, prudent, and natural rock pressure, the nature and formation of the gas and oil sand is not radically changed, but if large pumps to pump out the wells, out of proportion to the rock pressure, are used, as are now actually threatened, by the complainant, the gas and oil sand is actually broken down as though shot with dynamite and other violence, and the salt water thereunder, always to be found, at once drowns out the wells, where rock pressure has been too greatly or rapidly decreased; that the use of the highways is a portion of 247]the *public property, and the same should be confined to those who supply all alike who may seek to be served; and because of its nature and extent, and because the enormous amount of capital needed to make practical investments tends to create monopolies. The business of gas transportation is a public business in interstate trade, over which Congress has never legislated, and to permit complainant to carry out its said attempt and intent to monopolize the natural gas of the state and transport it away without regulation by the state laws, over and across the state's highways, without the state's consent, would be to devote public property to private and exclusive use, against the principles of the Constitution of this state and the United States, and deprive the intending purchasers of natural gas in this state from all supply whatsoever."

There are other allegations of the effect of contemplated acts of the complainants upon the gas supply of the state, and there are admissions that pipe lines are the only practical means of transportation; but this, it is alleged, is due to its cheapness as compared with other means of transportation, considering the price of gas as a fuel, as compared with other fuel products and the transportation of gas from other fields. And it is set forth that the highways of the state are open to the transportation of gas by any means which do not "make a permanent appropriation of any part of the highways by placing a plant in the same."

It is further alleged that in order to supply the cities of the state with gas, lines are continually being extended, and that there are several other pipe lines which are seeking to carry on business in the state in the same manner as desired by complainant, and if the right exist in complainant, it exists in all other foreign corporations, and, if exercised, lines will be extended, as one part of the field becomes exhausted, to other parts of the field, and the lines supplying the cities of the state will also be extended in *like manner and effect, and a[248 speedy destruction of the supply of the gas in the state will result.

It is admitted that there are maintained and operated in the state natural gas pipe lines; but it is alleged that they are in daily use for the transportation of gas within the state. And it is further admitted that they in many instances, and often at great length, run over, along, and across the highways of the state, and "are operated without hurt, hindrance, damage, or inconvenience to the traveling public or to abutting property owners." But it is averred that "they were laid and are operated according to the laws in force at the time, and pursuant to the laws of the state."

Appellant admits that it is his duty to execute the laws of the state, and that it is his intention to enforce chapter 67 of the Session Laws of 1907 and 1908, and the acts amendatory and supplementary thereto "in so far as the same must or should

be done by litigation in which the state is interested," but that his duties rest solely upon himself, and are not controlled by others, and that he intends to prevent solely by actions in competent courts the laying, constructing, and operating of gas pipe lines in, on, under, across, or along the highways of the state by complainant or by any other person not authorized so to do by the laws of the state. He denies the acts of force charged against him, or that he proposes to use force. The other denials and admissions it is not necessary to set out. A dissolution of the injunction is prayed.

The cases were consolidated, as we have said, and submitted on the bills and the answers, "to the end that an immediate determination thereof and final decree therein" might be obtained.

A final decree was entered, declaring that the statute referred to "is unreasonable, unconstitutional, invalid, and void, and of no force or effect whatever," and a perpetual injunction was awarded against its enforcement.

249] *The basis of the decree of the court was that expressed in its opinion ruling upon the demurrers; to wit, that the statute of Oklahoma was prohibitive of interstate commerce in natural gas, and in consequence was a violation of the commerce clause of the Constitution of the United States, and that being, as the court said, its dominant purpose, it would, if enforced against complainants, "invade their rights as guaranteed by the 14th Amendment of the National Constitution" and also the Constitution of the state. 172 Fed. 545.

These conclusions are contested, and it is asserted that the statute's "ruling principle is conservation, not commerce; that the due process clause is the single issue." And due process, it is urged, is not violated, because the statute is not a taking of property, but a regulation of it under the police power of the state. The provisions of the act, it is further insisted, are but exercise of the police power to conserve the natural resources of the state, and as means to that end the right of eminent domain is forbidden to foreign corporations engaged in transporting gas from the state, and the use of the highways of the state confined to pipe lines operated by domestic corporations, in order that gas may be transmitted only between points within the state. And such exercise of power, it is contended, does not regulate interstate commerce, but only affects it indirectly.

A paradox is seemingly presented. Interstate commerce in natural gas is absolutely prevented,—prohibited, in effect, for we think it is undoubted that pipe lines are the only practical means of gas transportation, and to prohibit interstate commerce is more than to indirectly affect it. Every provision of the statute is directed to such result. Pipe line construction is confined to corporations organized under the laws of the state, and the condition of their incorporation is that they shall only transmit gas between *points in the state and[250 shall not transport to or deliver to corporations or persons engaged in transporting or furnishing gas to points outside of the state. The right of eminent domain is given alone to such corporations, and the use of the highway is confined to them; and that there be no element of control over them omitted, a violation of the statute is punished by a forfeiture of charters and of property. Nor can a new corporation be formed if even one of its stockholders was a stockholder of an offending corporation.

To such stringent subjection foreign corporations could not be brought, so they are absolutely excluded from the state by the following provision: "Sec. 3. Foreign corporations formed for the purpose of, or engaged in the business of, transporting or transmitting natural gas by means of pipe lines, shall never be licensed or permitted to conduct such business within this state."

The statute presents no embarrassing questions of interpretation. It was manifestly enacted in the confident belief that the state had the power to confine commerce in natural gas between points within the state, and all of the rights conferred on domestic corporations, all of the rights denied to foreign corporations, were means to such end. And the state having such power, it is contended, if its exercise affects interstate commerce, it affects such commerce only incidentally. In other words, affects it only, as it is contended, by the exertion of lawful rights, and only because it cannot acquire the means for its exercise.

The appellant makes a broader contention. The right to conserve, or rather, the right to reserve, the resources of the state for the use of the inhabitants of the state, present and future, is broadly asserted. "The ruling principle of the law," counsel say, "is conservation, not commerce." It is true the means adopted to secure conservation is more insistently brought forward than the right of conservation, *and[251 the power of the state over its corporations and over its highways and its right to give or withhold eminent domain is many times put forward in the argument and illustrated by the citation of many cases. It cannot but be observed that these rights need not the support of one another. If the right of conservation be as complete as contended, for it could be secured by simple

prohibitions or penalties. If the power over highways and eminent domain be as absolute as asserted, it will have to be given effect, no matter for what purpose exercised. We are therefore admonished at the very start in the discussion of the importance of the questions presented and the power which the states may exert against one another, even accepting the concession of appellant that Congress may break down the isolation by granting the right not only to take private property, but to subject the highways of the state, against the consent of the state, to the uses of interstate commerce. With full appreciation of the importance of the questions involved, we pass to their consideration.

As to conservation, appellant says that "the case narrows itself to the single question of whether, in any event, a state has the right to conserve its natural resources; and, second, has it the right to preserve a common supply for the equal use of all those who may by law resort to it."

The second question is not presented in the case. The provisions of the statute are not directed against waste. They are directed against any use of the gas except in the state. The right of the state "to preserve the common supply for the equal use of all" owners is not denied by appellees. We put the question out of consideration, therefore, except incidentally, and concede the right of the state to preserve the supply of gas, as we shall hereafter set forth.

The extent of power which the second question implies a state possesses challenges serious inquiry. The natural resources of a state may be other than natural gas; for 252]*example, may be timber and coal and iron and other metals; but it is contended that the right of conservation extends to these, and the broad statement of the first question is qualified in the argument by the properties of natural gas and the limitation of its supply. This, it is contended, gives a range to the police power of the state which otherwise it would not possess. And such power, as we understand the further contention to be, may determine not only the conservation of the resources of the state, but as to what class of persons may use them, as dependent upon their transportation in state, rather than in interstate, commerce. The contention is discussed at length and variously illustrated. Indeed, analogies are adduced of limitations upon the use of property by virtue of the police power under conditions which invoke its exercise for the advancement of the general welfare. We select for review from the cases brought forward, those nearest to our inquiry, which are Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, ante, 369, 31 Sup. Ct. Rep. 337; Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, 14 A. & E. Ann. Cas. 560.

Ohio Oil Co. v. Indiana was a writ of error to the supreme court of Indiana to review a judgment of that court which sustained a statute which prohibted anyone having the control or possession of any natural gas or oil well to permit the gas or oil thereform to escape into the open air, and restrained the oil company from violating the statute. Against the statute was urged the rights of property assured by the 14th Amendment of the Constitution of the United States. The case is a valuable one and clearly announces the right of an owner to the soil beneath it, and the relation of his rights to all other owners of the surface of the soil. The right of taking the gas, it was said, was common to all owners of the surface, and because of such a common right in all landowners, an unlimited use (against a wasteful use the statute was directed) by any it was competent for the state to prohibit. This *limitation upon[253 the surface owners of property was justified by the peculiar character of gas and oil, they having the power of self-transmission, and that therefore to preserve an equal right in all surface owners there could not be an unlimited right in any. Gas and oil were likened to, not made identical with, animals *feræ naturæ*, and, like such animals, were subject to appropriation by the owners of the soil, but also, like them, did not become property until reduced to actual possession.

But an important distinction was pointed out. In things *feræ naturæ*, it was observed, all were endowed with the power of reducing them to possession and exclusive property. In the case of natural gas, only the surface proprietors had such power, and the distinction, it was said, marked the difference in the extent of the state's control. "In the one, as the public are the owners, everyone may be absolutely prevented from seeking to reduce to possession. No devesting of private property, under such a condition, can be conceived, because the public are the owners, and the enactment by the state of a law as to the public ownership is but the discharge of the governmental trust resting in the state as to property of that character. Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600. On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil be-

neath. They could not be absolutely deprived of this right which belongs to them without a taking of private property." And this right, it was further said, was coequal in all of the owners of the surface, and that the power of the state could be exerted "for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them of their privilege to reduce to possession, and to reach the like end by preventing waste." And further characterizing the statute, it was said, viewed as one to prevent the waste of the common property of 254]*the surface owners, it protected their property, not devested them of it. And special emphasis was given to this conclusion by the comment that, to assert that the right of the surface owner to take was, under the 14th Amendment, a right to waste, was "to say that one common owner may devest all the others of their rights without wrongdoing; but the lawmaking power cannot protect all the owners in their enjoyment without violating the Constitution of the United States."

The case, therefore, is an authority against, not in support of, the contention of the appellant in the case at bar.

The statute of Indiana was directed against waste of the gas, and was sustained because it protected the use of all the surface owners against the waste of any. The statute was one of true conservation, securing the rights of property, not impairing them. Its purpose was to secure to the common owners of the gas a proportionate acquisition of it,—a reduction to possession and property,—not to take away any right of use or disposition after it had thus become property. It was sustained because such was its purpose; and we said that the surface owners of the soil, owners of the gas as well, could not be deprived of the right to reduce it to possession without the taking of private property. It surely cannot need argument to show that if they could not be deprived of the right to reduce the gas to possession, they could not be deprived of any right which attached to it when in possession.

The Oklahoma statute far transcends the Indiana statute. It does what this court took pains to show that the Indiana statute did not do. It does not protect the rights of all surface owners against the abuses of any. It does not alone regulate the right of the reduction to possession of the gas, but, when the right is exercised, when the gas becomes property, takes from it the attributes of property,—the right to dispose of it; indeed, selects its market, to reserve it for future purchasers and use 255]within the state, *on the ground that the welfare of the state will thereby be subserved. The results of the contention repel its acceptance. Gas, when reduced to possession, is a commodity; it belongs to the owner of the land; and, when reduced to possession, is his individual property, subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial,—the business welfare of the state, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a state would confine them to the inhabitants of the state. If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that "in matters of foreign and interstate commerce there are no state lines." In such commerce, instead of the states, a new power appears and a new welfare,—a welfare which transcends that of any state. But rather let us say it is constituted of the welfare of all of the states, and that of each state is made the greater by a division of its resources, natural and created, with every other state, and those of every other state with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward, it *must be[256 done by the authority of another instrumentality than a court.

The case of State ex rel. Corwin v. Indiana & O. Oil, Gas, & Min. Co. 120 Ind. 575, 6 L.R.A. 579, 2 Inters. Com. Rep. 758, 22 N. E. 778, is pertinent here. A statute of Indiana was considered which made it unlawful to pipe or conduct gas from any point within the state to any point or place without the state. It was assailed on one side as a regulation of interstate commerce, and therefore void under the Constitution of the United States. It was defended, on the other hand, as a provision for the exercise of the right of eminent domain, confining it to those engaged in state

business, denying it to those engaged in interstate business; and, further, as inposing restrictions on foreign corporations. It will be observed, therefore, the statute had, it may be assumed, the same inducement as the Oklahoma statute, and the same special justifications were urged in its defense. The court rejected the defenses, and decided that the statute was not a legitimate exercise of the police power, or the regulation of the right of eminent domain or of foreign corporations, but had the purpose "plainly and unmistakably manifested" to prohibit transportation of natural gas beyond the limits of the state; and that, this being its purpose, it was void as a regulation of interstate commerce. These propositions were announced: (1) Natural gas is as much a commodity as iron ore, coal, or petroleum or other products of the earth, and can be transported, bought, and sold as other products. (2) It is not a commercial product when it is in the earth, but becomes so when brought to the surface and placed in pipes for transportation. (3) If it can be kept within the state after it has become a commercial product, so may corn, wheat, lead, and iron. If laws can be enacted to prevent its transportation, "a complete annihilation of interstate commerce might result." And the court concluded: "We can find no tenable ground upon which the act can be sustained, and 257]we are compelled to *adjudge it invalid." The case was explicitly affirmed in Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co. 155 Ind. 545, 53 L.R.A. 134, 58 N. E. 706, 21 Mor. Min. Rep. 102.

The case is valuable because the court, through the same justice who wrote the opinion, distinguished between an exercise of the police power to regulate the taking of natural gas and its prohibition in interstate commerce.

Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555, 12 L.R.A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76, sustained a statute which prohibited the taking of gas under a greater pressure than 300 pounds to the square inch. The court said that natural gas "is, on doubt, so far a commercial commodity that this state cannot prohibit its transportation to another state by direct legislation," citing State ex rel. Corwin v. Indiana & O. Oil, Gas, & Min. Co. supra. The court said further: "If it can be taken from the well and transportated to another state under a safe pressure, the state cannot prohibit its transportation, nor can the state establish one standard of pressure for its own citizens and another standard for the citizens of other states." The court, therefore, discerning in the statute no discrimination and no prohibition, but only a regulation universal in its application, and justified by the nature of the gas, and which allowed its transportation to other states, decided that there was no restriction or burden upon interstate commerce.

Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, ante, 369, 31 Sup. Ct. Rep. 337, is to the same effect as Ohio Oil Co. v. Indiana. Its similarity to the latter case was pointed out. Indeed, they can be said to be identical in principle. In the one case oil and gas, in the other mineral water and gas, were commingled beneath the surface of the earth, and capable of movement and common ownership. In the one case the right was asserted to waste the gas to secure the oil, which was the more valuable of the two; in the other case the right was asserted to waste the water to secure the gas, as the more valuable of the two. In both cases there was *a statute forbidding[258 the waste. Speaking of the purpose of the statute in Lindsley v. Natural Carbonic Gas Co. it was said: "It is to prevent or avoid the injury and waste suggested that the statute was adopted. It is not the first of its type. One in principle quite like it was considered by this court in Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466." The statute was sustained upon the reasoning of that case.

Hudson County Water Co. v. McCarter is urged, we have seen, on our attention. A statute of the state of New Jersey was involved, which made it unlawful for any person or corporation to transport or carry through pipes the waters of any fresh-water lake, river, etc., into any other state, for use therein. Two propositions may be said to be the foundation of the decision of the court below sustaining the statute. (1) "The fresh-water lakes, ponds, brooks, and rivers, and the waters flowing therein, constitute an important part of the natural advantages of" the state, "upon the faith of which its population has multiplied in numbers and increased in material and moral welfare. The regulation of the use and disposal of such waters, therefore, if it be within the powers of the state, is among the most important objects of government." (2) "The common law recognizes no right in the riparian owner, as such, to divert water from the stream in order to make merchandise of it, nor any right to transport any portion of the water from the stream to a distance for the use of others." [70 N. J. Eq. 701, 709, 14 L.R.A. (N.S.) 197, 118 Am. St. Rep. 754, 65 Atl. 489, 10 A. & E. Ann. Cas. 116.] It was further declared that the common law au-

thorized the acquisition of water "only by riparian owners, and for purposes narrowly limited. Not that the ownership is common and public." And the contention was rejected that the title of the individual riparian owner was to the water itself,—the fluid considered as a commodity,—and exclusive against the public and against all persons excepting other riparian owners.

It is clear that neither of these propositions will support the contentions of the 259]appellant in the case at bar. Nor *does any principle announced upon the review of the case here, though the power of the state to enact the statute was put "upon a broader ground than that which was emphasized below." The police power of the state was discussed and the difficulty expressed of fixing "boundary stones between" it and the right of private property which was asserted in the case. There were few decisions, it was said, that were very much in point. But certain principles were expressed, of which Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600, was considered as furnishing an illustration, and Kansas v. Colorado, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552, and Georgia v. Tennessee Copper Co. 206 U. S. 230, 51 L. ed. 1038, 27 Sup. Ct. Rep. 618, 11 A. & E. Ann. Cas. 488, some suggestions.

That principle was that the "interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use." And this principle was emphasized as the one determining the case, and the opinion expressed that it was "quite beyond any rational view of riparian rights that an agreement of no matter what private owners could sanction the diversion of an important stream outside the boundaries of the state in which it flows. The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health."

It is hardly necessary to say that there was no purpose in the case to take from property its uses and commercial rights, or to assimilate a flowing river and the welfare which was interested in its preservation to the regulation of gas wells, or to take from the gas when reduced to possession the attributes of property decided to belong to it in Ohio Oil Co. v. Indiana, and recognized in Lindsley v. Natural Carbonic Gas Co. Indeed, pains were taken to put out of consideration a material measure of the bene-260]fits of a great river to *a state. And surely we need not pause to point out the difference between such a river, flowing upon the surface of the earth, and such a substance as gas, seeping invisible through sands beneath the surface.

We have reviewed the cases at some length, as they demonstrate the unsoundness of the contention of appellant based upon the right to conserve (we use this word in the sense appellant uses it) the resources of the state, and that the statute finds no justification in such purpose for its interference with private property or its restraint upon interstate commerce. At this late day it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of a state, and that it cannot be regulated or restrained by a state, or that a state cannot exclude from its limits a corporation engaged in such commerce. To attain these unauthorized ends is the purpose of the Oklahoma statute. The state, through the statute, seeks in every way to accomplish these ends, and all the powers that a state is conceived to possess are exerted and all the limitations upon such powers are attempted to be circumvented. Corporate persons are more subject to control than natural persons. The business is therefore confined to the former, and foreign corporations are excluded from the state. Lest they might enter by the superior power of the Constitution of the United States, the use of the highways is forbidden to them and the right of eminent domain is withheld from them, and the prohibitive strength which these provisions are supposed to carry is exhibited in the fact that the boundary of the state is a highway. If it cannot be passed without the consent of the state, commerce to and from the state is impossible. The situation is not underestimated by appellant, and he says: "If the appellees had the right of way they might engage in interstate commerce, but their desire to engage in interstate commerce is a different thing from the means open to them to procure a right of way." And it is further *said, that "the confusion[261 of the right to engage in interstate commerce with the power to forcibly secure a right of way is the basis of appellees' case."

There is here and there a suggestion that the state not having granted such right, the alternative is a grant of it by Congress. But this overlooks the affirmative force of the interstate commerce clause of the Constitution. The inaction of Congress is a declaration of freedom from state interference with the transportation of articles of legitimate interstate commerce, and this has been the answer of the courts to contentions like those made in the case at bar. State ex rel. Corwin v. Indiana & O. Oil,

Gas, & Min. Co. 120 Ind. 575, 6 L.R.A. 579, 2 Inters. Com. Rep. 758, 22 N. E. 778; Benedict v. Columbus Constr. Co. 49 N. J. Eq. 23, 23 Atl. 485, and also in Haskell v. Cowham [April 7, 1911], United States circuit court of appeals, eighth circuit. In the latter case the Oklahoma statute was under review, and in response to the same contentions which are here presented, these propositions were announced, with citation of cases:

"No state by the exercise of, or by the refusal to exercise, any or all of its powers, may prevent or unreasonably burden interstate commerce within its borders in any sound article thereof.

"No state by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against or directly regulate interstate commerce or the right to carry it on."

The power of the state of Oklahoma over highways is much discussed by appellant and appellees; the appellant contending for a power practically absolute, as exercised under the statute, making the highways impassable barriers to the pipe lines of appellees. The appellees contend for a more modified and limited right in the state, one not extending beyond an easement of public passage, subject, therefore, to certain rights in the abutting owners, which rights can be transferred; and further contend that 262]even *if the power of the state be not so limited, it cannot be exercised to discriminate against interstate commerce.

The rights of abutting owners we will not discuss, nor the rights derived from them by appellees, except to say that whatever rights they had, they conveyed to appellees, and against them there is no necessity of resorting to the exercise of eminent domain. We place our decision on the character and purpose of the Oklahoma statute. The state, as we have seen, grants the use of the highways to domestic corporations engaged in intrastate transportation of natural gas, giving such corporations even the right to the longitudinal use of the highways. It denies to appellees the lesser right to pass under them or over them, notwithstanding it is conceded in the pleadings that the greater use given to domestic corporations is no obstruction to them. This discrimination is beyond the power of the state to make. As said by the circuit court of appeals in the eighth circuit, no state can by action or inaction prevent, unreasonably burden, discriminate against, or directly regulate, interstate commerce or the right to carry it on. And in all of these inhibited particulars the statute of Oklahoma offends.

And, we repeat again, there is no question in the case of the regulating power of the state over the natural gas within its borders. The appellees concede the power, and, replying to the argument of appellant, based on the intention of appellees to erect large pumps to increase the natural rock pressure of the gas, appellees say: "Kansas by legislative enactment forbids the use of artificial apparatus to increase the natural flow from gas wells. Chapter 312, Laws of Kansas, 1909, page 520. To this act the Kansas Natural Gas Company has no objection."

Decree affirmed.

Mr. Justice Holmes, Mr. Justice Lurton, and Mr. Justice Hughes dissent.

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*MARK JACOBS, Appt., [263
v.
JOSEPH BEECHAM.

(See S. C. Reporter's ed. 263–274.)

Evidence — presumptions — difference.

1. Conceding the burden of proof to rest upon the manufacturer of a medicine under a secret formula, when suing to restrain the use of his tradename by an alleged infringer, to show that the latter's medicine is not made by his formula, there is at least a prima facie presumption of a difference between the two formulas.

[Presumptions, see Evidence, II., in Digest Sup. Ct. 1908.]

Evidence — burden of proof — unfair competition.

2. The burden rests upon defendant when sued for an unfair use of the plaintiff's tradename to justify his use of it.

[Burden of proof, see Evidence, II., in Digest Sup. Ct. 1908.]

Unfair competition — proprietary medicines — secret formula.

3. Using the name of a manufacturer of pills under a secret formula upon pills made by a competitor is not saved from being unfair because it is accompanied by a statement that the latter makes the pills, even if it be conceded that he is using the other's formula.

[For other cases, see Unfair Competition, in Digest Sup. Ct. 1908.]

Unfair competition — defense — fraud on public.

4. The use of the word "patent" to indicate a medicine made by a secret formula, when the medicine is in fact not patented, is not such fraud as defeats the right of

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NOTE.—On unfair competition in trade—see notes to Lare v. Harper, 30 C. C. A. 376, and Scheuer v. Muller, 20 C. C. A. 165.

On misleading or false labels—see notes to Holeproof Hosiery Co. v. Wallach Bros. 97 C. C. A. 265, and Raymond v. Hill Baking-Powder Co. 29 C. C. A. 250.

the manufacturer to relief in equity against unfair competition.

[For other cases, see Unfair Competition, in Digest Sup. Ct. 1908.]

Unfair competition — defense — fraud on public.

5. The continued use of circulars and labels which suggest the foreign origin of a product, after its manufacture had been begun in this country, and the use of the name of the original proprietor for some time after the business had been transferred to his son, are not such fraud as defeats the right of a manufacturer to relief in equity against unfair competition.

[For other cases, see Unfair Competition, in Digest Sup. Ct. 1908.]

[No. 139.]

Argued April 21 and 24, 1911. Decided May 15, 1911.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the Circuit Court for the Eastern District of New York, enjoining the use of the name of a manufacturer of pills under a secret formula upon pills made by a competitor. Affirmed.

See same case below, 86 C. C. A. 623, 159 Fed. 129.

The facts are stated in the opinion.

Messrs. **George F. Hurd** and **Cornelius W. Wickersham** (by special leave) argued the cause, and, with Messrs. Max J. Kohler, Moses Weill, and Isaac Weill, filed a brief for appellant:

A trademark, to be valid, must be exclusive; and exclusiveness in the right of user of a generic term, such as a geographical or proper name, is impossible in the nature of things.

Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 20 L. ed. 581; Brown Chemical Co. v. Meyer, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625; Corbin v. Gould, 133 U. S. 308, 33 L. ed. 611, 10 Sup. Ct. Rep. 312; Leelanche Battery Co. v. Western Electric Co. 23 Fed. 276; Hopkins, Trade-Marks 2d ed. §§ 40, 53.

No unfair competition has been shown.

Baglin v. Cusenier Co. 90 C. C. A. 499, 164 Fed. 25; Hostetter v. Comerford, 97 Fed. 585; Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 604, 32 L. ed. 535, 537, 9 Sup. Ct. Rep. 166; Lamont v. Leedy, 88 Fed. 72; Canham v. Jones, 2 Ves. & B. 218, 13 Revised Rep. 70; Saxlehner v. Wagner, 216 U. S. 375, 380, 54 L. ed. 525, 527, 30 Sup. Ct. Rep. 298; Chadwick v. Covell, 151 Mass. 191, 6 L.R.A. 839, 21 Am. St. Rep. 442, 23 N. E. 1068; Watkins v. Landon, 52 Minn. 389, 19 L.R.A. 236, 38 Am. St. Rep. 560, 54 N. W. 193; Marshall v. Pinkham, 52 Wis. 572, 38 Am. Rep. 756, 9 N. W. 615; John D. Park & Sons Co. v. Hartman, 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 29; Singleton v. Bolton, 3 Dougl. 293; Burgess v. Burgess, 17 Eng. L. & Eq. Rep. 257; James v. James, L. R. 13 Eq. 421, 41 L. J. Ch. N. S. 353, 26 L. T. N. S. 563, 20 Week. Rep. 434; Massam v. J. W. Thorley's Cattle Food Co. L. R. 6 Ch. Div. 574, 46 L. J. Ch. N. S. 707, 36 L. T. N. S. 848; Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 185, 41 L. ed. 118, 124, 18 Sup. Ct. Rep. 1002.

The false use of the word "patent" disentitles complainant to equitable relief.

Holzapfel's Compositions' Co. v. Rahtjen's American Composition Co. 183 U. S. 1, 46 L. ed. 49, 22 Sup. Ct. Rep. 6; Oliphant v. Salem Flouring Mills, 5 Sawy. 128, Fed. Cas. No. 10,486; Consolidated Fruit-Jar Co. v. Dorflinger, Fed. Cas. No. 3,129; Leather Cloth Co. v. American Leather Cloth Co. 11 H. L. Cas. 523, 35 L. J. Ch. N. S. 53, 11 Jur. N. S. 513, 12 L. T. N. S. 742, 13 Week. Rep. 873; Clinton E. Worden & Co. v. California Fig Syrup Co. 187 U. S. 516, 47 L. ed. 282, 23 Sup. Ct. Rep. 161; Cheavin v. Walker, L. R. 5 Ch. Div. 850, 46 L. J. Ch. N. S. 686, 37 L. T. N. S. 300; Preservaline Mfg. Co. v. Heller Chemical Co. 118 Fed. 103; Pharmaceutical Soc. v. Piper [1893] 1 Q. B. 686, 62 L. J. Q. B. N. S. 305, 5 Reports, 296, 68 L. T. N. S. 490, 41 Week. Rep. 447, 57 J. P. 502; Fulton, Patents, Trademarks & Designs, London, 1902, p. 188.

The misrepresentation of manufacture in England, and the continued use of the name "Thomas Beecham," disentitle complainant to equitable relief.

Manhattan Medicine Co. v. Wood, 108 U. S. 218, 222, 27 L. ed. 706, 707, 2 Sup. Ct. Rep. 436; Clinton E. Worden & Co. v. California Fig Syrup Co. 187 U. S. 528, 47 L. ed. 288, 23 Sup. Ct. Rep. 161; Palmer v. Harris, 60 Pa. 156, 100 Am. Dec. 557; Re Saunion & Co. Cox's Manuel, case 625; Browne, Trade-Marks, 2d ed. § 71, p. 78; Allen B. Wrisley Co. v. Iowa Soap Co. 104 Fed. 551; Kenny v. Gillet, 70 Md. 574, 17 Atl. 499; Prince Mfg. Co. v. Prince's Metallic Paint Co. 135 N. Y. 24, 17 L.R.A. 129, 31 N. E. 990; Hobbs v. Francais, 19 How. Pr. 567; Millbrae v. Taylor, — Cal. —, 25 L.R.A. 196, 37 Pac. 235; Coleman, B. W. Co. v. Dannenberg Co. 103 Ga. 784, 41 L.R.A. 470, 68 Am. St. Rep. 143, 30 S. E. 639; Raymond v. Royal Baking Powder Co. 29 C. C. A. 245, 55 U. S. App. 575, 85 Fed. 231; Paul, Trade-Marks, § 318, p. 543; Stachelberg v. Ponce, 23 Fed. 430, affirmed in 128 U. S. 686, 32 L. ed. 569, 9 Sup. Ct. Rep. 200; Symonds v. Jones, 82 Me. 315, 8 L.R.A. 570, 17 Am. St. Rep. 485, 19 Atl. 820; Hegeman v. Hegeman, 8 Daly, 22;

Royal Baking Powder v. Raymond, 70 Fed. 376, affirmed in 29 C. C. A. 245, 55 U. S. App. 575, 85 Fed. 231; Siegert v. Abbott, 61 Md. 276, 48 Am. Rep. 101; Alaska Packer's Asso. v. Alaska Improv. Co. 60 Fed. 103; Solis Cigar Co. v. Pozo, 16 Colo. 394, 25 Am. St. Rep. 279, 26 Pac. 556.

Mr. **John L. Wilkie** argued the cause and filed a brief for appellee:

The word "patent" was not intended to indicate, and did not in fact indicate, that the article to which it was applied was in fact patented.

Cahn v. Gottschalk, 14 Daly, 542, 2 N. Y. Supp. 13; Cochrane v. McNish [1896] A. C. 225, 65 L. J. P. C. N. S. 20, 74 L. T. N. S. 109; Marshall v. Ross, L. R. 8 Eq. 651, 39 L. J. Ch. N. S. 225, 21 L. T. N. S. 260, 17 Week. Rep. 1086; Stewart v. Smithson, 1 Hilt. 119; Leather Cloth Co. v. American Leather Cloth Co. 11 H. L. Cas. 523, 35 L. J. Ch. N. S. 53, 11 Jur. N. S. 513, 12 L. T. N. S. 742, 13 Week. Rep 873; Insurance Oil Tank Co. v. Scott, 33 La. Ann. 946, 39 Am. Rep. 286; Century Dict. p. 4325; 7 Murray's Oxford Dict. 549; 10 Encyclopædie Dict. p. 409; Stormonth's Dict. p. 712; Brewer's Etymological & Pronouncing Dictionary of Difficult Words; State v. Donaldson, 41 Minn. 74, 42 N. W. 781; Nordyke & M. Co. v. Kehlor, 155 Mo. 643, 78 Am. St. Rep. 600, 56 S. W. 287; Palmer v. McCormick, 30 Fed. 82.

The discontinuance of a misstatement, when made before suit brought, relieves the complainant of the effect of the rule.

Moxie Nerve Food Co. v. Modox Co. 153 Fed. 487; Johnson v. Seabury, 71 N. J. Eq. 750, 124 Am. St. Rep. 1007, 67 Atl. 36, 14 A. & E. Ann. Cas. 840; Symonds v. Jones, 82 Me. 302, 8 L.R.A. 570, 17 Am. St. Rep. 485, 19 Atl. 820.

The appellee has not been guilty of any false representations as to the place of manufacture.

Tarrant & Co. v. Johann Hoff, 22 C. C. A. 644, 45 U. S. App. 143, 76 Fed. 959; Clark Thread Co. v. Armitage, 21 C. C. A. 178, 45 U. S. App. 62, 74 Fed. 936; Société Anonyme v. Western Distilling Co. 43 Fed. 416; Siegert v. Gandolfi, 79 C. C. A. 142, 149 Fed. 100; Gluckman v. Strauch, 99 App. Div. 361, 91 N. Y. Supp. 223, affirmed in 186 N. Y. 560, 79 N. E. 1106.

The appellee has not made any false representation as to the person by whom the pills are manufactured.

Manhattan Medicine Co. v. Wood, 103 U. S. 218, 223, 27 L. ed. 706, 708, 2 Sup. Ct. Rep. 436.

Mr. Charles W. Gould filed a brief for appellee in support of a motion to dismiss or affirm.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill by the owner of a proprietary or patent medicine, so called, made according to a secret formula, and known as "Beecham's Pills," to restrain the defendant *from using the same name on[271 pills made by him, and trying to appropriate the plaintiff's good will. The plaintiff had a decree in the circuit court, enjoining the defndant from using the word "Beecham" in connection with pills prepared or sold by him, which decree was affirmed by the circuit court of appeals, 86 C. C. A. 623, 159 Fed. 129.

The present appeal is based on two or three different grounds. The first of these is that anyone who honestly can discover the formula has a right to use it, to tell the public that he is using it, and for that purpose to employ the only words by which the formula can be identified to the public mind. As to the defendant's having discovered the formula, it is said that if he makes a different or inferior article the burden is on the plaintiff to prove the fact. As to the method adopted by the defendant to advertise his wares, which, apart from other imitations, consists in simply marking them "Beecham's Pills," it is said that the proper name cannot constitute a trademark, and has become the generic designation of the thing. The defendant's use of the name is said to be saved from being unfair by the statement underneath that he made the pills.

Corruptio optimi pessima. Sound general propositions thus are turned to the support of a conclusion that manifestly should not be reached. We will follow and answer the argument in the order in which we have stated it. If, in a technical sense, the burden of proof is on the plaintiff to prove that the defendant's pills are not made by his formula, there it at least a prima facie presumption of difference, just as in the case of slander there is a presumption that slanderous words are false. A different rule would prevent the owner of a secret process from protecting it except by giving up his secret. Again, when the defendant has to justify using the plaintiff's tradename, the burden is on him. Finally, as the case presents what is a fraud on its face, it is more likely that the defendant is *a modern advertiser than that he has[272 discovered the hidden formula of the plaintiff's success.

As to the defendant's method of advertising, he does not simply say that he has the Beecham formula, as in Saxlehner v. Wagner, 216 U S. 375, 54 L. ed. 525, 30 Sup. Ct. Rep. 298, but he says that he makes Beecham's pills. The only sense

in which "Beecham's Pills" can be said to have become a designation of the article is that Beecham, so far as appears, is the only man who has made it. But there is nothing generic in the designation. It is in the highest degree individual, and means the producer as much as the product. It has not left the originator, to travel with the goods, as in Chadwick v. Covell, 151 Mass. 190, 195, 6 L.R.A. 839, 21 Am. St. Rep. 442, 23 N. E. 1068, or come to express character rather than source, as it is admitted sometimes may be the case. Holzapfel's Compositions Co. v. Rahtjen's American Composition Co. 183 U. S. 1, 46 L. ed. 49, 22 Sup. Ct. Rep. 6; Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166; Thomson v. Winchester, 19 Pick. 214, 216, 31 Am. Dec. 135. To call pills Beecham's pills is to call them the plaintiff's pills. The statement that the defendant makes them does not save the fraud. That is not what the public would notice or is intended to notice, and, if it did, its natural interpretation would be that the defendant had bought the original business out and was carrying it on. It would be unfair, even if we could assume, as we cannot, that the defendant uses the plaintiff's formula for his pills. McLean v. Fleming, 96 U. S. 245, 252, 24 L. ed. 828, 831; Millington v. Fox, 3 Myl. & C. 338, 352; Gilman v. Hunnewell, 122 Mass. 139, 148.

The other grounds of appeal are charges that the plaintiff's boxes have upon them false statements such as to exclude them from equitable relief. The one most pressed is that certain of the boxes carry the words "Beecham's Patent Pills," and that the pills are not patented. The answer is that the word does not convey the notion that they are. To signify that, the proper word is [273]"patented" *rather than "patent," and it commonly is used separately, not prefixed to a noun. On the other hand, the use of the word patent to indicate medicines made by secret formulas is widespread and well known. It is mentioned in the dictionaries, and it occurs in the plaintiff's circulars. We think it clear that there is no danger that anyone would be defrauded by the form of the label on the plaintiff's box, and that it would be wrong to press Holzapfel's Compositions Co. v. Rahtjen's American Composition Co. 183 U. S. 1, 46 L. ed. 49, 22 Sup. Ct. Rep. 6, so far as to cover this case.

It is objected further that the plaintiff's boxes are labeled "Beecham's Patent Pills, price 25 cents, sold by the Proprietor, St. Helen's, Lancashire, England," or "Beecham's Patent Pills, St. Helen's, Lancashire," or "Beecham's Pills, Saint Helen's," and that a circular contains the statement that "the pills accompanying this pamphlet are specially packed for U. S. America, being covered with a quickly soluble pleasant coating," etc. The statement in the circular is true in a literal sense, but suggests the belief that the pills were made in England, whereas in fact they now are made in New York. The labels may be said to convey a similar suggestion in a fainter form. With this may be mentioned the remaining object of cavil, that some of the boxes still bear the name of Thomas Beecham, although Thomas Beecham transferred his interest to the plaintiff, his son, in 1895. Both of these matters are small survivals from a time when they were literally true, and are far too insignificant, when taken with the total character of the plaintiff's advertising, to leave him a defenseless prey to the world. The facts are that the business was started by Thomas Beecham, in England, that he made the pills there and got a considerable custom in America, that he took the plaintiff into partnership, continuing the business under the old name, and that in 1895 he retired, turning over his interest to his son. The son went on under the same name for a time, but his boxes now bear his *own name as pro-[274 prietor, and his circulars show that he is his father's successor. About 1890 they began to make the pills in New York as well as in England, but, as has been seen, not every phrase in the advertisements was nicely readjusted to the change. That is all there is in the whole subject of complaint. There is not the slightest ground for charging the plaintiff with an attempt to defraud the public by these statements, or any reason why the judgment below should not be affirmed, unless it be in a motion for the plaintiff to dismiss. This was met by the fact that the bill seemingly relied upon the registration of the words "Beecham's Pills" as a trademark under the act of Congress as one ground for the jurisdiction of the circuit court. Warner v. Searle & H. Co. 191 U. S. 195, 205, 206, 48 L. ed. 145, 147, 148, 24 Sup. Ct. Rep. 79; Standard Paint Co. v. Trinidad Asphalt Mfg. Co. April 10, 1911, 220 U. S. 446, ante, 536, 31 Sup. Ct. Rep. 456.

Decree affirmed.

IN THE MATTER OF GEORGE HARRIS, Bankrupt.

(See S. C. Reporter's ed. 274-280.)

Witnesses — self-crimination — compulsory deposit of bankrupt's books.

Requiring the bankrupt to deposit his books of account in the office of the receiver,

there to remain in the custody of the bankrupt, who is to afford the receiver free opportunity to inspect them, the receiver to use and permit them to be used only for the purpose of the civil administration of the bankrupt estate, and not for any criminal proceeding, is a proper exercise of the authority of the bankruptcy court, and does not compel the bankrupt to be a witness against himself in a criminal case in the constitutional sense, although the knowledge gained from the books may be used to procure other evidence for use against him in a criminal prosecution.

[For other cases, see Witnesses, V. c, in Digest Sup. Ct. 1908.]

[No. 165.]

Argued April 28, 1911. Decided May 15, 1911.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit, presenting the question as to the right of a court of bankruptcy to require the bankrupt to deposit his books of account with the receiver, where they contain evidence that may tend to incriminate the bankrupt. Answered in the affirmative.

The facts are stated in the opinion.

Mr. **Louis J. Vorhaus** argued the cause, and, with Mr. Moses H. Grossman, filed a brief for Harris:

The compulsory production of a man's private books and papers, to be used in evidence against him, is compelling him to be a witness against himself.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Re Kanter, 9 Am. Bankr. Rep. 104; Re Hess, 14 Am. Bankr. Rep. 559; Wigmore, Ev. § 2264.

No criminal prosecution is pending against the bankrupt, but that fact is no answer to his right to claim this constitutional privilege.

Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Re Hess, 14 Am. Bankr. Rep. 559.

The bankruptcy law does not supplant the constitutional privilege.

Counselman v. Hitchcock, supra; Re Feldstein, 4 Am. Bankr. Rep. 321; Re Kanter, 9 Am. Bankr. Rep. 104; Re Hess, 14 Am. Bankr. Rep. 559; People ex rel. Taylor v. Forbes, 143 N. Y. 219, 38 N. E. 303.

As the case is not such that the court

NOTE.—Compulsory deposit of bankrupt's books with receiver or trustee as infringing privilege against self-incrimination.

The bankruptcy proceedings in RE HARRIS were begun by involuntary petition, and we are therefore forced to abandon the position taken by some decisions in the inferior Federal courts, that there is a distinction in this regard between voluntary and involuntary proceedings.

Stress was laid in Re Sapiro, 92 Fed. 340, upon the voluntary character of the bankruptcy proceedings as defeating the privilege, and it was held that the voluntary bankrupt could not refuse to deliver to the trustee the books of account kept by the bankrupt in his business, upon the ground of his constitutional privilege against self-crimination. The court said: "But the privilege is asserted here in favor of the bankrupt to excuse him from producing the books of account kept in the business which he was conducting when his voluntary petition was filed to invoke the benefits, and submit to the requirements, of the bankruptcy law. He thereby elected to place all his property (aside from exemptions), including these books of account, which contain apparently the only evidence of credits outstanding, at the disposition of this court. If he were otherwise privileged to withhold the books, his petition operates both as a waiver and as a transfer of the right of custody, and the books cannot now be withheld or withdrawn upon the assertion that they may contain criminating evidence or matter. If within the knowledge or control of the petitioner, the books must be disclosed and produced."

"While there may be some doubt," said the court in Re Hess, 134 Fed. 109, "about the question as to whether a bankrupt can plead this privilege to a demand for his books and papers, or to fully answer as to his property, in cases of voluntary bankruptcy (Re Sapiro, 1 Am. Bankr. Rep. 296), this being an involuntary petition, this question need not be considered." The court here conceded the existence of the privilege, but held that as to whether the books and papers of an involuntary bankrupt actually contained incriminatory matter, the bankrupt may offer to show his answer that his under these circumstances, a bankrupt pleads this privilege, he should be required to bring the books and papers which he alleges contain the incriminating evidence before either the court or referee in bankruptcy; and when it is made to appear that his plea is well founded, the court can make such order in the case as will fully protect him from discovery of such evidence, and at the same time, if possible, enable the trustee to obtain such information from the books as is always necessary and indispensable in the settlement of bankrupt estates." Accordingly, the matter was referred to the referee "to take such testimony as the bankrupt may offer to show his answer that his books and papers contain evidence which may tend to incriminate him is made in good faith to protect him against a criminal prosecution that has been instigated or which will probably be brought against him, and report such evidence and his conclusions thereon to this court, specifying which of said documents, if any, do or do not contain such alleged incriminating evidence." This course was substantially followed in

can say that it is perfectly clear that the bankrupt is mistaken and that the delivery of the books cannot possibly injure him, the privilege of the bankrupt must be recognized.

1 Burr's Trial, 244; Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; People ex rel. Taylor v. Forbes, 143 N. Y. 231, 38 N. E. 303; Re Kanter, 9 Am. Bankr. Rep. 104.

Although by the terms of the order the books of account themselves cannot be used against the bankrupt in any criminal case, nevertheless the inspection of the books of account which the order authorizes may indicate and point out witnesses and other evidence, apart from books themselves, by means of which a criminal charge against the bankrupt may be established, and the bankrupt would thus be compelled to incriminate himself.

Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195.

Although the order prohibits the use of the books themselves in any criminal case against the bankrupt, it permits the receiver to inspect them and take extracts therefrom. Suppose, then, the bankrupt should be indicted for a criminal offense which could be established by means of entries in his books of account, and that upon the trial of such indictment he should be required, by subpœna or notice, to produce his books. Upon his failure to do so, would not the testimony of one who had examined the books, or the extracts made by the receiver, be admissible as secondary evidence of their contents? And could not the production of such secondary evidence be compelled by subpœna? Would not such evidence, in whatever manner obtained, be competent and admissible as against the bankrupt?

Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; Kerrch v. United States, 96 C. C. A. 258, 171 Fed. 366; People ex rel. Zotti v. Flynn, 135 App. Div. 284, 120 N. Y. Supp. 511.

The provision of the order forbidding the use of the books in any criminal proceeding against the bankrupt does not afford him absolute immunity against future prosecution for any offense to which said books relate.

Counselman v. Hitchcock, supra.

The endeavor to aid the receiver in the administration of the bankrupt's estate furnishes no justification for the slightest encroachment upon the bankrupt's privilege.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

Mr. **Abram I. Elkus** argued the cause, and, with Mr. Carlisle J. Gleason, filed a brief for the receiver:

The bankrupt's contention involves an impairment both of efficiency in the administration of the bankrupt act and of the court's power to take possession of the bankrupt estate.

Re Harris, 164 Fed. 293.

Re Hark, 136 Fed. 986, and in Re Hess, 136 Fed. 988.

To justify involuntary bankrupts in their refusal to turn over to the receiver books of account needed by him in order to continue the business as directed by the court, on the ground that they contain evidence which might incriminate them, it must appear to the court that the claim is made in good faith, and that there is reasonable ground to apprehend danger from the production of the books. Re Rosenblatt, 143 Fed. 663.

So far as these cases recognize the existence of such a privilege in involuntary proceedings, they must be regarded as overruled by Re Harris, as must also the case of Re Kanter, 117 Fed. 356, where the court refused to compel involuntary bankrupts to turn over to the receiver all their books of account, records, papers, etc., beclause they were at the time under an indictment in the state court for fraudulently removing, secreting, and disposing of their property and of obtaining goods on false pretenses, and they expressly swore that the books, etc., sought would furnish evidence against them, and from the circumstances the court thought that such would probably be the case.

The bankrupt waives his right to object to the use of his books by the state prosecuting authorities, where at the commencement of the bankruptcy proceedings he surrendered such books to the receiver, who was subsequently appointed trustee, without raising any question of privilege as to their use against him. Re Tracy, 177 Fed. 532.

In State v. Strait, 94 Minn. 384, 102 N. W. 913, where there was a voluntary petition in bankruptcy, and the books and papers of the bankrupt were turned over to the receiver or trustee without objection, it was held that the bankrupt's constitutional privilege from self-crimination was not infringed because the trustee produced such books before the grand jury, which, largely because of the evidence therein contained, returned indictments against the bankrupts.

See also note to Manning v. Mercantile Securities Co. 30 L.R.A.(N.S.) 725, on the right of a corporate officer to refuse to turn over the corporate books to a receiver, upon the ground that they have a tendency to incriminate him.

And upon the general question of the constitutional privilege against self-crimination, see note to Levy v. Superior Court, 29 L.R.A. 811.

The 5th Amendment of the Constitution does not prevent a court from compelling a bankrupt to yield his books for purposes of civil administration of his estate.

Brown v. Walker, 161 U. S. 591, 596, 600, 40 L. ed. 819, 820, 822, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; Re Heath, 2 Deae. & C. 214, Mont. & B. Bankr. 184, 2 L. J. Bankr. N. S. 27; Ex parte Innes, Buck, Bankr. 337; Re Bromley, 3 Nat. Bankr. Reg. 686; Re Sapiro, 92 Fed. 340; Re Hark, 136 Fed. 986; Re Hess 136 Fed. 988.

A trustee of a bankrupt estate is vested, by operation of law, as of the date of the adjudieation, with the title of the bankrupt to all doeuments relating to his property.

Babbitt v. Duteher, 216 U. S. 102, 54 L. ed. 402, 30 Sup. Ct. Rep. 372, 17 A. & E. Ann. Cas. 969.

Title does not vest in a reeeiver in bankruptey, but a receiver has a right to possession, the property being within the eontrol of the eourt.

1 Remington, Bankr. § 1121, pp. 640, 643, § 1128.

Mr. Justiee **Holmes** delivered the opinion of the court:

In this case the district eourt madc an order that the bankrupt should deposit his books of aceount in the offiee of the receiver, there to remain in the custody of bankrupt; the latter to afford the receiver free opportunity to inspect the same, but the reeeiver to use and to permit them to be used only for the purpose of the eivil administration of the estate, and not for any eriminal proceeding. It was ordered further that in ease of subpœna or other process to the reeciver for their produetion, he should notify the bankrupt, to the end that the bankrupt might have an opportunity to raise the question of his constitutional privilege. The bankrupt petitioned the eireuit court of appeals to revise the order. It appears that he made to 279]a eommereial *agency a written statement of his assets and liabilities January 4, 1908, but he dcclined to testify eoncerning it, as it might tend to eriminate him, several ereditors having threatened him with prosecution for having obtained merehandise from them by that means. He also made oath that the books contained evidenee that might tend to ineriminate him; whieh was confirmed by an affidavit of his attorney. The receiver desired the books in order to aseertain what disposition was made of the assets alleged in the statement to the agency. On the other side, the bankrupt was willing to allow an inspection if he could save his right that the books should not be used against him in a criminal trial; but he excepted to the order on the ground that no statute proteeted him from the knowledge gained from the books being used to find and get evidenee that might be used against him in a criminal proseeution. He relied upon the 5th Amendment and Counselman v. Hitehcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195. The circuit eourt of appeals certifies the question whether the order was a proper exereise of the authority of the bankruptcy court.

If the order to the bankrupt, standing alone, infringed his eonstitutional rights, it might be true that the provisions intended to save them would be inadequate, and that nothing short of statutory immunity would suffiee. But no eonstitutional rights are touched. The question is not of testimony, but of surrender,—not of compelling the bankrupt to be a witness against himself in a eriminal ease, present or future, but of eompelling him to yield possession of property that he no longer is entitled to keep. If a trustee had been appointed, the title to the books would have vested in him by the express terms of § 70, and the bankrupt could not have withheld possession of what he no longer owned, on the ground that otherwise he might be punished. That is one of the misfortunes of bankruptey if it follows crime. The right not to be compelled to be a witness against oneself is not a right to appropriate property *that[280 may tell one's story. As the bankruptcy court could have enforeed title in favor of the trustee, it could enforce possession *ad interim* in favor of the receiver. § 2. In the property eareful provision to protect him from use of the books in aid of prosecution, the bankrupt got all that he eould ask. The question certified is answered, "Yes."

CHRISTOPHER STRASSHEIM, Sheriff of Cook County, Illinois, Appt.,
v.
MILTON DAILY.

(See S. C. Reporter's ed. 280–286.)

Habeas corpus — to test extradition — sufficiency of indictment.

1. A count in an indictment for obtaining money by false pretenses, alleging that money was obtained from the state by falsely representing that certain machinery sold to the state was new, whereas in fact it was

NOTE.—On habeas corpus in the Federal courts—see notes to Re Reinitz, 4 L.R.A. 236; State ex rel. Cochran v. Winters, 10 L.R.A. 616; Re Huse, 25 C. C. A. 4; and Tinsley v. Anderson, 43 L. ed. U. S. 91.

As to questions reviewable by habeas cor-

secondhand, substantially charges a crime so as to preclude a discharge on habeas corpus in extradition proceedings, although the contract of sale contains guaranty and testing clauses, which relate, however, only to workmanship and freedom from defects.

[For other cases, see Habeas Corpus, 127–139, in Digest Sup. Ct. 1908.]

Extradition — fugitive from justice.

2. One who does, within the state, an overt act which is, and is intended to be, a material step towards accomplishing a crime, and then absents himself from the state, and does the rest elsewhere, becomes a fugitive from justice for extradition purposes when the crime is complete, if not before.

[For other cases, see Extradition, 13–17, in Digest Sup. Ct. 1908.]

Habeas corpus — to test extradition — fugitive from justice.

3. A showing that the accused was in the state in the neighborhood of the time alleged in the indictment as the date of the crime is enough to preclude a discharge upon habeas corpus in extradition proceedings, on the ground that he was not a fugitive from justice.

[For other cases, see Habeas Corpus, 127–131, in Digest Sup. Ct. 1908.]

[No. 638.]

Argued April 3 and 4, 1911. Decided May 15, 1911.

APPEAL from the District Court of the United States for the Northern District of Illinois to review an order discharging on habeas corpus a person held under a commitment in extradition proceedings. Reversed and prisoner remanded.

The facts are stated in the opinion.

Mr. **Thomas E. Barkworth** argued the cause, and, with Mr. Franz C. Kuhn, Attorney General of Michigan, and Messrs. Ferdinand L. Barnett and Charles W. McGill, filed a brief for appellant:

The defendant was charged with crime in the demanding state.

Pierce v. Creecy, 210 U. S. 387, 52 L. ed. 1113, 28 Sup. Ct. Rep. 714.

The prima facie effect of the governor's warrant, the accompanying papers, and the elements embodied in the charge has not been overcome by proofs adduced on behalf of the petitioner in the habeas corpus proceeding tending to show that he was not, within the meaning of the law, a fugitive from the justice of the state of Michigan.

Ex parte Hoffstot, 180 Fed. 240; Hyatt v. New York, 188 U. S. 691, 710, 47 L. ed. 657, 661, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311; Re Cook, 49 Fed. 833; Re Sultan, 115 N. C. 57, 28 L.R.A. 294, 44 Am. St. Rep. 433, 20 S. E. 375; Hayes v. Palmer, 21 App. D. C. 461; Re Palmer, 138 Mich. 36, 100 N. W. 996; Compton v. Alabama, 214 U. S. 1, 8, 53 L. ed. 885, 887, 29 Sup. Ct. Rep. 605, 16 A. & E. Ann. Cas. 1098.

Mr. **William S. Forrest** argued the cause and filed a brief for appellee:

A fugitive from justice within the meaning of art. 4, § 1, subd. 2, of the Constitution of the United States, and of the act of Congress passed in pursuance thereof, is a person who stands charged by indictment or affidavit in the demanding state with committing a crime therein, and who was corporeally within that state at the time when, if ever, the crime was committed, and has thereafter departed therefrom, and is found in the surrendering state.

Hyatt v. New York, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311; State v. Hall, 115 N. C. 811, 28 L.R.A. 289, 44 Am. St. Rep. 501, 20 S. E. 729, 10 Am. Crim. Rep. 297.

Advance stages of preparation do not amount to an attempt to commit a crime, and therefore cannot be the juridical cause of a crime.

People v. Murray, 14 Cal. 159; United States v. Stephens, 8 Sawy. 116, 12 Fed. 52; Reg. v. Williams, 1 Den. C. C. 39; Reg. v. Meredith, 8 Car. & P. 590; Patrick v. People, 132 Ill. 533, 24 N. E. 619; Hicks v. Com. 86 Va. 223, 19 Am. St. Rep. 891, 9 S. E. 1024.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an appeal from an order on habeas corpus, discharging the respondent, Daily, from custody under a warrant of the governor of Illinois, directing his extradition to Michigan as a fugitive from justice from that state. Daily, it appears, had been indicted in Michigan for bribery and also for obtaining money from the state by false pretenses, and a requisition had been issued to which the warrant of the governor of Illinois was the response. The district judge who issued the habeas corpus was of opinion, however, that the facts alleged in

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pus—see notes to State v. Jackson, 1 L.R.A. 373; Bion's Appeal, 11 L.R.A. 694; Glass v. The Betsey, 1 L. ed. U. S. 489; United States v. Hamilton, 1 L. ed. U. S. 490; Re Carll, 27 L. ed. U. S. 288; Oteiza y Cortes v. Jacobus, supra; and Pearce v. Texas, 39 L. ed. U. S. 164.

On scope of review on habeas corpus in extradition cases—see notes to Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464, and Bruce v. Rayner, 62 C. C. A. 506.

As to who are fugitives from justice for extradition purposes—see notes to Bassing v. Cady, 52 L. ed. U. S. 540; State v. Hall, 28 L.R.A. 289; and Re Strauss, 63 C. C. A. 104.

the indictment for obtaining money by false pretenses did not constitute a crime against the laws of Michigan, and that the evidence showed that Daily was not a fugitive from justice. We will consider these two questions in turn.

The third count of the indictment is the only one that needs to be stated, although all the counts allege a false representation that certain machinery, to be sold to the state, was new, whereas in fact it was sec-
282]ondhand and *used, and the obtaining from the state of $10,000 by means of such representation. The third count alleges that one Armstrong was warden of the Michigan state prison at Jackson, and, in conjunction with the board of control of the prison, authorized to buy machinery for a cordage plant in the prison; that he was authorized to accept the machinery and to pay for it from the funds of the state under his control; that said board and Armstrong contracted with the Hoover & Gamble Company, acting through Daily, the agent, and one Eminger, the secretary of the company, for the purchase of such machinery, all of which, by the contract, was to be new; that Armstrong, Daily, and Eminger had agreed beforehand to substitute old, worn, and secondhand machinery, of less value, for that which was contracted for, the board being ignorant of their intent, and being deceived and defrauded by the substitution; that the secondhand machinery having been substituted, Armstrong, Daily, and Eminger, with intent to cheat the state, to wit, on the 1st day of May, 1908, falsely pretended that the machinery so furnished was the new machinery required by the contract, and rendered bills for the same at the contract prices; that the bills were audited and allowed by Armstrong, and the machinery paid for as new machinery, and that Armstrong, Daily, and Eminger, by means of the false pretenses set up, obtained from the state of Michigan money, to wit, $10,000, the state and the board of control relying upon the false pretenses and being deceived thereby. We sum up the count thus broadly, because, although considerable ingenuity was spent in pointing out defects that would occur to no one outside of the criminal law, yet, whatever may be thought of the criticisms in Michigan, it is plain that the count shows that the defendant "was substantially charged with a crime," and upon habeas corpus in extradition proceedings that is enough. Pierce v. Creecy, 210 U. S. 387, 405, 52 L. ed. 1113, 1122, 28 Sup. Ct. Rep. 714.

283] *It would seem, although the record is otherwise, that the judge below really went on the ground that the terms of the contract excluded a reliance upon the false representation alleged. The contract, after stating that it was for "all new machinery to be manufactured by the Hoover & Gamble Company," contained a guaranty that the machinery should be "constructed in a thorough manner, free from any defects of machinery or workmanship, and finished in a first-class manner." It also provided for the retention of the last quarter of the price "until the machinery is all installed and tested and operating, so as to fulfil the guaranty above given, to the satisfaction and approval of C. G. Wrentmore, Cons. Engr. of the Board of Control." The case is not to be tried on habeas corpus. Therefore it is enough to say that the guaranty and testing clauses do not exclude the possibility that the money was obtained by the false pretenses alleged. The guaranty goes, not to newness, but to workmanship and freedom from defects, and the approval of the consulting engineer is required only to show that the guaranty is fulfilled. The guaranty does not exclude other representations and undertakings. As has been seen, it was expressed in the contract that the subject-matter of the guaranty was machinery to be manufactured and new. If old machinery was put in and represented to be new, it was a material fraud.

We come, then, to the other question, whether the facts show that the defendant is a fugitive from justice. The bribery is laid under a *videlicet* as taking place on May 13, 1908; the false pretenses are averred to have been made on May 1, of the same year. On both of these dates the defendant was in Chicago. What happened, in short, was this: Daily had tried to sell secondhand machinery, in which he had an interest, to the state, and it was rejected. At the time of receiving notice, or afterwards, but within ten days before July 22, 1907, he had a conversation with Armstrong in Chicago, in which he said it was *a[284 mistake not to accept his proposition; that he thought it could be arranged, and that there would be a nice present in it for Armstrong, which he said would be "$1,000, anyway." In the affidavit of Armstrong, accompanying the requisition, it is stated explicitly that the present was offered if Armstrong would let Daily substitute his old machinery for new in case a contract should be made.

On July 22, 1907, the successful bid of the Hoover & Gamble Company was sent in. It was signed by Daily, and Daily was with the board of control in Michigan, accompanying it, when it was considered and accepted. He had made a previous visit to the board in the spring, and he was there in November to see the machinery and to de-

lay shipment. At the latter date he told Armstrong that Eminger, the secretary of the company, had objected to the word "new" in the contract, and was afraid they would have trouble with the consulting engineer, but Armstrong replied that he did not think they would have any trouble with him. Finally, in April, 1908, Daily was at the prison again, in further execution of the program arranged by him and Armstrong, as the judge below properly found. Armstrong's affidavit states that Daily did substitute his old machinery, that it was understood that Armstrong was not to communicate the fact to the proper officer of the state or to the board of control, that the plant was put in, that the contract price was paid in full, and that thereafter Daily paid Armstrong $1,500, as he had agreed. But it may be assumed, for the moment, that Daily personally did no act in Michigan in any way connected with his plan otherwise than as we have stated above.

If a jury should believe the evidence, and find that Daily did the acts that led Armstrong to betray his trust, deceived the board of control, and induced by fraud the payment by the state, the usage of the civilized world would warrant Michigan in 285]punishing him, although he *never had set foot in the state until after the fraud was complete. Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power. Com. v. Smith, 11 Allen, 243, 256, 259; Simpson v. State, 92 Ga. 41, 22 L.R.A. 248, 44 Am. St. Rep. 75, 17 S. E. 984; American Banana Co. v. United Fruit Co. 213 U. S. 347, 356, 53 L. ed. 826, 832, 29 Sup. Ct. Rep. 511, 16 A. & E. Ann. Cas. 1047; Com. v. Macloon, 101 Mass. 1, 6, 18, 100 Am. Dec. 89. We may assume, therefore, that Daily is a criminal under the laws of Michigan.

Of course, we must admit that it does not follow that Daily is a fugitive from justice. Hyatt v. New York, 188 U. S. 691, 712, 47 L. ed. 657, 661, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311. On the other hand, however, we think it plain that the criminal need not do within the state every act necessary to complete the crime. If he does there an overt act which is and is intended to be a material step toward accomplishing the crime, and then absents himself from the state and does the rest elsewhere, he becomes a fugitive from justice when the crime is complete, if not before. Re Cook, 49 Fed. 833, 843, 844; Ex parte Hoffstot, 180 Fed. 240, 243; Re Sultan, 115 N. C. 57, 28 L.R.A. 294, 44 Am. St. Rep. 433, 20 S. E. 375. For all that is necessary to convert a criminal under the laws of a state into a fugitive from justice is that he should have left the state after having incurred guilt there. (Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291), and his overt act becomes retrospectively guilty when the contemplated result ensues. Thus, in this case, offering the bid and receiving the acceptance were material steps in the scheme, they were taken in Michigan, and they were established in their character of guilty acts when the plot was carried to the end, even if the intent with which those steps were taken did not make Daily guilty before. Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276.

We have given more attention to the question of time than it is entitled to, because of the seeming exactness of *the[286 evidence. But a shorter and sufficient answer is to repeat that the case is not to be tried on habeas corpus, and that when, as here, it appears that the prisoner was in the state in the neighborhood of the time alleged, it is enough.

Judgment reversed, prisoner remanded.

MARCHIE TIGER, Plff. in Err.,
v.
WESTERN INVESTMENT COMPANY and Ellis H. Hammett, R. C. Allan, and J. C. Pinson, Copartners under the Name of Coweta Realty Company.

(See S. C. Reporter's ed. 286-317.)

Statutes — construction — subsequent legislation.

1. Subsequent congressional legislation may be considered as an aid to the interpretation of prior legislation upon the same subject.

[For other cases, see Statutes, 249-255, in Digest Sup. Ct. 1908.]

Indians — restrictions on alienation.

2. The prohibition against the alienation of allotted lands by the allottee or his heirs, without the approval of the Secretary of the Interior, created by the supplemental Creek agreement of June 30, 1902 (32 Stat. at L. 500, chap. 1323), was continued, as to conveyances by full-blooded Indian heirs, beyond the five-year limitation therein expressed, by the act of April 26, 1906 (34 Stat. at L. 137, chap. 1876), which, in § 22, after empowering adult heirs of a deceased Indian of either of the Five Civilized Tribes to convey their inherited lands, provided that "all conveyances made under

NOTE.—On power of Congress over the Indians—see note to Worcester v. Georgia, 8 L. ed. U. S. 484.

this provision by heirs who are full-blooded Indians are to be subject to the approval of the Secretary of the Interior," and in § 29 repealed all inconsistent legislation.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indians — individual status — congressional control.

3. Congress, in pursuance of the long-established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease.

[For other cases, see Indians, 17–19, in Digest Sup. Ct. 1908.]

Indians — validity of restrictions on alienation — citizenship.

4. The rights of the Creek Indians in the Indian territory who were made citizens of the United States by the act of March 3, 1901 (31 Stat. at L. 1447, chap. 868), with all of the rights, privileges, and immunities of such citizens, were not unconstitutionally impaired by the act of April 26, 1906, § 22, extending the prohibition against the alienation of allotted lands by the allottee or his heirs without the approval of the Secretary of the Interior, created by the supplemental Creek agreement of June 30, 1902, beyond the five-year limitation therein expressed.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

[No. 60.]

Argued November 30 and December 1 and 2, 1910. Ordered for reargument January 23, 1911. Reargued March 1 and 2, 1911. Decided May 15, 1911.

IN ERROR to the Supreme Court of the State of Oklahoma to review a decree which reversed a decree of the United States for the Western District of Indian Territory, in favor of plaintiff in a suit to remove a cloud on title. Reversed and remanded for further proceedings.

See same case below, 21 Okla. 630, 96 Pac. 602.

The facts are stated in the opinion.

Mr. **W. L. Sturdevant** argued the cause, and, with Messrs. M. L. Mott and W. A. Brigham, filed a brief for plaintiff in error on original argument:

Sections 19 and 22 of the act of Congress of April 26, 1906, when read in connection with § 23 of the same act, and §§ 8 and 9 of the act of May 27, 1908, show a clear and unmistakable intention on the part of Congress to protect, and, in furtherance of that end, to extend the period of restrictions upon, the inherited lands of full-blood Indians.

Endlich, Interpretation of Statutes, §§ 43, 45, 322; Lewis's Sutherland, Stat. Constr. 2d ed. §§ 443, 585, et seq; Black, Constr. & Interpretation of Laws, § 113; Alexander v. Alexander, 5 Cranch, 7, 8, 3 L. ed. 20, 21; United States v. Freeman, 3 How. 556, 11 L. ed. 724; Brown v. Duchesne, 19 How. 183, 15 L. ed. 595; New Lamp Chimney Co. v. Ansonia Brass & Copper Co. 91 U. S. 656, 23 L. ed. 336; Brewer v. Blougher, 14 Pet. 178, 10 L. ed. 408; Kohlsaat v. Murphy, 96 U. S. 153, 24 L. ed. 844; McKee v. United States, 164 U. S. 287, 41 L. ed. 437, 17 Sup. Ct. Rep. 92; Interstate Drainage & Invest. Co. v. Freeborn County, 85 C. C. A. 532, 158 Fed. 273; Goodrum v. Buffalo, 89 C. C. A. 525, 162 Fed. 817; Keeney v. McVoy, 206 Mo. 42, 103 S. W. 946; United States use of Hill v. American Surety Co. 200 U. S. 203, 50 L. ed. 440, 26 Sup. Ct. Rep. 168; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; United States v. Moore, 88 C. C. A. 455, 161 Fed. 519; United States v. Hanson, 93 C. C. A. 371, 167 Fed. 893; 26 Ops. Atty. Gen. 352.

A proviso in a statute often has an effect which restricts or enlarges the scope of the entire act. The application of such provisions is not always limited to the matters only in the section in which they appear. They sometimes have as much force even when attached or subjoined to a paragraph of a statute as they would if standing alone in an independent paragraph.

Black, Constr. & Interpretation of Laws, § 110; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 239, 46 L. ed. 1144, 22 Sup. Ct. Rep. 881; United States v. Whitridge, 197 U. S. 135, 49 L. ed. 696, 25 Sup. Ct. Rep. 406; United States v. Scruggs, 84 C. C. A. 440, 156 Fed. 940.

The power of the general government to deal with, control, and protect the property of the Indian, where not expressly abandoned, is no longer open to controversy. Arising originally out of the necessities of the situation, it now has the support of immemorial legislative and executive usage, and, likewise, that of judicial sanction, as evidenced in many decisions of this court. This power must, in the nature of things, continue until its further exercise is deemed unnecessary by those in whom it rests.

United States v. Rickert, 188 U. S. 439, 47 L. ed. 536, 23 Sup. Ct. Rep. 478; Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 165; Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216; Stephens v. Cherokee Nation, 174 U. S. 484, 43 L. ed. 1055, 19 Sup. Ct. Rep. 722; United States v. Kagama, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; Worcester v. Georgia,

6 Pet. 515, 8 L. ed. 483; Wallace v. Adams, 204 U. S. 420, 51 L. ed. 550, 27 Sup. Ct. Rep. 363.

Congress, having retained authority over the subject by agreement, and acting within the life of the agreement and while the tribal government still exists, may conclude that a longer period of care and supervision is necessary to its policy and in the best interests of both the government and the Indian, and thereupon extend the period of restrictions by appropriate legislation. Such a course comes within the rightful exercise of power reserved over the subject, and the act in controversy and all its provisions are therefore valid. Nor is this relation of the government and the Indian affected by his citizenship, or by any other rights which he may possess, or by the police power of the state over him, or by any rights which the state of Oklahoma has in the premises; but, on the contrary, it is entirely compatible with all these.

Smith v. Stevens, 10 Wall. 321, 19 L. ed. 933; Wiggan v. Conolly, 163 U. S. 60, 41 L. ed. 70, 16 Sup. Ct. Rep. 914; Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; Goodrum v. Buffalo, 89 C. C. A. 525, 162 Fed. 817; United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478; United States v. Hall, 171 Fed. 218; Rainbow v. Young, 88 C. C. A. 653, 161 Fed. 836; National Bank v. Anderson, 77 C. C. A. 259, 147 Fed. 87; United States v. Thurston County, 74 C. C. A. 425, 143 Fed. 287; Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216; McKay v. Kalyton, 204 U. S. 458, 51 L. ed. 566, 27 Sup. Ct. Rep. 346; Conley v. Ballinger, 216 U. S. 84, 54 L. ed. 393, 30 Sup. Ct. Rep. 224; United States v. Shock, 187 Fed. 862, 870.

Powers, rights, and interest of sovereignty are never relinquished by lapse or implication. Once established and asserted, they are presumed to exist, and to continue to exist until abandoned by express terms. This principle applies alike to prerogatives of the executive, powers of the legislature, and the jurisdiction of the courts. All acts derogatory thereof are strictly construed and every doubt resolved in favor of their perpetuity.

United States v. Herron, 20 Wall. 251, 22 L. ed. 275; National Bank v. Anderson, 77 C. C. A. 259, 147 Fed. 90; Hamilton v. Reynolds, 88 Ind. 193; State ex rel. Isenring v. Polacheck, 101 Wis. 430, 77 N. W. 708; Pooler v. United States, 62 C. C. A. 317, 127 Fed. 519; United States v. Knight, 14 Pet. 301, 10 L. ed. 465; Wheeling & B. Bridge Co. v. Wheeling Bridge Co. 138 U. S. 287, 34 L. ed. 967, 11 Sup. Ct. Rep. 301; United States v. Shaw, 3 L.R.A. 232, 39 Fed. 433; Mosle v. Bidwell, 65 C. C. A. 533, 130 Fed. 335.

Mr. Wade H. Ellis, Special Assistant to the Attorney General, argued the cause, and, with Mr. Henry E. Colton, Special Assistant to the Attorney General, filed a brief for the United States:

Section 22 has been uniformly construed, by the tribunals that have had occasion to construe it, as superseding previous rules for the alienation of inherited lands by full-blood heirs, and as providing the only rule by which said lands could be alienated.

Brown v. United States, 44 Ct. Cl. 304; United States v. Shock, 187 Fed. 870.

Unallotted tribal Indian lands are always within the control of Congress.

Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 165; Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216; Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; Conley v. Ballinger, 216 U. S. 84, 54 L. ed. 393, 30 Sup. Ct. Rep. 224.

Even lands allotted to Indians in severalty may be continued under the direct supervision of Congress:

United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478.

Congress may continue, or impose anew, restrictions upon the alienation of allotted Indian lands, even after the limitations reserved in the original grant have expired.

Smith v. Stevens, 10 Wall. 324, 19 L. ed. 935; Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1.

The grant of citizenship does not deprive Congress of its full power to legislate with respect both to the Indian and his lands, unless they have been expressly subjected by Congress to state control.

United States v. Celestine, 215 U. S. 278, 54 L. ed. 195, 30 Sup. Ct. Rep. 93; United States v. Sutton, 215 U. S. 291, 54 L. ed. 200, 30 Sup. Ct. Rep. 116; United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478; United States v. Allen, 103 C. C. A. 1, 179 Fed. 19; United States v. Flournoy Live-stock & R. E. Co. 69 Fed. 891; Hitchcock v. United States, 22 App. D. C. 275; Ross v. Eells, 56 Fed. 855.

The intention of Congress to withdraw Federal control over the Indian and his lands must be clearly expressed, and the courts will not assume it.

Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 512; United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478.

There is a difference between political rights and property rights, in so far as either may be affected by the grant of citizenship, and property rights may be controlled by Congress, even though political rights are granted.

United States v. Rickert, supra.

Without respect to citizenship, Congress had full power to impose restrictions upon the alienation of land by full-blood Indians as a class of incompetents.

United States v. Flournoy Live-stock & Real Estate Co. 69 Fed. 891; Rice v. Parkman, 16 Mass. 326; Church of Jesus Christ of L. D. S. v. United States, 136 U. S. 3, 42, 34 L. ed. 478, 490, 10 Sup. Ct. Rep. 792; Shively v. Bowlby, 152 U. S. 1, 48, 38 L. ed. 331, 349, 14 Sup. Ct. Rep. 548; Muller v. Oregon, 208 U. S. 412, 422, 52 L. ed. 551, 556, 28 Sup. Ct. Rep. 324, 13 A. & E. Ann. Cas. 957.

Mr. George S. Ramsey argued the cause, and with Messrs. C. L. Thomas, L. J. Roach, Chris M. Bradley, and R. C. Allen, filed a brief for defendants in error:

A proviso is construed strictly, and takes no case out of the enacting clause which does not clearly fall within its terms.

Black, Constr. & Interpretation of Laws, pp. 270, 273; 2 Sutherland, Stat. Constr. § 352; Ryan v. Carter, 93 U. S. 78, 85, 23 L. ed. 807, 809; United States v. Dickson, 15 Pet. 141, 165, 10 L. ed. 689, 698; United States v. Newhall, 91 Fed. 529; Carter v. Hobbs, 92 Fed. 599; Wall v. Cox, 41 C. C. A. 408, 101 Fed. 409; Re Matthews, 109 Fed. 614; Boston Safe-Deposit & T. Co. v. Hudson, 15 C. C. A. 651, 25 U. S. App. 257, 68 Fed. 760; United States v. Schlicrholz, 137 Fed. 618; Gould v. New York L. Ins. Co. 132 Fed. 929; Murray v. Beal, 97 Fed. 569; Paxton & H. Irrigating Canal & Land Co. v. Farmers' & M. Irrig. & Land Co. 45 Neb. 884, 29 L.R.A. 853, 50 Am. St. Rep. 596, 64 N. W. 343.

Not only will the proviso be strictly construed, but the general rule of interpretation is that a proviso must be construed with reference to the subject-matter of the section of which it forms a part, unless there is a manifest legislative intention that it should limit the operation of other sections of the act.

Boston Safe-Deposit & T. Co. v. Hudson, 15 C. C. A. 651, 25 U. S. App. 257, 68 Fed. 760; United States v. 132 Packages of Spirituous Liquors, 65 Fed. 983; Chattanooga, R. & C. R. Co. v. Evans, 14 C. C. A. 116, 31 U. S. App. 432, 66 Fed. 814; Re Matthews, 109 Fed. 614; McRae v. Holcomb, 46 Ark. 306; Bragg v. Clark, 50 Ala. 363; Black, Constr. & Interpretation of Laws, p. 275; 2 Sutherland, Stat. Constr. § 352.

It is not necessary, in order that a clause may operate as a proviso, for the section to be preceded by the term "provided."

Black, Constr. & Interpretation of Laws, p. 270.

The court in construing a statute has the right to consider and consult the reports of the congressional committees, and the progress of the bill through Congress.

Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 333, 53 L. ed. 1019, 29 Sup. Ct. Rep. 671; The Delaware, 161 U. S. 459, 40 L. ed. 771, 16 Sup. Ct. Rep. 516; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349.

Statutes in derogation of common right are always subject to a strict construction.

Black, Constr. & Interpretation of Laws, 300–302; 2 Sutherland, Stat. Constr. § 680; Walker v. Chicago, 56 Ill. 277.

Marchie Tiger and Marchie Tiger's ancestors were citizens of the United States

Ross v. Eells, 56 Fed. 855; United States v. Hall, 171 Fed. 214; United States v. Boss, 160 Fed. 132; Dick v. United States, 208 U. S. 352, 52 L. ed. 524, 28 Sup. Ct. Rep. 399; Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; Ex parte Savage, 158 Fed. 205; United States v. Saunders, 96 Fed. 268; United States v. Kopp, 110 Fed. 160; Ex parte Viles, 139 Fed. 68; United States v. Dooley, 151 Fed. 697; United States v. Auger, 153 Fed. 671; United States v. Allen, 171 Fed. 907.

Marchie Tiger's ancestors owned these lands in fee simple absolute, subject only to the condition or limitation, contained in the grant, that the lands should not be alienated by them or their heirs before the expiration of five years from August 8, 1902.

Taylor v. Brown, 147 U. S. 640, 37 L. ed. 313, 13 Sup. Ct. Rep. 549.

It is not within the power of Congress to create a condition or limitation, or extend a condition or limitation affecting these lands, after conveyance to the alottees and the acceptance of the conveyance by the allottees, in fee simple, subject only to the definite condition or limitation expressed in the grant.

Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506.

All other cases adjudicated by this court, bearing upon titles to Indian lands and rights therein, are to be distinguished from the case at bar, for the reason that the status of full citizenship and full ownership of property does not occur in any case heretofore presented:

United States v. Rickert, 188 U. S. 433, 47 L. ed. 534, 23 Sup. Ct. Rep. 478; Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216; Choctaw Nation v. United States, 119 U. S. 1, 30 L. ed. 306, 7 Sup. Ct. Rep. 75; Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; Taylor v. Brown, 147 U. S. 640, 37 L. ed. 313, 13 Sup. Ct. Rep. 549; Ex parte Savage, 158 Fed. 205; Wiggan v. Conolly, 163 U. S. 56, 41 L. ed. 69, 16 Sup. Ct. Rep. 914.

The Constitution of the United States had been put in force in the Indian territory by act of Congress passed long before the act of April 26, 1906. That act, in so far as it undertook to restrict the vested rights to alienate on and after August 8, 1907, interfered with the vested rights, and is inconsistent and incompatible with the estate granted.

Mandlebaum v. McDonell, 29 Mich. 78, 18 Am. Rep. 61; Gladney v. Sydnor, 172 Mo. 318, 60 L.R.A. 880, 95 Am. St. Rep. 524, 72 S. W. 554; Bruce v. Strickland, 81 N. C. 267; Westervelt v. Gregg, 12 N. Y. 202, 62 Am. Dec. 160; Spreckles v. Spreckles, 116 Cal. 339, 36 L.R.A. 497, 58 Am. St. Rep. 177, 48 Pac. 228; Reade v. De Lea, 14 N. M. 442, 95 Pac. 131.

Mr. **S. T. Bledsoe** also argued the cause, and, with Mr. Evans Browne, filed a brief as *amici curiæ*.

Mr. **W. W. Hastings** argued the cause for the Cherokee Nation.

Messrs. **George S. Ramsey** and **S. T. Bledsoe** argued the cause and filed a brief for defendants in error on reargument:

The members of the Five Civilized Tribes are citizens of the United States, with all the rights, privileges, and immunities as such.

United States v. Allen, 171 Fed. 919, 103 C. C. A. 1, 179 Fed. 13.

Conferring citizenship upon the members of the Five Civilized Tribes, with all the rights, privileges, and immunities thereof, operated to sever the relation of guardian and ward, so far as such relation may have existed, if at all, between the United States and the members of the Five Civilized Tribes.

Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; United States v. Dooley, 151 Fed. 697; Ex parte Viles, 139 Fed. 70; United States v. Hall, 171 Fed. 214; United States v. Kopp, 110 Fed. 160; United States v. Auger, 153 Fed. 671; Ex parte Savage, 158 Fed. 205; United States v. Boss, 160 Fed. 132.

Whatever rights the United States, as the dominant party, may have had in the domain of the Creek Nation and the other tribes, passed absolutely and unconditionally from the United States to the respective allottees under the plain and unequivocal provisions of the various treaties and agreements made with the tribes providing for the allotment in severalty of the public domain of the nations.

Stephens v. Cherokee Nation, 174 U. S. 488, 43 L. ed. 1056, 19 Sup. Ct. Rep. 722; Ligon v. Johnston, 90 C. C. A. 486, 164 Fed. 670; Shulthis v. MacDougal, 162 Fed. 331, 95 C. C. A. 615, 170 Fed. 529; United States v. Reese, 5 Dill. 405, Fed. Cas. No. 16,137; Cherokee Nation v. Southern Kansas R. Co. 33 Fed. 900, 135 U. S. 641–661, 34 L. ed. 295–303, 10 Sup. Ct. Rep. 965; United States v. Rogers, 23 Fed. 658; Holden v. Joy, 17 Wall. 211–253, 21 L. ed. 523–537.

The allottee was vested with the fee-simple title, subject to a limitation contained in the grant prohibiting the alienation of the allotment for a definite and fixed period, to wit, five years from and after the ratification of the agreement. This fixed period, as fixed in the agreement or treaty, expired on August 8, 1907. Any legislation undertaking to extend this limitation against alienation necessarily destroys the vested property right then existing in the allottee.

8 Words & Phrases, pp. 7307, 7308; 2 Sutherland, Stat. Constr. § 671.

The Federal government cannot extend its authority and jurisdiction except where the right is granted by the Constitution.

United States v. Harris, 106 U. S. 629–644, 27 L. ed. 290–295, 1 Sup. Ct. Rep. 601.

An act of Congress is not due process of law, which undertakes to devest a private citizen of his property, either for private or public interest.

Cooley, Const. Lim. 503; Sutherland, Notes on U. S. Const. p. 649.

Mr. Justice **Day** delivered the opinion of the court:

This case involves the validity of conveyances made by Marchie Tiger, plaintiff in error, a full-blood Indian of the Creek tribe, to the defendants in error, the Western Investment Company, and Ellis H. Hammett, R. C. Allan, and J. C. Pinson, copartners under the name of Coweta Realty Company.

The lands in controversy were located in the Indian territory, were allotted under certain acts of Congress, to which we shall have occasion to refer later, and were inherited by Marchie Tiger during the year 1903 from his deceased brother and sisters,

Sam, Martha, Lydia, and Louisa Tiger, also members of the Creek nation, and allottees of the lands which passed by inheritance to Marchie Tiger.

According to the law of descent and distribution, which had been put in force in the Indian territory, Marchie Tiger was the sole heir at law of his deceased brother and sisters. 32 Stat. at L. 500, chap. 1323; Mansfield's Dig. Arkansas Stat. chap. 49, § 2522.

On August 8, 1907, Marchie Tiger sold and conveyed by warranty deed to the defendant in error the Western Investment Company certain of the said lands for the sum of $2,000, which was paid by the company. On July 1, 1907, Marchie Tiger sold and conveyed by warranty deed certain other of said lands to the Coweta Realty Company, and likewise sold and conveyed the same, in the same manner, on July 26, 1907, on August 8, 1907, and on August 299]13, 1907, *to the Coweta Realty Company; the consideration agreed to be paid by the company was $3,000, of which $558 was paid. The plaintiff in error offered to return the amounts paid by the respective purchasers, and made tender thereof, which was refused, and this suit is brought to have the deeds in question canceled, and the claim set aside as a cloud upon plaintiff's title.

Each and all of these conveyances were made without the approval of the Secretary of the Interior. The supreme court of Oklahoma held the conveyances valid and denied relief to the plaintiff in error. 21 Okla. 630, 96 Pac. 602.

Two questions arise in the case. First: Could a full-blood Creek Indian, on and after the 8th day of August, 1907, convey the lands inherited by him from his relatives, who were full-blood Creek Indians, which lands had been allotted to them, so as to give a good title to the purchaser, although the conveyance was made without the approval of the Secretary of the Interior? Second: If the legislation of Congress in question undertook to make such conveyances valid only when approved by the Secretary of the Interior, is it constitutional?

An answer to these questions requires a consideration of certain treaties and legislation concerning title to these lands. In 1833 [7 Stat. at L. 417], the United States made a treaty with the Creek nation of Indians, in consideration of which they were to move to a new country west of the Mississippi, and to surrender all the lands held by them east of the Mississippi, and the United States agreed to convey to them a tract of land comprising what is now a part of the state of Oklahoma.

On August 11, 1852, in pursuance of this treaty, the United States issued a patent for the tract of country mentioned, in which it was recited that the grantor, "in consideration of the premises, and in conformity with the above-recited provisions of the treaty aforesaid, has given *and grant-[300 ed, and by these presents does give and grant, unto the Muskogee (Creek) tribe of Indians, the tract of country above mentioned, to have and to hold the same unto the said tribe of Indians so long as they shall exist as a nation and continue to occupy the country hereby assigned to them."

Upon this tract of land the Creeks became a settled people, and established a government. In 1893 the United States, in pursuance of a policy which looked to the final dissolution of the tribal government, took steps toward the distribution and allotment of the lands among the members of the tribe. On March 3, 1893, Congress passed an act (27 Stat. at L. 645, chap. 209), which provides:

"Sec. 15. The consent of the United States is hereby given to the allotment of lands in severalty, not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; . . . and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease."

Section 16 of the act provided for the appointment of commissioners to enter upon negotiations with the Cherokee, Choctaw, Chickasaw, Creek, and Seminole Nations, looking to the extinguishment of the tribal title to lands in the territory held by the nations or tribes, whether by cession of the same, or some part thereof, to the United States, or by allotment and division thereof in severalty among the Indians of such nations or tribes, or by such other method as may be agreed upon by such nations or tribes with the United States, with a view to such adjustment on the basis of justice and equity as might, with the consent of such nations or tribes, so far as might be necessary, be requisite and suitable to enable the ultimate creation of a state or states of the Union, which shall embrace the lands within the Indian territory.

*After negotiations and legislation[301 looking to the enrolment of the tribes entitled to citizenship, an act of Congress known as the original Creek agreement was passed. (Act of March 1, 1901, 31 Stat. at L. 861, chap. 676.)

Section 7 of that act contains certain restrictions upon the title of individual

Indians after the same had been conveyed to them by the Creek Nation, with the approval of the Secretary of the Interior. Section 7 of the act of March 1, 1901, was amended by the act of June, 30, 1902 (32 Stat. at L. 500, chap. 1323), known as the supplemental creek agreement.

Section 16 of the act superseded § 7 of the first Creek agreement, and, as it contains the restriction on alienation of allotted lands, important to be considered, so much of that section as contains such restrictions is here quoted:

"Sec. 16. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any encumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear."

This agreement was ratified by the action of the Creek National Council, and approved by the President of the United States August 8, 1902.

It is thus apparent that the five-year limitation created by § 16 of the act of 1902, upon the alienation of lands by the Creek Indians, had expired when the conveyances in controversy were made.

302] *Within that five years, and about fifteen months before the expiration thereof, Congress passed the act of April 26, 1906 (34 Stat. at L. 137, chap. 1876), entitled, "An Act to Provide for the Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory, and for Other Purposes."

Sections 19, 20, 22, and 23 of the act are important to be considered, and are given in full in the margin.†

303] *Sec. 28 of the act provides for the continuance of the tribal government of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations, but places certain restrictions upon their right of legislation, making the same subject to the approval of the President of the United States.

Section 29 of the act provides that all acts and parts of acts inconsistent with the provisions of the act be repealed.

As § 22 of the act is the one upon which the rights of the parties most distinctly turn, we here insert it:

*"Sec. 22. That the adult heirs of [304 any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside, or in which said real estate is situated, upon an order of such court, made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

It is the contention of the defendants in error that this section, when read in connection with § 16 of the act of 1902, above quoted, has the effect to require conveyances made by full-blood Indian heirs during the period from the passage of the act of which § 22 is a part, until the expiration of the five years period named in § 16, to be approved by the Secretary of the Interior, but does not interfere with the capacity of such full-blood Indian heirs to convey the inherited lands after the expiration of the five years. This was the view entertained by the supreme court of Oklahoma in deciding this case.

In support of that view, it is insisted that the last sentence of § 22 must be read as a proviso, limiting and qualifying

†"Sec. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribe shall be determined by the rolls of citizens of said tribes, approved by the Secretary of the Interior; Provided, however, that such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may

that which has gone before in the same section; that without this proviso the first part of the section would enable adult heirs of full blood to convey their inherited lands notwithstanding the five years limitation provided in § 16 had not expired, and that the real purpose of this section was to place 305]such full-blood Indian heirs under *the protection of the Secretary of the Interior, so far as his approval was required, until the expiration of the five-year period named in § 16.

On the other hand, it is contended that the act of April 26, 1906, in the sections referred to, has undertaken to make new provision for the protection of full-blood Indians of the Five Civilized Tribes, and to place them, as to the alienation, disposition, and encumbrance of their lands, under restrictions such as shall operate to protect them, and to require the Secretary of the Interior to approve such conveyances, in order that such Indians shall part with their lands only upon fair remuneration, and when their interests have been duly safeguarded by competent authority.

Previous legislation upon this subject differed as to the several nations.

As to the Seminoles, at the time of the passage of the act of April 26, 1906, the law forbade alienation prior to the date of the patent. The patent was to be made by the principal chief of the tribe when the tribal government ceased to exist. 30 Stat. at L. 567, chap. 542.

The legislation concerning the Creeks we have already recited. Alienation was forbidden until expiration of the five-year period, to wit: until August 8, 1907.

One section (14) of the Cherokee act provides there shall be no alienation within five years from the ratification of the act; another section (15) provides that Cherokee allotments, except homesteads, shall be alienable in five years after the issue of the patent. 32 Stat. at L. 716, chap. 1375.

The Choctaw and Chickasaw act provided (§ 16) that:

"All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One fourth in acreage in one year, one fourth in acreage in three years, and the balance in five years,—in each case *from date of patent; provided, that[306 such land shall not be alienable by the allottee or his heirs at any time before the ex-

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authorize the leasing of such homestead under such rules and regulations: Provided, further, that conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed, but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided, and every deed executed before, or for the making of which a contract or agreement was entered into before, the removal of restrictions, be and the same is hereby declared void: Provided further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

"Sec. 20. That after the approval of this act, all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, shall be in writing, and subject to approval by the Secretary of the Interior, and shall be absolutely void and of no effect without such approval: Provided, That allotments of minors and incompetents may be rented or leased under order of the proper court: Provided further, that all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian territory.

. . . . . .

"Sec. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian territory; and in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside, or in which said real estate is situated, upon an order of such court, made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

"Sec. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein; Provided, that no will of a full-blood Indian devising real estate shall be valid if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian territory or a United States commissioner." 34 Stat. at L. 137, chap. 1876.

piration of the Choctaw and Chickasaw tribal governments for less than its appraised value." Act of July 1, 1902, 32 Stat. at L. 641, 643, chap. 1362.

In this case we are concerned with the construction of the act of April 26, 1906, so far as it involves the Creeks, and other statutes are mentioned with a view to aid in the construction of that act. It is the contention of the plaintiff in error that the act of April 26, 1906, repealed all former legislation upon the subject, and intended to provide, as to full-blood Indians of the tribes, new and important protection in the disposition of their landed interests, and that, as the act provides that previous inconsistent legislation shall be repealed, so far as the same subjects are covered in the new act it was intended to give additional protection to full-blood Indians, and to prevent them from being deprived without adequate consideration of their lands and holdings; and that the real purpose of § 22, in so far as the adult heirs of the deceased Indians of the five civilized tribes are concerned, is to subject conveyances of such lands, when made by full-blood Indians, to the approval of the Secretary of the Interior.

We think a consideration of this act and of subsequent legislation *in pari materia* therewith demonstrates the purpose of Congress to require such conveyances by full-blood Indians to be approved by the Secretary of the Interior.

The sections of the act of April 26, 1906, under consideration, show a comprehensive system of protection as to such Indians. Under § 19 they are not permitted to alienate, sell, dispose of, or encumber allotted lands within twenty-five years unless Congress otherwise provides. The leasing of their lands, other than homesteads, for more than one year, may be made under rules and regulations prescribed by the Secretary of the Interior. And in case of 307]*the inability of a full-blood Indian, already owning a homestead, to work or farm the same, the Secretary may authorize the leasing of such homestead.

Under § 20, leases and rental contracts of full-blood Indians, with certain exceptions, are required to be in writing, subject to the approval of the Secretary of the Interior. Under § 23, authority is given "to all persons of lawful age and sound mind to devise and bequeath all his estate, real and personal, and all interest therein;" but no will of a full-blood Indian, devising real estate, and disinheriting parent, wife, spouse, or children of a full-blood Indian, is valid until acknowledged before and approved by a judge of a United States court in the territory, or by the United States commissioner.

Coming now to § 22, the first part of that section gives the adult heirs of any deceased Indian of either of the Five Civilized Tribes power to sell and convey the inherited lands named, with certain provisions as to joining minor heirs by guardians in such sales. This part of the statute would enable full-blood Indians, as well as others, to convey such lands as adult heirs of any deceased Indian, etc., but the last sentence of the section requires the conveyance made under this provision, that is, conveyances made by adult heirs of the character named in the first part of the section, when full-blood Indians, to be subject to the approval of the Secretary of the Interior. This construction is in harmony with the other provisions of the act, and gives due effect to all the parts of § 22. True, it has the effect to extend the requirement of the approval of the Secretary of the Interior as to full-blood Indians beyond the terms prescribed in § 16 of the act of 1902, and this, we think, was the purpose of Congress, which is emphasized in § 29 of the act, wherein all previous inconsistent acts and parts of acts are repealed.

As to the argument that the last sentence of § 22 is to be construed as a proviso intended to limit the generality of *the previous part of the section,[308 and not to affect prior legislation upon the subject, it may be observed: the sentence does not take the ordinary character of a proviso and is not introduced as such; and, even if regarded as a proviso, it is well-known that independent legislation is frequently enacted by Congress under the guise of a proviso. Interstate Commerce Commission v. Baird, 194 U. S. 25, 36, 48 L. ed. 860, 865, 24 Sup. Ct. Rep. 563, and previous cases in this court therein cited.

Had Congress intended not to interfere with full-blood Indian heirs in their right to make conveyances after the expiration of the five years named in § 16 of the act of 1902, it would have been easy to have said so, and some reference would probably have been made to the prior legislation. No reference is made to the prior legislation, but it is broadly enacted that all conveyances of the character named in § 22, made by heirs of full-blood Indians, shall be subject to the approval of the Secretary of the Interior.

The construction contended for by the defendants in error places Congress in the attitude of requiring such conveyances to be made with the approval of the Secretary of the Interior for the time between the passage of the act of 1906 and the expira-

tion of the period named in the act of 1902, with unrestricted power thereafter to make such conveyances without such approval. Such construction is inconsistent with subsequent legislation of Congress upon the same subject, and which proceeds upon the theory that, in the understanding of Congress, at least, restrictions still existed so far as the inherited lands of full-blood Indians were concerned.

Section 8 of the act of May 27, 1908 (35 Stat. at L. 312, chap. 199), provides:

"Sec. 8. That section 23 of the act entitled, 'An Act to Provide for the Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory, and for Other Purposes,' approved April 26th, 309]1906, is hereby amended *by adding, at the end of said section the words, 'or a judge of a county court of the state of Oklahoma.'"

Section 9 of that act provides:

"Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee, etc., etc."

The obvious purpose of these provisions is to continue supervision over the right of full-blood Indians to dispose of lands by will, and to require conveyances of interest of full-blood Indians in inherited lands to be approved by a competent court.

When several acts of Congress are passed, touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject. Cope v. Cope, 137 U. S. 682, 34 L. ed. 832, 11 Sup. Ct. Rep. 222; United States v. Freeman, 3 How. 556, 11 L. ed. 548.

We cannot believe that it was the intention of Congress, in view of the legislation which we have quoted, to leave untouched the five-year restriction of the act of 1902, so far as the inherited lands of full-blood Indians are concerned, or to permit the same to be conveyed without restriction from the expiration of that five-year period until the enactment of the legislation of May, 1908.

In passing the enabling act for the admission of the state of Oklahoma, where these lands are, Congress was careful to preserve the authority of the government of the United States over the Indians, their lands and property, which it had prior to the passage of the act. 34 Stat. at L. 267, chap. 3335.

We agree with the construction contended for by the plaintiff in error, and insisted upon by the government, which has been allowed to be heard in this case, that the *act of April, 1906, while it permitted[310 inherited lands to be conveyed by full-blood Indians, nevertheless intended to prevent improvident sales by this class of Indians, and made such conveyance valid only when approved by the Secretary of the Interior.

The further question arises in this case—in view of the construction we have given the legislation of Congress, is it constitutional? It is insisted that it is not, because the Indian is a citizen of the United States, and entitled to the protection of the Constitution, and that to add to the restrictions of the act of 1902 those contained in subsequent acts is violative of his constitutional rights, and deprives him of his property without due process of law. It is to be noted in approaching this discussion that this objection is not made by the Indian himself; he is here seeking to avoid his conveyance. It is not made by the Creek Nation or Tribe, for it is stated without contradiction that the act of 1906 has been ratified by the council of that nation.

The unconstitutionality of the act is asserted by the purchasers from the Indian, who are the defendants in error here, and proceeds upon the assumption that the Indian, at the time of the conveyance, August 8, 1907, had full legal title to the premises, which could not be impaired by legislation of Congress subsequent to the act of June 30, 1902.

Assuming that the defendants in error are in a position to assert such constitutional rights, is there anything in the fact that citizenship has been conferred upon the Indians, or in the changed legislation of Congress upon the subject, which marks a deprivation of such rights? We must remember in considering this subject that the Congress of the United States has undertaken from the earliest history of the government to deal with the Indians as dependent people, and to legislate concerning their property with a view to their protection as such. Cherokee *Nation v. Georgia, 5[311 Pet. 1, 17, 8 L. ed. 25, 31; Elk v. Wilkins, 112 U. S. 94, 99, 28 L. ed. 643, 645, 5 Sup. Ct. Rep. 41; Stephens v. Cherokee Nation, 174 U. S. 445, 484, 43 L. ed. 1041, 1055, 19 Sup. Ct. Rep. 722. We quote two of the many recognitions of this power in this court:

"The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else:

because the theater of its exercise is within the geographical limits of the United States; because it has never been denied: and because it alone can enforce its laws on all the tribes." United States v. Kagama 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep 1109.

"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Lone Wolf v. Hitchcock, 187 U. S. 565, 47 L. ed. 306, 23 Sup. Ct. Rep. 216.

Citizenship, it is contended, was conferred upon the Creek Indians by the act of March 3, 1901 (31 Stat. at L. 1447, chap. 868), amending the act of February 8, 1887 (24 Stat. at L. 390, chap. 119), by adding to the Indians given citizenship under that act, "every Indian in the Indian territory." So amended, the act would read as to such Indian: "He is hereby declared to be a citizen of the United States, and entitled to all the rights, privileges, and immunities of such citizen." Is there anything incompatible with such citizenship in the continued control of Congress over the lands of the Indian? Does the fact of citizenship necessarily end the duty or power of Congress to act in the Indian's behalf?

Certain aspects of the question have already been settled by the decisions of this court. That Congress has full power to legislate concerning the tribal property of the Indians has been frequently affirmed. 312]Cherokee Nation v. *Hitchcock, 187 U. S. 294, 308, 47 L. ed. 183, 190, 23 Sup. Ct. Rep. 115; United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478; McKay v. Kalyton, 204 U. S. 458, 51 L. ed. 566, 27 Sup. Ct. Rep. 346.

Nor has citizenship prevented the Congress of the United States from continuing to deal with the tribal lands of the Indians.

In Cherokee Nation v. Hitchcock, 187 U. S. 294, 307, 47 L. ed. 183, 190, 23 Sup. Ct. Rep. 115, Mr. Justice White, speaking for the court, said:

"There is no question involved in this case as to the taking of property; the authority which it is proposed to exercise by virtue of the act of 1898 [30 Stat. at L. 495, chap. 517] has relation merely to the control and development of the tribal property, which still remains subject to the administrative control of the government, even though the members of the tribe have been invested with the status of citizenship under recent legislation."

In United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478, Mr. Justice Harlan, speaking for the court, said:

"These Indians are yet wards of the nation, in a condition of pupilage or dependency, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the agreement of 1889, ratified by the act of 1891 [26 Stat. at L. 1035, 1036, chap. 543], is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life and ultimately the privileges of citizenship."

To the same effect have been the decisions of circuit courts of appeals dealing with this subject. In the circuit court of appeals of the eighth circuit this apposite language was used by Judge Thayer in speaking for the court:

"We know of no reason, nor has any been suggested, why it was not competent for Congress to declare that these Indians should be deemed citizens of the United States, and entitled to the rights, privileges, and immunities *of citizens, while it[313 retained, for the time being, the title to certain lands in trust for their benefit, and withheld from them for a certain period the power to sell, lease, or otherwise dispose of their interest in such lands. It is competent for a private donor, by deed or other conveyance, to create an estate of that character; that is to say, it is competent for a private person to make a conveyance of real property and to withhold from the donee for a season the power to sell or otherwise dispose of it. And we can conceive of no sufficient reason why the United States, in the exercise of its sovereign power, should be denied the right to impose similar limitations, especially when it is dealing with the dependent race like the Indians, who have always been regarded as the wards of the government. Citizenship does not carry with it the right on the part of the citizen to dispose of land which he may own, in any way that he sees fit, without reference to the character of the title by which it is held. The right to sell property is not derived from, and is not dependent upon, citizenship; neither does it detract in the slightest degree from the dignity or value of citizenship that a person is not possessed of an estate, or, if possessed of an estate, that he is deprived for the time being of the right to alienate it." Beek v. Flournoy Live-Stock & Real Estate Co. 12 C. C. A. 497, 502, 27 U. S. App. 618, 65 Fed. 30, 35.

To the same effect is Rainbow v. Young, 88 C. C. A. 653, 161 Fed. 835, in which

the opinion was by Circuit Judge, now Mr. Justice, Van Devanter. In that case, after referring to the fact that while the members of the Winnebago tribe had received allotments in severalty and had become citizens of the United States and of the state of Nebraska, their tribal relation had not terminated, and they were still unable to alienate, mortgage, or lease their allotments without the consent of the Secretary of the Interior, Judge Van Devanter said: "In short, they are regarded as being in some respects still in a state of dependency and tutelage, which entitles them to the 314]care and protection *of the national government; and when they shall be let out of that state is for Congress alone to determine." The Rainbow Case was cited with approval by Mr. Justice Brewer in delivering the opinion in United States v. Sutton, 215 U. S. 291, 296, 54 L. ed. 200, 202, 30 Sup. Ct. Rep. 116.

Much reliance is placed upon Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506. In that case it was held that a conviction could not be had under the Federal statute for selling liquor to an Indian, the sale not being on a reservation, and the Indian having been made a citizen, and subject to the civil and criminal laws of the state. In that case the opinion was by Mr. Justice Brewer, who also delivered the opinion in the case of United States v. Celestine, 215 U. S. 278, 54 L. ed. 195, 30 Sup. Ct. Rep. 93.

In the Celestine Case it was held that although an Indian had been given citizenship of the United States, and of the state in which an Indian reservation was located, the United States might still retain jurisdiction over him for offenses committed within the limits of the reservation. In the opinion the subject was fully reviewed by Mr. Justice Brewer. In the course of it he quoted with approval from the opinion of Mr. Justice McKenna, sitting as a circuit judge, in Eells v. Ross, 12 C. C. A. 205, 29 U. S. App. 59, 64 Fed. 417, holding that the act of 1887, conferring citizenship upon the Indians, did not emancipate them from control or abolish the reservation. Mr. Justice Brewer also quoted from the Heff Case, commenting upon the change of policy in the government which looked to the establishment of the Indians in individual homes, free from national guardianship, charged with the rights and obligations of citizens of the United States, and held that it was for Congress to determine when and how the relation of guardianship theretofore existing should be determined; and after quoting from the Heff Case, said (215 U. S. 290):

"Notwithstanding the gift of citizenship, both the defendant and the murdered woman remained Indians by race, and the crime was committed by one Indian *upon[315 the person of another, and within the limits of a reservation. Bearing in mind the rule that the legislation of Congress is to be construed in the interest of the Indian, it may be fairly held that the statute does not contemplate a surrender of jurisdiction over an offense committed by one Indian upon the person of another Indian within the limits of the reservation; at any rate, it cannot be said to be clear that Congress intended by the mere grant of citizenship to renounce entirely its jurisdiction over the individual members of this dependent race."

In United States v. Sutton, supra, following United States v. Celestine, it was held that jurisdiction continued over the Indians as to offenses committed within the limits of an Indian reservation, and that Congress might prohibit the introduction of liquor into the Indian country. In Re Heff, supra, this court said (p. 509): "But the fact that property is held subject to a condition against alienation does not affect the civil or political status of the holder of the title."

Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.

The privileges and immunities of Federal citizenship have never been held to prevent governmental authority from placing such restraints upon the conduct or property of citizens as is necessary for the general good. Incompetent persons, though citizens, may not have the full right to control their persons and property. The privileges and immunities of citizenship were said, in the Slaughter-House Cases, 16 Wall. 36, 76, 21 L. ed. 394, 408, to comprehend:

"Protection by the government, with the right to acquire *and possess property[316 of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

Conceding that Marchie Tiger, by the act conferring citizenship, obtained a status which gave him certain civil and political rights, inhering in the privileges and immunities of such citizenship, unnecessary to here discuss, he was still a ward of the nation so far as the alienation of these lands was concerned, and a member of the

existing Creek Nation. The inherited lands, though otherwise held in fee, were inalienable without the consent of the Secretary of the Interior, until August, 1907, by virtue of the act of Congress. In this state of affairs Congress, with plenary power over the subject, by a new act permitted alienation of such lands at any time, subject only to the condition that the Secretary of the Interior should approve the conveyance.

Upon the matters involved, our conclusions are that Congress has had at all times, and now has, the right to pass legislation in the interest of the Indians as a dependent people; that there is nothing in citizenship incompatible with this guardianship over the Indian's lands inherited from allottees, as shown in this case; that in the present case, when the act of 1906 was passed, the Congress had not released its control over the alienation of lands of full-blood Indians of the Creek Nation; that it was within the power of Congress to continue to restrict alienation by requiring, as to full-blood Indians, the consent of the Secretary of the Interior to a proposed alienation of lands such as are involved in this case; that it rests with Congress to determine when its guardianship shall cease; and while it still continues, it has the right to vary its restrictions upon alienation of Indian lands in the promotion of what it deems the best interest of the Indian.

As we have construed the statute in-
317]volved, while it permits *the conveyance of inherited lands of the character of those in issue, it requires such conveyance to be made with the approval of the head of the Interior Department.

For the reasons we have stated, we find nothing unconstitutional in the act making this requirement.

The judgment of the Supreme Court of Oklahoma is reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

SIMEON HALLOWELL
v.
UNITED STATES.

(See S. C. Reporter's ed. 317–324.)

Indians — congressional control — introducing liquor on allotted land.

A conviction of an Indian of the offense of introducing intoxicating liquor into the Indian country and into an Indian allotment while the title to the same is held in trust by the government may be had under the act of January 30, 1897 (29 Stat. at L. 506, chap. 109), although the defendant Indian is a citizen of the United States, and entitled, under the acts of August 7, 1882 (22 Stat. at L. 341, chap. 434), § 7, and February 8, 1887 (24 Stat. at L. 388, chap. 119), § 6, to the rights, privileges, and immunities of such citizens, and to the benefit of the laws, civil and criminal, of the state in which his allotment is situated, and upon which the offense is alleged to have been committed.

[For other cases, see Indians, 54–61, in Digest Sup. Ct. 1908.]

[No. 89.]

Argued March 10, 1911. Decided May 15, 1911.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit, presenting the question whether an Indian who is a citizen of the United States may be convicted for introducing intoxicating liquor into his allotment. Answered in the affirmative.

The facts are stated in the opinion.

Mr. **Thomas L. Sloan** argued the cause and filed a brief for Hallowell:

The Omaha Indian Reservation in Thurston County, Nebraska, is within the sole and exclusive police power and jurisdiction of the state of Nebraska.

Painter v. Ives, 4 Neb. 128; Ex parte Sloan, 4 Sawy. 330, Fed. Cas. No. 12,944; Draper v. United States, 164 U. S. 244, 41 L. ed. 420, 17 Sup. Ct. Rep. 107; United States v. McBratney, 104 U. S. 621–623, 26 L. ed. 869, 870; Langford v. Monteith, 102 U. S. 145, 147, 26 L. ed. 53, 54; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995; Utah & N. R. Co. v. Fisher, 116 U. S. 28, 29 L. ed. 542, 6 Sup. Ct. Rep. 246.

The act of January 30, 1897, is a police regulation, and there is no divided sovereignty.

Re Heff, 197 U. S. 489, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; United States v. Dewitt, 9 Wall. 41, 19 L. ed. 593; Ex parte Dick, 72 C. C. A. 667, 141 Fed. 5.

It is the status of the Indian, taken either collectively as a tribe or as an individual member of a tribe, that brings him within the law and the constitutional provision upon which it rests.

United States v. LeBris, 121 U. S. 278, 30 L. ed. 946, 7 Sup. Ct. Rep. 894; Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399; Re Heff, 197

Note.—On jurisdiction to punish crimes committed by or against Indians—see notes to State v. Campbell, 21 L.R.A. 169, and Worcester v. Georgia, 8 L. ed. U. S. 484.

U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506.

Assistant Attorney General **Harr** argued the cause and filed a brief for the United States:

Since this case was certified, the question involved has been settled by the decisions in—

United States v. Sutton, 215 U. S. 291, 54 L. ed. 200, 30 Sup. Ct. Rep. 116; United States v. Celestine, 215 U. S. 278, 54 L. ed. 195, 30 Sup. Ct. Rep. 93.

Jurisdiction and control over the lands of Indians to which the United States holds title is a neccssary consequence of its sovereignty and constitutional authority in respect both to the public lands and the Indians.

Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151, 167, 29 L. ed. 845, 850, 6 Sup. Ct. Rep. 670.

The controlling considerations here are, first, that the United States holds the title in trust, and has therefore jurisdiction, for the protection of the Indians, to prohibit and provide criminal punishment for the introduction of liquor upon such allotments, just as it has authority, for the protection of settlers and the general public, to prohibit trespassers upon the public lands in a state, and punish any violation of its inhibitions (Jourdan v. Barrett, 4 How. 169, 185, 11 L. ed. 924, 931; Gibson v. Chouteau, 13 Wall. 92, 99, 20 L. ed. 534, 536; Camfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864); and second, that the exercise of such jurisdiction is properly based on the guardianship of the Federal government over the Indians, and the necessity for protecting them.

Mr. Justice **Day** delivered the opinion of the court:

Simeon Hallowell, plaintiff in error, was convicted in the district court of the United States for the district of Nebraska upon the charge of having introduced whisky into the Indian country, in violation of the act of January 30, 1897. 29 Stat. at L. 506, chap. 109. After sentence, Hallowell took the case to the circuit court of appeals for the eighth circuit, and that court certified to this court the question hereinafter set forth.

The certificate sets forth an agreed statement of facts upon which the case was tried in the district court, as follows:

"That the defendant, Simeon Hallowell, an Omaha Indian, is and was, on the 1st day of August, 1905, an allottee of land granted to him on the Omaha Indian Reservation, in Thurston county, Nebraska; that the allotment so made to him was made under the provisions of the act of Congress of August 7, 1882 (22 Stat. at L. 341, chap. 434); that the first or trust patent was issued to him in the year 1884, and that the twenty-five year period of the trust limitation has not yet expired; and that the fee *title of the allotment so[319 made to him is still held by the United States.

"That the defendant, Simeon Hallowell, on the 1st day of August, 1905, procured at a point outside the said reservation one-half gallon of whisky, which he took to his home, which was within the limits of the Omaha Indian Reservation, and upon an allotment which he had inherited, and which allotment was made under the provisions of the act of Congress of August 7, 1882, and the title of which is held by the government, as the twenty-five-year trust period has not expired. That he took the said whisky into and upon this allotment for the purpose of drinking and using the same himself, and that he did drink said whisky and did give some of it to his friends or visitors to drink.

"That the said Omaha Indian Reservation has been allotted practically in whole, and that many of the allotments of deceased Omaha Indians have been sold to white people, under the provisions of the act of Congress of May 27, 1902 (32 Stat. at L. 245, 275, chap. 888); that within the original boundary limits of the Omaha Indian Reservation there are many tracts of land that have been sold, under the provisions of said act, to white persons who are the sole owners thereof, and that the full title to such lands has passed to the purchaser, the same as if a final patent without restriction upon alienation had been issued to the allottee.

"That all of the Omaha Indians who were living in the year 1884, and by law entitled to allotments, received them.

"That the Omaha Indian Reservation is within and a physical part of the organized territory of the state of Nebraska, as are also the allotments herein referred to, into and upon which the said defendant took said whisky. That the Omaha Indians exercise the right of citizenship, and participate in the county and state government extending *over said Omaha Indian Res-[320 ervation, and over and upon the allotments herein referred to. That the defendant, Simeon Hallowell, has been on frequent occasions a judge and clerk of election, a justice of the peace, an assessor, and a director of the public school district in which he lives. That Omaha Indians have taken part in the state and county government, extending over the reservation, and have held the following offices in said county of Thurston, state of Nebraska: County

coroner, county attorney, county judge, justice of the peace, constable, road overseer, election officers, and have also served as jurors in the county and district courts. Defendant is self-supporting, as are most of said Indians. Some of them are engaged in business and most of them engaged in farming."

Upon this statement the circuit court of appeals certified to this court the following question:

"When, under the act of August 7, 1882 (22 Stat. at L. 341, chap. 434), an allotment in severalty has been made to a tribal Indian out of lands in a tribal reservation in the state of Nebraska, and a trust patent therefor has been issued to the allottee, and when the provisions of § 7 of the said act of August 7, 1882, and of § 6 of the act of February 8, 1887 (24 Stat. at L. 388, chap. 119), have become effective as to such allottee, does the fact that the United States holds the land so allotted in trust for the allottee, or, in case of his decease, for his heirs, as provided in § 6 of the said act of August 7, 1882, enable, authorize, or permit the United States to regulate or prohibit the introduction of intoxicating liquors upon such allotment during the limited period for which the land so allotted is so held in trust by the United States?"

Under the act of August 7, 1882, first mentioned in the certificate, provision was made for the allotment of lands in severalty among the Indians. Section 6 of the act provides in part:

321] *"Sec. 6. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the state of Nebraska, and that, at the expiration of said period, the United States will convey the same by patent to said Indian or his heirs, as aforesaid, in fee, discharged of said trust, and free of all charge or encumbrance whatsoever."

As appears from the certificate upon which this case is submitted, the trust period named in the section had not expired at the time the alleged offense was committed.

Section 7 of the act of August 7, 1882, provides:

"Sec. 7. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of, and be subject to, the laws, both civil and criminal, of the state of Nebraska; and said state shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law."

Section 6 of the act of February 8, 1887, referred to in the question propounded, provides:

"Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce, any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been *made under the[322 provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

It is apparent that, at the time of the commission of the alleged offense, the place wherein it was alleged to have been committed was a part of lands allotted to an Indian; that the title to the lands allotted was still held in trust by the United States for the benefit of the Indian to whom the allotment had been made; that the plaintiff in error had been declared to be a citizen of the United States, and entitled to the rights, privileges, and immunities of such citizenship, and entitled to the benefit of the laws, civil and criminal, of the state of Nebraska, in which the Indian allotment was situated, and upon which the offense is alleged to have been committed.

The act under which the conviction was had was passed January 30, 1897 (29 Stat. at L. 506, chap. 109), and provides in part:

"That . . . any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever, into the

Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense, 323]*and not less than two hundred dollars for each offense thereafter."

Obviously this act in terms embraced the acts stated in the agreed statement of facts, which we have set forth above. The liquor was introduced into the Indian country and into an Indian allotment, while the title to the same was still held in trust by the government.

The contention of the plaintiff in error is that the act cannot be applied to him because, at the time charged, he had become a citizen, and not subject to such regulation as a ward of the government; and furthermore, that the territory in question had become subject to the jurisdiction of the state of Nebraska, to whose police regulations upon the subject of the liquor traffic he was alone amenable.

When this case was certified here, Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506, had been decided, but the subsequent cases of the United States v. Celestine, 215 U. S. 278, 54 L. ed. 195, 30 Sup. Ct. Rep. 93, and United States v. Sutton, 215 U. S. 291, 54 L. ed. 200, 30 Sup. Ct. Rep. 116, were yet undetermined. We had occasion to consider these cases in Tiger v. Western Invest. Co. 221 U. S. 286, ante, 738, 31 Sup. Ct. Rep. 578, and need not here repeat what was there said concerning them.

In United States v. Sutton, supra, it was held that a conviction could be had under the act of January 30th, 1897 (29 Stat. at L. supra), for the offense of introducing liquor into an Indian reservation. It is true that in the Sutton Case the reservation was within the limits of the state of Washington, and that state had disclaimed jurisdiction over Indian lands, which were to remain under the absolute jurisdiction and control of the Congress of the United States, and it was held that while this fact did not deprive the state of the right of punishing crimes committed on such reservation by other than Indians or against Indians. (Draper v. United States, 164 U. S. 240, 41 L. ed. 419, 17 Sup. Ct. Rep. 107), that where jurisdiction and control over Indian lands remained in the United States, Congress had the right to forbid 324]the introduction *of liquor into such territory, and to provide for the punishment of those found guilty thereof. Couture v. United States, 207 U. S. 581, 52 L. ed. 350, 28 Sup. Ct. Rep. 259, was cited, where a conviction for introducing liquor into the Indian country was affirmed.

In the case at bar, the United States had not parted with the title to the lands, but still held them in trust for the Indians. In that situation its power to make rules and regulations respecting such territory was ample. Van Brocklin v. Anderson (Van Brocklin v. Tennessee) 117 U. S. 151, 167, 29 L. ed. 845, 850, 6 Sup. Ct. Rep. 670; Gibson v. Chouteau, 13 Wall. 92, 99, 20 L. ed. 534, 536; Light v. United States, 220 U. S. 523, ante, 570, 31 Sup. Ct. Rep. 485.

It is a result of the recent cases decided in this court (Couture v. United States, 207 U. S. 581, 52 L. ed. 350, 28 Sup. Ct. Rep. 259; United States v. Celestine, 215 U. S. 278, 54 L. ed. 195, 30 Sup. Ct. Rep. 93; United States v. Sutton, 215 U. S. 291, 54 L. ed. 200, 30 Sup. Ct. Rep. 116, and Tiger v. Western Invest. Co. 221 U. S. 286, ante, 738, 31 Sup. Ct. Rep. 578) that the mere fact that citizenship has been conferred upon Indians does not necessarily end the right or duty of the United States to pass laws in their interest as a dependent people. A discussion of the matter in those cases renders further comment unnecessary now. Furthermore, in the present case liquor was introduced into an allotment the title to which was still held by the United States, and concerning which it had the power to make rules and regulations under the authority of the Constitution of the United States. While for many purposes the jurisdiction of the state of Nebraska had attached, and the Indian as a citizen was entitled to the rights, privileges, and immunities of citizenship, still the United States, within its own territory and in the interest of the Indians, had jurisdiction to pass laws protecting such Indians from the evil results of intoxicating liquors, as was done in the act of January 30, 1897, which made it an offense to introduce intoxicating liquors into such Indian country, including an Indian allotment. In this view, the question certified will be answered in the affirmative, and it is so ordered.

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*LOUIS A. DOWELL, JR., and Wil-[325
son W. Harn, Plffs. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 325–333.)

Appeal — supplying deficiency in record.

1. Certificates of the judge and the clerk of the court below, returned to the supreme court of the Philippine Islands in a pro-

ceeding to supply deficiencies in the record in a criminal cause, could be accepted by that court, so far as any questions under the Federal Constitution and statutes are concerned, although they were not under oath, and although the court's seal was not attached to the clerk's certificate.

[Amending or perfecting record, see Appeal and Error, 3256–3300, in Digest Sup. Ct. 1908.]

Criminal law — rights of accused — confronting witnesses — perfecting record.

2. The right of the accused, under the Philippine Islands Bill of Rights of July 1, 1902 32 Stat. at L. 691, chap. 1369), § 10, to meet the witnesses face to face, was not infringed by the action of the supreme court of the Philippine Islands, upon suggestion of diminution of the record, in ordering the judge and clerk of the court below to supply the failure of the record to show whether the accused pleaded to the complaint, and were present in court during the entire trial.

[For other cases, see Criminal Law, 108–111, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — presence of accused at trial — perfecting record.

3. Due process of law was not denied by the action of the supreme court of the Philippine Islands in making an order upon its own motion when the accused were absent from the court, requiring the judge and clerk of the court below to supply deficiencies in the record.

[For other cases, see Constitutional Law, 804–807, in Digest Sup. Ct. 1908.]

Criminal law — preliminary objections — waiver by plea.

4. Objections to the want of proper arrest and preliminary examination of the accused before a magistrate, and to the lack of verification of the information by oath or affidavit, must be taken before pleading the general issue by some proper motion or plea in order to be available to the accused.

[For other cases, see Criminal Law, 134–138, in Digest Sup. Ct. 1908.]

Indictment — necessity in Philippine Islands.

5. The requirement of the 5th Amendment to the Federal Constitution, that infamous crimes must be presented by indictment, has no application to the Philippine Islands.

[For other cases, see Indictment, 16–29, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — criminal prosecution without indictment.

6. Due process of law does not require that a criminal charge be presented by an indictment found by a grand jury.

[For other cases, see Constitutional Law, 789–795, in Digest Sup. Ct. 1908.]

Jury — right to, in Philippine Islands.

7. In the absence of congressional legislation to that end, there is no right to demand trial by jury in criminal cases in the Philippine Islands.

[For other cases, see Jury, 13–15, in Digest Sup. Ct. 1908.]

[No. 131.]

Argued April 20, 1911. Decided May 15, 1911.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which affirmed a conviction in the Court of First Instance for the Province of Samar, of misappropriation of public funds. Affirmed.

See same case below, 11 Philippine, 4.

The facts are stated in the opinion.

Mr. **Charles F. Consaul** argued the cause, and, with Messrs. Charles C. Heltman and Frank B. Ingersoll, filed a brief for plaintiffs in error:

The personal presence of an accused during the whole trial in a felony case is a fundamental right and a constitutional privilege which the accused himself cannot waive.

Prine v. Com. 18 Pa. 103; Waller v. State, 40 Ala. 333; Wharton, Crim. Pl. & Pr. § 540; 1 Bishop, Crim. Proc. §§ 271–1353; Jackson v. Com. 19 Gratt. 656.

The record must affirmatively show the personal presence of the accused during the whole trial in felony cases.

State v. Dooly, 64 Mo. 149; State v. Barnes, 59 Mo. 154; Kelly v. State, 3 Smedes & M. 518; Shapoonmash v. United States, 1 Wash. Terr. 189; Graham v. State, 40 Ala. 659; Eliza v. State, 39 Ala. 693; Younger v. State, 2 W. Va. 579, 98 Am. Dec. 791; Hamilton v. Com. 16 Pa. 129, 55 Am. Dec. 485; State v. Langford, 44 N. C. (Busbee, L.) 436; Long v. State, 52 Miss. 23; Cole v. State, 10 Ark. 318.

The record must affirmatively show all of those indispensable requisites which are necessary to the validity of the record as a judicial proceeding. The judgment is absolutely void without a showing of such essential requisites as that the accused was represented by counsel; that he was regularly arraigned; that a case was made up for trial; that the accused was present in court; that he was confronted by the witnesses against him; and that a judgment was rendered in his presence.

Dyson v. State, 26 Miss. 362; Stubbs v. State, 49 Miss. 716, 1 Am. Crim. Rep. 608; French v. State, 85 Wis. 400, 21 L.R.A. 402, 39 Am. St. Rep. 855, 55 N. W 566, 9 Am. Crim. Rep. 348.

An accused in a felony case must be arraigned before there can be a legal trial.

Note.— On the right of accused to be confronted by witnesses—see note to Morris v. United States, 80 C. C. A. 116.

On the right of prisoner to be present during trial—see note to Lewis v. United States, 36 L. ed. U. S. 1011.

Early v. State, 1 Tex. App. 266, 28 Am. Rep. 409; Holden v. State, 1 Tex. App. 247; Pringle v. State, 2 Tex. App. 300; Graeter v. State, 54 Ind. 159; McJunkins v. State, 10 Ind. 140; State v. Check, 63 Mo. 364; State v. Matthews, 20 Mo. 55; Aylesworth v. People, 65 Ill. 301, 1 Am. Crim. Rep. 604; Yundt v. People, 65 Ill. 372; Johnson v. People, 22 Ill. 314; State v. Wilson, 42 Kan. 587, 22 Pac. 622; Cachute v. State, 50 Miss. 165; Hanson v. State, 43 Ohio St. 376, 1 N. E. 136, 5 Am. Crim. Rep. 625; Warrace v. State, 27 Fla. 362, 8 So. 748; State v. Revells, 31 La. Ann. 387; State v. Epps, 27 La. Ann. 227; State v. Taylor, 111 Mo. 448, 20 S. W. 193; Bowen v. State, 98 Ala. 83, 12 So. 808; Perry v. State, 37 Ark. 54; Douglass v. State, 3 Wis. 820; Hill v. State, 1 Yerg. 76, 24 Am. Dec. 441.

Even in misdemeanor cases some courts of high authority hold that where the record fails to show arraignment and plea a conviction will be reversed.

State v. Vanhook, 88 Mo. 105; State v. Geiger, 45 Mo. App. 111; Miller v. People, 47 Ill. App. 472.

The prisoner must answer, or, standing mute, the court must cause a plea of not guilty to be entered in order to make up an issue; if not, there is nothing for the court to try, and there can be no valid trial had, and any judgment is a nullity.

Johns v. State, 104 Ind. 557, 4 N. E. 153; Morris v. State, 4 Tex. App. 589; Fisher v. State, 46 Ala. 723; Sartorious v. State, 24 Miss. 602; State v. Saunders, 53 Mo. 234; Gould v. People, 89 Ill. 216; State v. Dillingham, 43 Ark. 154; Burley v. State, 1 Neb. 385.

The record must show affirmatively that the accused did plead to the charge.

People v. Corbett, 28 Cal. 328; People v. Heller, 2 Utah, 135; Tindall v. State, 71 Ind. 314; Grigg v. People, 31 Mich. 471, 1 Am. Crim. Rep. 602.

The intention of Congress in providing a form of civil government for the Philippine Islands was to throw around the citizens of those Islands the safeguards and protection common to the United States.

Weems v. United States, 217 U. S. 349, 54 L. ed. 793, 30 Sup. Ct. Rep. 544, 19 A. & E. Ann. Cas. 705.

The record must affirmatively show that a cause was made up for trial.

Lewis v. United States, 146 U. S. 370–387, 36 L. ed. 1011–1017, 13 Sup. Ct. Rep. 136; Dyson v. State, 26 Miss. 362.

In trials for felony, the prisoner must be personally present whenever any step is taken by the court in his case; and this must affirmatively appear by the record, or a judgment of conviction must be reversed.

McQuillen v. State, 8 Smedes & M. 587; Dougherty v. Com. 69 Pa. 286; Brown v. State, 24 Ark. 620; Osborn v. State, 24 Ark. 629; Holton v. State, 2 Fla. 500; Gladden v. State, 12 Fla. 562; Rutherford v. Com. 78 Ky. 639; State v. Elkins, 63 Mo. 159; People v. Vail, 6 Abb. N. C. 206; United States v. Santos, 5 Blatchf. 104, Fed. Cas. No. 16,222; Sahlinger v. People, 102 Ill. 241; 1 Bishop, Crim. Proc. § 682; Maurer v. People, 43 N. Y. 1; Wheeler v. State, 14 Ind. 573; Jones v. State, 26 Ohio St. 208.

Assistant Attorney General **Fowler** argued the cause and filed a brief for defendant in error:

It was not necessary that the information be found by a grand jury.

Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Bollin v. Nebraska, 176 U. S. 83, 86, 44 L. ed. 382, 383, 20 Sup. Ct. Rep. 287.

In fact, there may be a due process of law without any resort to a court of justice.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Public Clearing House v. Coyne, 194 U. S. 497, 508, 48 L. ed. 1092, 1098, 24 Sup. Ct. Rep. 789.

Appellants were not entitled to a trial by jury.

Missouri v. Lewis, 101 U. S. 22, 31, 25 L. ed. 989, 992; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Hallinger v. Davis, 146 U. S. 314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105.

Mr. Justice **Day** delivered the opinion of of the court:

This is a writ of error to the supreme court of the Philippine Islands to review a proceeding in which the plaintiffs in error, Louis A. Dowdell and Wilson W. Harn, together with one Charles H. MacIlvaine, were convicted in the court of first instance of the Philippine Islands upon an amended complaint which charged that the three persons named, as inspectors and lieutenants of the Philippine constabulary, in the province of Samar, Philippine Islands, conspired together to abstract, steal, and convert to their own use certain public funds in the custody and control of Dowdell as supply officer, and guarded by Harn as officer of the day; that, in pursuance of the conspiracy, the three defendants, with the intent and purpose of stealing, and converting the same to their own use, unlawfully, feloniously, and wilfully removed the same from the office of the Philippine constabulary to the residence of the said Harn in Catbalogan, in said province, and did there conceal the

same, and during the night, in pursuance of said conspiracy, and for the purpose of concealing the evidence of their crime, and of deceiving their superior officers concerning the disappearance of said public funds, did take and remove the safe in which said funds had been kept in the office of the Philippine constabulary, and caused the same to be taken and conveyed out into the bay adjacent and there sunk in the waters of 327]*the bay. The public funds abstracted and taken consisted of Philippine coin and paper currency of the value of 9,971 pesos and 26 centavos, equivalent in value to 49,856 pesetas, in violation of paragraph 3 of article 390 of the Philippine Penal Code.

The accused were convicted, and the present plaintiffs in error sentenced to imprisonment to six years and a day. Plaintiffs in error thereupon took an appeal to the supreme court of the Philippine Islands. In that court they were sentenced to eight years and one day imprisonment.

The case is brought here under § 10 of the act of July 1, 1902 (32 Stat. at L. 691, chap. 1369), giving this court the right to review, revise, reverse, modify or affirm final judgments or decrees of the supreme court of the Philippine Islands in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved.

In the supreme court of the Philippine Islands the attorney general asked that the case be sent back to the court of first instance for a new trial, because it did not appear that defendants had pleaded to the complaint, but the court overruled this application, and thereupon the court made the following order:

"Resolved, That the clerk of the court of first instance of Samar be, and he is hereby, directed to send forthwith to this court a certified copy of all entries in any book in his office referring to the case of the United States v. Louis A. Dowdell and Wilson W. Harn, and particularly of any entry relating to the arraignment of the defendants and to their plea. He is further directed to at once send to this court a certificate as to whether he was present at the separate trial of each of the defendants, Dowdell and Harn, and, if so, whether each or both of them were present at such trial, and the Hon. W. F. Norris, the judge who 328]*tried the case, is hereby directed to send to this court a certificate showing whether the defendants and each of them were present during the trial of said cause against Louis A. Dowdell and Wilson W. Harn."

To this order Judge Norris, judge of the court of first instance, made return, in which he stated that each of the defendants, now plaintiffs in error, was present in open court during the entire time of trial, from the calling of the case until after sentence was pronounced. The judge said he was unable to say whether there had been a formal arraignment or not. The clerk of the court of first instance certified a record of the proceedings in court, in which it appears that the defendants were asked whether they pleaded guilty or not guilty of the crime of which they were charged, and answered that they pleaded not guilty.

The official reporter of the court certified that his notes of the proceedings showed that the plaintiffs in error were arraigned, waived reading of the complaint, and pleaded not guilty. The certificate of the reporter was signed by him as court reporter of the twelfth judicial district, and the judge of that district certified that the reporter was the duly appointed, qualified, and acting reporter of the district. The reporter's certificate adds nothing to that which the clerk certified.

The first six assignments of error cover objections to this action of the court in amending its record, and to the want of presence of the accused, and the failure to show by the record the arraignment of the accused, their plea to the complaint, and their presence during the trial.

If the supreme court of the Philippine Islands, in taking the action referred to for supplying the record of omissions, did not violate the Constitution or any statute of the United States, then we cannot disturb the judgment below on these assignments of error. It is contended that the court erred in taking the statement of the judge of the *court of first instance without the[329 knowledge or consent of the plaintiffs in error, that the statement was not sworn to, that the plaintiffs in error were not given the opportunity to meet the witnesses face to face, or to be confronted with the witnesses, and therefore such statement was received in violation of article 6 of the Amendments to the Constitution of the United States, and § 5 of the act of Congress of July 1, 1902 (32 Stat. at L. 691, chap. 1369).

A like objection is made to the statement certified by the clerk of the court of first instance, and because his statement is not a certified copy of the minutes, or any part thereof, of the court, was not sworn to, and had no seal of the court attached.

As to the objection of the lack of oath to the certificates of the judge and clerk, and absence of a seal on the clerk's certificate of the proceedings, questions of that kind, where the court is correcting a record before it as an appellate tribunal, are addressed to the court making the order, which may determine for itself in what form it will accept such record. At least, there is no valid

objection to such practice based on the Constitution or statutes of the United States.

It is averred that the order of the supreme court of the Philippine Islands was made without the knowledge or consent of the accused, and that the plaintiffs in error had not the opportunity to meet the witnesses face to face, in violation of article 6 of the Amendments of the Constitution of the United States, and § 5 of the act of Congress of July 1, 1902 (32 Stat. at L. 691, chap. 1369), embodying the so-called Philippine Bill of Rights, which is substantially taken from the Bill of Rights of the Federal Constitution. Kepner v. United States, 195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. Rep. 797, 1 A. & E. Ann. Cas. 655. Section 5 of that act provides: "That in all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel, . . . to have a speedy and public trial, to meet the witnesses face to face, etc." This is substan-330]tially *the provision of the 6th Amendment of the Constitution of the United States, which provides that the accused shall enjoy the right to a speedy and public trial, and to be confronted with the witnesses against him. This provision of the statute intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination. It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination. Mattox v. United States, 156 U. S. 237, 242, 39 L. ed. 409, 410, 15 Sup. Ct. Rep. 337; Kirby v. United States, 174 U. S. 47, 55, 43 L. ed. 890, 893, 19 Sup. Ct. Rep. 574, 11 Am. Crim. Rep. 330; 2 Wigmore, Ev. §§ 1396, 1397.

But this general rule of law embodied in the Constitution, and carried by statute to the Philippines, and intended to secure the right of the accused to meet the witnesses face to face, and to thus sift the testimony produced against him, has always had certain well-recognized exceptions. As examples are cases where the notes of testimony of deceased witness, of which the accused has had the right of cross-examination in a former trial, have been admitted. Dying declarations, although not made in the presence of the accused, are uniformly recognized as competent testimony. Mattox v. United States, supra. Documentary evidence to establish collateral facts admissible under the common law, may be admitted in evidence. Cooley, Const. Lim. 2d ed. 450, note; People v. Jones, 24 Mich. 224.

In the present case, the judge, clerk of the court, and the official reporter were not witnesses against the accused within the meaning of this provision of the statute. They were not asked to testify to facts concerning their guilt or innocence. They were simply required to certify, in *accord-[331 ance with a practice approved by the supreme court of the Philippine Islands, as to certain facts regarding the course of trial in the court of first instance. The taking of such certification involved no inquiry into the guilt or innocence of the accused; it was only a method which the court saw fit to adopt to make more complete the record of the proceedings in the court below, which it was called upon to review. Where a court, upon suggestion of the diminution of the record, orders a clerk of the court below to send up a more ample record, or to supply deficiencies in the record filed, there is no production of testimony against the accused, within the meaning of this provision as to meeting witnesses face to face, in permitting the clerk to certify the additional matter. We think the court acted within its authority in this respect, and did not violate the Philippine Bill of Rights, embodied in the act of July, 1902, in the respects suggested.

If the assignments of error can be taken to cover the objection that the accused were not present when the court ordered the additional record to be made, we think there is no merit in this objection. In Hopt v. Utah, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417, this court held that due process of law required the accused to be present at every stage of the trial. And see Howard v. Kentucky, 200 U. S. 164, 50 L. ed. 421, 26 Sup. Ct. Rep. 189. In Schwab v. Berggren, 143 U. S. 442, 36 L. ed. 218, 12 Sup. Ct. Rep. 525, this court held that due process of law did not require the accused to be present in an appellate court, where he was represented by counsel, and where the only function of the court is to determine whether there is error in the record, to the prejudice of the accused.

As we understand the procedure in the supreme court of the Philippine Islands, it acts upon the record sent to it upon the appeal, and does not take additional testimony, although it has power to modify the sentence. In any event, the record before us does not show that any *additional[332 testimony was taken against the accused in the supreme court of the Philippine Islands, bearing upon their guilt or innocence of the crime charged. The assignment of error is, in this respect, that the court made the order for the corrections of its record when the accused was absent from the court,

and upon its own motion. For the reasons we have stated, we think this was within the power of the court, and there was no lack of due process of law in making the order as the court did in this case.

Objections are made as to the want of proper arrest and preliminary examination of the accused before a magistrate, and that the information was not verified by oath or affidavit. If tenable at all, no objections of this character appear to have been made in due season in the court of first instance. Objections of this sort must be taken before pleading the general issue by some proper motion or plea in order to be available to the accused. 1 Bishop, Crim. Proc. § 730.

As to the objection that no indictment was found by a grand jury, as required by article 5 of the Amendments of the Constitution, there is no such requirement in the Philippine act of July 1, 1902. It is therein provided that "no law shall be enacted which shall deprive any person of life, liberty, or property without due process of law." This court has held that due process of law does not require presentment of an indictment found by a grand jury. Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292.

The objection that the accused was not tried by a petit jury is disposed of in Dorr v. United States, 195 U. S. 138, 49 L. ed. 128, 24 Sup. Ct. Rep. 808, 1 A. & E. Ann. Cas. 697, in which it was held that in the absence of congressional legislation to that end, there was no right to demand trial by jury in criminal cases in the Philippine Islands. It is unnecessary to repeat the reasons for that conclusion, announced in the Dorr Case.

333] *Other assignments of error are made; an examination satisfies us that no violation of the Constitution or statutes of the United States in the proceedings had in the Supreme Court of the Philippine Islands warrants a disturbance of the judgment of that court.

Affirmed.

Dissenting, Mr. Justice **Harlan.**

CHARLES H. MERILLAT and Mason N. Richardson, Trustees, Appts.,
v.
MELVILLE D. HENSEY, Mercantile Trust Company, Frederick A. Mertens, and Park Agnew.

(See S. C. Reporter's ed. 333–346.)

Appeal — review of facts — concurrent findings below.

1. Concurrent findings of fact by the two lower courts in a suit to set aside a conveyance as in fraud of creditors will ordinarily be accepted by the Federal Supreme Court on appeal.

[For other cases, see Appeal and Error, 4931–4959, in Digest Sup. Ct. 1908.]

Fraudulent conveyances — assignment of chose in action — preservation of surplus.

2. An assignment, as security for a debt, of a cause of action for damages under an indemnity bond, does not, as a matter of law, hinder, delay, or defraud creditors because of a reservation in favor of the assignor of any surplus remaining after paying the debt, by an agreement between the parties, not disclosed in the assignment itself, and not filed, as was such assignment, with the clerk of the court in which the action was pending.

[For other cases, see Fraudulent Conveyances, V., in Digest Sup. Ct. 1908.]

[No. 107.]

Argued March 17, 1911. Decided May 15, 1911.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, dismissing the bill in a suit to set aside an assignment as in fraud of creditors. Affirmed.

See same case below, 32 App. D. C. 64.

The facts are stated in the opinion.

Messrs. **Charles H. Merillat** and **Mason N. Richardson** argued the cause and filed a brief for appellants:

A creditor may secure a preference for himself; but he must stop with this. Otherwise it will be held a fraud.

Meyberg v. Jacobs, 40 Mo. App. 137.

A secret reservation of a benefit to a known failing debtor is fraudulent *per se* and vitiates the preference.

Lukins v. Aird, 6 Wall. 79, 18 L. ed. 751; Means v. Dowd, 128 U. S. 282, 32 L. ed. 435, 9 Sup. Ct. Rep. 65; Dent v. Ferguson, 132 U. S. 67, 33 L. ed. 248, 10 Sup. Ct. Rep. 13; Huntley v. Kingman & Co. 152 U. S. 527, 38 L. ed. 540, 14 Sup. Ct. Rep. 688; Bamberger v. Schoolfield, 160 U. S. 150, 40 L. ed. 376, 16 Sup. Ct. Rep. 225; Re A. L. Robertshaw Mfg. Co. 133 Fed. 556; Greenleve v. Blum, 59 Tex. 126; Rice v. Cunningham, 116 Mass. 469; Campbell v. Davis, 85 Ala. 56, 4 So. 140; Dean v. Skinner, 42 Iowa, 418; Connelly v. Walker, 45 Pa. 454; Neubert v. Massman, 37 Fla. 97, 19 So. 625; Moore v. Wood, 100 Ill. 451; Beidler v. Crane, 135 Ill. 98, 25 Am. St. Rep. 349, 25 N. E. 655; Jones v. Gott, 10 Ind. 242; Clark v. French, 23 Me. 228, 39 Am. Dec. 618; Sidensparker v. Sidensparker, 52 Me. 490, 83 Am. Dec. 527; Malcolm v. Hodges, 8 Md. 418; Whed-

bee v. Stewart, 40 Md. 420; Franklin v. Claflin, 49 Md. 24; Smith v. Conkwright, 28 Minn. 23, 8 N. W. 876; Molaska Mfg. Co. v. Steele, 36 Mo. App. 496; Wooten v. Clark, 23 Miss. 77; Waples-Platter Co. v. Low, 4 C. C. A. 205, 10 U. S. App. 704, 54 Fed. 93; Coolidge v. Melvin, 42 N. H. 510; Winkley v. Hill, 9 N. H. 31, 31 Am. Dec. 215; Scott v. Hartman, 26 N. J. Eq. 92; Moore v. Williamson, 44 N. J. Eq. 505, 1 L.R.A. 336, 15 Atl. 587; Newell v. Wagness, 1 N. D. 69, 44 N. W. 1014; Mendenhall v. Elwert, 36 Or. 375, 52 Pac. 22, 59 Pac. 805; Bentz v. Rockey, 69 Pa. 77; Edwards v. Dickson, 66 Tex. 614, 2 S. W. 718; Humphries v. Freeman, 22 Tex. 45; Young v. Heermans, 66 N. Y. 382; Bump, Fraud. Conv. § 201; Wait, Fraud. Conv. § 272; 14 Am. & Eng. Enc. Law, 2d ed. p. 248; 20 Cyc. Law & Proc. pp. 463, 464; 1 Story, Eq. Jur. §§ 361, 362; Kerr, Fr. & Mistake, 206, 207.

The proviso to § 1120 of the District Code, that in suits to set aside conveyances or assignments as made with the intent to hinder, delay, or defraud creditors, "the question of fraudulent intent shall be deemed a question of fact, and not of law," does not alter the Federal rule when applied to the instant case. The proviso does not abolish the cardinal doctrine of the law, that parties shall be deemed to intend the natural and probable consequences of their acts.

Farrow v. Hayes, 51 Md. 505; Main v. Lynch, 54 Md. 672; Whedbee v. Stewart, 40 Md. 414; Coleman v. Burr, 93 N. Y. 17, 45 Am. Rep. 160; Edgell v. Hart, 9 N. Y. 213, 59 Am. Dec. 532; Thomson v. Crane, 73 Fed. 329; Hathaway v. Brown, 18 Minn. 414, Gil. 373; Smith v. Conkwright, 28 Minn. 23, 8 N. W. 876; Moore v. Wood, 100 Ill. 455; Palmour v. Johnson, 84 Ga. 99, 10 S. E. 500.

Conceding, for purposes of argument only, that the secret trust made the assignment only presumptively fraudulent, and that the court below was correct in holding the transaction susceptible of explanation, the explanation must be one of fact; and a bare denial of intent to defraud does not overcome the presumption of fraud. The denial is not even competent evidence as to the intent.

Bokel, Gwynn, McKenney Co. v. Costello, 22 App. D. C. 86; Whedbee v. Stewart, 40 Md. 414; Farrow v. Hayes, 51 Md. 505; Hathaway v. Brown, 18 Minn. 414, Gil. 373.

Intent to hinder, delay, and defraud creditors is the gist of the offense; not success of nor necessity for the fraud.

Billings v. Russell, 101 N. Y. 231, 4 N. E. 531; Meyberg v. Jacobs, 40 Mo. App. 137.

While a creditor may seek to have his own claim preferred, he must do no more than by fair methods to obtain payment of his own claim; and if he go further, and secure a benefit to the failing debtor, this will taint the whole transaction.

Crawford v. Kirksey, 55 Ala. 282, 27 Am. Rep. 704; Seaman v. Nolen, 68 Ala. 466; Story v. Agnew, 2 Ill. App. 358; Sidensparker v. Sidensparker, 52 Me. 490, 83 Am. Dec. 527.

The foregoing citations of authorities as to secret reservations apply to choses in action, as well as other species of property.

Anthracite Ins. Co. v. Sears, 109 Mass. 383; Green v. Tantum, 19 N. J. Eq. 105; Hitt v. Ormsbee, 14 Ill. 236; Ionia County Sav. Bank v. McLean, 84 Mich. 628, 48 N. W. 159; Bump, Fraud. Conv. pp. 239, 240.

Mr. **Arthur A. Birney** argued the cause, and, with Mr. Henry F. Woodard, filed a brief for appellees:

The statute law has abolished the theory of constructive fraud, and made it necessary that fraud in fact, or dishonesty, shall be found in order to vacate a transfer.

McFadden v. Mitchell, 54 Cal. 628; Babcock v. Eckler, 24 N. Y. 623; Howe Mach. Co. v. Claybourn, 6 Fed. 438; Hooser v. Hunt, 65 Wis. 71, 26 N. W. 442.

The reservation of a surplus to Hensey after the payment of expenses and the debt due Mertens and Agnew was not even constructively fraudulent.

Huntley v. Kingman & Co. 152 U. S. 527, 532, 537, 38 L. ed. 540, 542, 544, 14 Sup. Ct. Rep. 688; Etheridge v. Sperry, 139 U. S. 267, 271, 35 L. ed. 173, 174, 11 Sup. Ct. Rep. 563; Leitch v. Hollister, 4 N. Y. 211; Curtis v. Leavitt, 15 N. Y. 127; Durham v. Whitehead, 21 N. Y. 131; Camp v. Thompson, 25 Minn. 175; Didier v. Patterson, 93 Va. 534, 25 S. E. 661.

The fact that the assignment was filed, while the agreement as to application of the proceeds was not filed, is not only not conclusive evidence of fraud, but, alone, is of no probative force.

Fechheimer v. Baum, 43 Fed. 726; Blanks v. Klein, 1 C. C. A. 254, 2 U. S. App. 363, 53 Fed. 436; Blennerhassett v. Sherman, 105 U. S. 100, 117, 26 L. ed. 1080, 1085; Chickering v. Hatch, 3 Sumn. 474, Fed. Cas. No. 2,672; Gaffney v. Signaigo, 1 Dill. 158, Fed. Cas. No. 5,169.

If it be shown that the conveyance, though absolute in form, was given in good faith to secure a real debt, it will be quite

immaterial that the right to redeem was not expressed, but rests in parol. The conveyance will be upheld to the extent of the debt proved.

Muchmore v. Budd, 53 N. J. L. 369, 22 Atl. 518; Didier v. Patterson, 93 Va. 534, 25 S. E. 631; Chickering v. Hatch, 3 Sumn. 474, Fed. Cas. No. 2,672; Gaffney v. Signaigo, 1 Dill. 158, Fed. Cas. No. 5,169; Leitch v. Hollister, 4 N. Y. 211; Bump, Fraud. Conv. 4th ed. § 55; Wait, Fraud. Conv. § 238; Smith v. Onion, 19 Vt. 427; Oriental Bank v. Haskins, 3 Met. 332, 37 Am. Dec. 140; Howe Mach. Co. v. Claybourn, 6 Fed. 438.

Mr. Justice **Lurton** delivered the opinion of the court:

This is a bill filed by a creditor of the defendant Hensey, attacking as fraudulent an assignment by him of a certain cause of action against the defendant the Mercantile Trust Company. The bill upon final hearing was dismissed by the trial court, and this judgment was affirmed in the court of appeals of the District of Columbia. From that decree an appeal has been perfected to this court.

The thing assigned was a claim for damage under an indemnity bond made by the Mercantile Trust Company upon which an action was at the time pending. The assignment was in these words:

Washington, D. C., October 21, 1903.

For value received, I hereby sell, assign, transfer, and set over to Frederick Mertens and Park Agnew my cause of action in the above-entitled suit, and all the proceeds which may be derived from the prosecution thereof from any judgment that may be obtained. I further authorize and empower the said assignees to continue the prosecution of said cause in my name, to which end I constitute them my lawful attorneys in fact.

In witness whereof, I have hereunto set my hand, this 21st day of October, 1903.

(Signed) Melville D. Hensey.

340] The assignor took from the assignees an agreement to return to him any balance after paying the debt due to the assignees.

This defeasance was in these words:

This agreement, entered into this 21st day of October, 1903, between Frederick Mertens and Park Agnew, parties of the first part, and Melville D. Hensey, party of the second part.

Whereas, the party of the second part has this day executed an assignment of his cause of action against the Mercantile Trust Company, at law No. 44,822, in the supreme court of the District of Columbia:

Now, therefore, it is agreed and understood between the parties that from the proceeds of any judgment that may be recovered against the Mercantile Trust Company in said suit, or any other suit involving the same, that there shall first be paid costs and attorneys' fees, secondly the claim of Mertens and Agnew against Melville D. Hensey, and any balance then remaining over to the said Hensey.

Witness the signatures and seals of the parties, this 21st day of October, 1903.

(Signed) Frederick Mertens,
Park Agnew,
Melville D. Hensey.

The assignment was filed with the clerk of the court, and the defeasance was delivered to Messrs. Birney & Woodard, the attorneys conducting the action for Hensey.

In June, 1905, there was judgment for Hensey for $8,468, which was finally affirmed by this court some two years later. Thereupon, this bill was filed by the appellants, who are judgment creditors, charging that the assignment of October 21, 1903, was made for the purpose of hindering, delaying, and defrauding creditors. Both the supreme court and the court of appeals concurred in holding that the appellants had failed to show fraud, actual or constructive, and that the single purpose of the *assignment was to secure[341 the payment of a just indebtedness to the assignees, the defendants Mertens and Agnew. After paying the attorneys' fees and court costs, the surplus is not enough to pay the debt secured in full.

In view, therefore, of the concurrence of both courts in finding that no actual fraud was intended, we shall pass at once to the question of constructive fraud.

Fraud in law is predicated upon the fact that the assignor took from the assignees the agreement above set out, and did not file it with the clerk of the court, as he did the assignment itself.

It has been argued that the assignment was misleading, as not indicating the consideration or purpose, and because not accompanied by the defeasance. But the assignment of a chose in action was not required to be recorded, and there was no way in which constructive notice might be given. The filing with the clerk was, of course, not constructive notice; the obvious purpose being to protect the assignees against the dismissal of the suit by the assignor, or the payment of the proceeds of the suit to him. Indeed, on the day before, the clerk was di-

rected to "enter the case as to the use of Mertens and Agnew."

That the assignment upon its face is valid is clear. If it is ineffective as to the appellants, it must be because of something behind it constituting evidence of bad faith. Are the inferences to be drawn from that evidence consistent with good faith, or do the facts indubitably establish fraud as matter of law? What are the facts from which we are to conclude as matter of law that the purpose was to hinder, delay, or defraud? It is said that the assignment was not absolute, but was a transfer to secure a debt, with a reservation, by an unpublished agreement, of any balance. The honesty of the debt intended to be secured was attacked, but that this was a baseless charge is hardly doubtful, especially after two courts have adjudged the debt just. It is then said 342]that the assignor was *at the time insolvent and intended to prefer the assignees, and that they knew it. This would be effective if bankruptcy had ensued within four months, and the trustee had sought to set it aside as a preference; but that on one side, it is neither immoral nor illegal for a failing debtor to prefer one creditor over another. Huntley v. Kingman & Co. 152 U. S. 527, 38 L. ed. 540, 14 Sup. Ct. Rep. 688.

But it is said that the value of the claim assigned was far beyond the amount of the debt secured. Here again we find both lower courts disagreeing with this contention.

The thing assigned was of uncertain value. It was an action for damages upon an indemnity bond. The plaintiff made a large claim and doubtless had some of the enthusiasm usual to plaintiffs seeking damages. One jury said he should have $18,000. The court said it was too much, and set the verdict aside. Another jury said he would be compensated by a little more than $8,000. The defendant thought this a monstrous sum, and carried the case first to the court of appeals of the District and then to this court before the judgment stuck. The costs, attorneys' fees, and interest upon the debt due the assignees more than consumed the whole, and the only question now is whether the assignees shall get a part of their debt or none.

But it is said that they have agreed to pay back any surplus, if any there should be after paying their debt, and that this is a reservation by the assignor of an interest in the subject assigned, which operates not as a circumstance of fraud, but as that kind of indubitable evidence which makes fraud in law.

Let us look at it. It did not show fraud in fact or law that this assignment was not an absolute sale or transfer of the chose assigned, but a mere security for an honest debt. If the claim came to nothing, the debt was unpaid. If, as proved to be the case, enough was realized to pay a part, the rest is a debt to be paid. But if there should be a *surplus, what then? If[343 nothing had been agreed about the surplus, is there any doubt that the law would have implied a promise to account to the assignor for that surplus? Is it, then, the law that a promise made to do that which, without the promise, the law would have compelled the assignee to do, constitutes such evidence of fraud as to be fraud in law?

There are some cases which seem to hold that if one makes a general assignment to secure creditors, and inserts a clause reserving to himself any surplus, that he thereby delays his creditors who might seek that surplus until the trust should be wound up, and therefore comes under the condemnation of the statute against conveyances to hinder, delay, or defraud creditors, however innocent his purpose, or the existence of a surplus. There are New York cases which seem to go so far, and perhaps others. Goodrich v. Downs, 6 Hill, 438; Barney v. Griffin, 2 N. Y. 365; Curtis v. Leavitt, 15 N. Y. 9, 124; Collomb v. Caldwell, 16 N. Y. 486. But the same court, in Leitch v. Hollister, 4 N. Y. 211, held that the principle did not apply to assignments in good faith "of a part of a debtor's property to creditors themselves, for the purpose of securing particular demands." "The conveyance," said the New York court, "whatever may be its form, is in effect a mortgage of the property transferred. A trust as to the surplus results from the nature of the security, and is not the object, or one of the objects, of the assignment. Whether expressed in the instrument or left to implication is immaterial. The assignee does not acquire the legal and equitable interest in the property conveyed, subject to the trust, but a specific lien upon it. The residuary interest of the assignor may, according to its nature, or that of the property, be reached by execution or by bill in equity. The creditor attaches that interest as the property of the debtor, and is not obliged to postpone action until the determination of any trust. He is *therefore neither delayed, hindered,[344 or defrauded in any legal sense."

That the mere reservation of a balance under an assignment to pay debts, one or many, is enough, as matter of law, to make the transaction void, whether the reservation be in or out of the instrument, has not been generally accepted. Muchmore v. Budd, 53 N. J. L. 369, 22 Atl. 518, where

many cases are cited, among them being Rahn v. M'Elrath, 6 Watts, 151; Floyd & Co. v. Smith, 9 Ohio St. 546; Ely v. Hair, 16 B. Mon. 230; Didier v. Patterson, 93 Va. 534, 25 S. E. 661. In Huntley v. Kingman Co. supra, the New York rule is impliedly disapproved. The assignment in that case was of a stock of merchandise to a third person as trustee, to sell and pay a particular debt and "hold the remainder subject to the order of the assignor." The instrument was attacked as fraudulent in law by reason of this reservation, and the trial court instructed the jury to find for the plaintiff on account of this reservation. This court reversed the judgment, holding the charge erroneous. Mr. Justice Brown, for the court, after saying that the agreement to account to the assignor for any surplus was no more than the law would have implied, said:

"Whatever may be the rule with regard to general assignments for the benefit of creditors, there can be no doubt that, in cases of chattel mortgages (and the instrument in question, by whatever name it may be called, is in reality a chattel mortgage), the reservation of a surplus to the mortgagor is only an expression of what the law would imply without a reservation, and is no evidence of a fraudulent intent. This was the ruling of the court of appeals of New York in Leitch v. Hollister, 4 N. Y. 211, 216, where the assignment was to the creditors themselves for the purpose of securing their demands. 'A trust,' said the court, 'as to the surplus, results from the nature of the security, and is not the ob-
345]ject, or one of the objects, of the *assignment. Whether expressed in the instrument or left to implication is immaterial. The assignee does not acquire the entire legal and equitable interest in the property conveyed, subject to the trust, but a specific lien upon it. The residuary interest of the assignor may, according to its nature, or that of the property, be reached by execution or by bill in equity.'"

The reservation which the law pronounces fraudulent is of some pecuniary benefit at the expense of creditors, especially when secretly secured,—such benefit to the assignor being presumed a prime purpose of the conveyance. Lukins v. Aird, 6 Wall. 79, 18 L. ed. 750. Other cases are considered and reviewed in Huntley v. Kingman & Co. supra.

Section 1120 of the District of Columbia Code [31 Stat. at L. 1368, chap. 854] provides that in suits to set aside transfers or assignments as made with intent to hinder, delay, or defraud creditors, "the question of fraudulent intent shall be deemed a question of fact, and not of law."

Counsel have argued, as courts have ruled, that no amount of evidence will assign to an instrument an operation which the law does not assign to it. Thus, a mere deed of gift which actually deprives existing creditors of property which was subject to their claims, or a transfer of property grossly disproportioned to a debt secured under a conveyance apparently absolute, but subject to a secret agreement that the surplus should be held for the assignor, could not be saved, for the necessary legal effect would be to hinder, delay, or defraud creditors, and the law could but assign to such conveyance the intent which must indubitably appear from the facts. Edgell v. Hart, 9 N. Y. 213, 217, 59 Am. Dec. 532.

But the assignment here was of a mere chose in action, not subject to legal process, but to be reached through equity only. There was no requirement of law that such an assignment should be recorded, and no legal way to give constructive notice. The debt secured was an honest *one, and the[346 security was of uncertain value and character, involving, great expense and delay in collection. The fact that the reservation of any surplus after paying the debt secured was not disclosed in the assignment itself was a circumstance of suspicious character, but not, as matter of law, inconsistent with an honest intent. Two courts have held that, under all the circumstances, the assignment was not made to hinder, delay, or defraud creditors, and as matter of law had no such result.

We are content to affirm this judgment.

Affirmed.

LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY OF NEW YORK, Plff. in Err.,

v.

BOARD OF ASSESSORS FOR THE PARISH OF ORLEANS, the City of New Orleans, and the State Tax Collector for the First District of the City of New Orleans.

(See S. C. Reporter's ed. 346–357.)

Constitutional law — due process of law — taxing property of nonresidents.

1. State taxation of the amounts due a foreign insurance company by its policy holders in the state for premiums on which credit of thirty and sixty days had been ex-

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Note.—On the situs, for the purposes of taxation, of debts evidenced by notes and mortgages—see note to Boyd v. Selma, 16 L.R.A. 729.

On situs, for taxation, of debts evidenced by notes or mortgages held by agent residing in different state from principal—see

tended does not take the property of the company without due process of law, contrary to U. S. Const., 14th Amend., even though such indebtedness is not evidenced by written instruments.

[For other cases, see Constitutional Law, 533–537; Taxes, 314–342, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — excessive taxation.

2. Assessing in excess of actual indebtedness the amounts due a foreign insurance company by its policy holders in the state, on which credits have been extended, does not take the property of the company without due process of law, where proper opportunity was afforded for correction.

[For other cases, see Constitutional Law, 523–553, in Digest Sup. Ct. 1908.]

[No. 92.]

Argued April 18, 19, 1911. Decided May 15, 1911.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which affirmed a judgment of the Civil District Court for the Parish of Orleans, in that State, dismissing a suit by a foreign insurance company to cancel an assessment for taxation. Affirmed.

See same case below, 122 La. 98, 47 So. 415.

The facts are stated in the opinion.

Mr. **Monte M. Lemann** argued the cause, and, with Messrs. Harry H. Hall and J. Blanc Monroe filed a brief for plaintiff in error:

A state cannot legally impose an assessment and tax upon premiums due under open account by local policy holders to nonresident or foreign insurance companies. Such assessment and tax would be a taking of property without due process of law, in violation of the 14th Amendment of the Constitution of the United States.

St. Louis v. Wiggins Ferry Co. 11 Wall. 429, 20 L. ed. 194; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 398, 47 L. ed. 513, 519, 23 Sup. Ct. Rep. 463; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179; Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558; United States v. Erie R. Co. 106 U. S. 327, 27 L. ed. 151, 1 Sup. Ct. Rep. 223; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; New York, L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952; Savings & L. Soc. v. Multnomah County, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; Dewey v. Des Moines, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; State Assessors v. Comptoir Nat. D'Escompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Buck v. Beach, 206 U. S. 407, 51 L. ed. 1114, 27 Sup. Ct. Rep. 712, 11 A. & E. Ann. Cas. 732; Barber Asphalt Paving Co. v. New Orleans, 41 La. Ann. 1015, 6 So. 794; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 44 La. Ann. 760, 16 L.R.A. 56, 11 So. 91; Railey v. Board of Assessors, 44 La. Ann. 766, 11 So. 93; Clason v. New Orleans, 46 La. Ann. 1, 14 So. 306; State ex rel. Mechanics & T. Ins. Co. v. Board of Assessors, 47 La. Ann. 1545, 18 So. 519; Bluefields Banana Co. v. Board of Assessors, 49 La. Ann. 43, 21 So. 627; Parker v. Strauss, 49 La. Ann. 1173, 22 So. 329; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 51 La. Ann. 1028, 45 L.R.A. 524, 72 Am. St. Rep. 483, 25 So. 970; Comptoir National D' Escompte v. Board of Assessors, 52 La. Ann. 1319, 27 So. 801; Williams v. Triche, 107 La. 92, 31 So. 926; Monongahela River Consol. Coal & Coke Co. v. Board of Assessors, 115 La. 566, 2 L.R.A. (N.S.) 637, 112 Am. St. Rep. 275, 39 So. 601; Metropolitan L. Ins. Co. v. Board of Assessors, 115 La. 698, 9 L.R.A.(N.S.) 1240, 116 Am. St. Rep. 179, 39 So. 846.

A plain distinction can be drawn between a premium due on open account to a nonresident or foreign insurance corporation by a local policy holder, on the one hand, and, on the other, an open account resulting from the sale of merchandise to a local purchaser from a local stock of goods belonging to a nonresident owner.

General Electric Co. v. Board of Assessors, 121 La. 116, 46 So. 122.

Assessments admittedly the result of mere guesswork, and so excessive as to ex-

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note to New Orleans v. Stempel, 44 L. ed. U. S. 174.

As to taxation of intangible property of nonresidents—see note to Walker v. Jack, 31 C. C. A. 467.

As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On due process of law in revenue proceedings—see note to Read v. Dingess, 8 C. C. A. 398.

ceed from ten to one hundred times the admitted value of the thing assessed, are absolute nullities.

27 Am. & Eng. Enc. Law, pp. 660, et seq.; Geren v. Gruber, 26 La. Ann. 694; State ex rel. New Orleans City R. Co. v. Board of Assessors, 30 La. Ann. 261; Merchants' Mut. Ins. Co. v. Board of Assessors, 40 La. Ann. 371, 3 So. 891; Oteri v. Parker, 42 La. Ann. 374, 7 So. 570; Lyon v. Alley, 130 U. S. 177, 32 L. ed. 899, 9 Sup. Ct. Rep. 480; Cooley, Taxn. 2d ed. p. 2; Merchants' Mut. Ins. Co. v. Board of Assessors, 40 La. Ann. 372, 3 So. 891; Natalbany Lumber Co. v. Tax Collector, 123 La. 174, 48 So. 879; Union Oil Co. v. Campbell, 48 La. Ann. 1350, 20 So. 1007; Waggoner v. Maumus, 112 La. 232, 36 So. 332; Swift v. Board of Assessors, 115 La. 321, 38 So. 1006.

The denial by the assessors of the statutory right of the owners to be heard renders the assessment null, and would amount to a taking of petitioner's property without due process of law.

Cooley, Taxn. 2d ed. pp. 361–363; 27 Am. & Eng. Enc. Law, 2d ed. pp. 660, 704; Exchange Bank Tax Cases, 21 Fed. 99; Hagar v. Reclamation Dist. 108, 111 U. S. 708, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Union Oil Co. v. Campbell, 48 La. Ann. 1350, 20 So. 1007; State ex rel. Johnson v. Tax Collector, 39 La. Ann. 538, 2 So. 59; Shattuck v. New Orleans, 39 La. Ann. 209, 1 So. 411.

The assessors have no right arbitrarily to refuse to believe the evidence of the taxpayers.

1 Desty, Taxn. p. 543.

The decision of the Louisiana supreme court, to the effect that the failure to file these suits prior to the 1st of November, 1905–1907, prevented plaintiffs in error from averring the nullity or excessive character of the assessments complained of, would amount to a deprivation of plaintiffs' property without judicial action and without due process of law.

Central R. Co. v. Wright, 207 U. S. 138, 52 L. ed. 141, 28 Sup. Ct. Rep. 47; Traveler's Ins. Co. v. Board of Assessors, 122 La. 136, 24 L.R.A.(N.S.) 388, 47 So. 439.

Apart from this consideration, the statutory limitation referred to does not apply to suits which contest the validity and legality of the tax.

Oteri v. Parker, 42 La. Ann. 374, 7 So. 570; Morgan's Louisiana & T. R. & S. S. Co. v. Pecot, 50 La. Ann. 737, 23 So. 948.

Mr. **Alexander C. King** also argued the cause, and, with Messrs. Monte M. Lemann and J. Blanc Monroe, filed a brief for plaintiff in error:

The state cannot, under the guise of a license tax, compel a foreign corporation to pay taxes on property not within the state.

Southern R. Co. v. Greene, 216 U. S. 400, 416, 54 L. ed. 536, 541, 30 Sup. Ct. Rep. 287, 17 A. & E. Ann. Cas. 1247; Corporation Tax Cases (Flint v. Stone Tracy Co.) 220 U. S. 107, ante, 389, 31 Sup. Ct. Rep. 342; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190.

The most extreme point to which the decisions have heretofore gone in this court is to permit the taxation of capital invested in a state where it is evidenced by some concrete form.

New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; State Assessors v. Comptoir National D'Escompte, 191 U. S. 388, 403, 48 L. ed. 232, 238, 24 Sup. Ct. Rep. 109; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 403, 51 L. ed. 853, 856, 27 Sup. Ct. Rep. 499; New York ex rel. New York C. & H. R. R. Co. v. Miller, 202 U. S. 584, 50 L. ed. 1155, 26 Sup. Ct. Rep. 714; Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; Buck v. Beach, 206 U. S. 392, 407, 51 L. ed. 1106, 1114, 27 Sup. Ct. Rep. 712, 11 A. & E. Ann. Cas. 732.

This court has shown itself more and more impressed by the injustice of double taxation,—taxation of the same thing by two different jurisdictions.

Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 A. & E. Ann. Cas. 493; Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 A. & E. Ann. Cas. 732.

Credits of the sort here sought to be assessed are taxable at the domicil of the creditors,—the various foreign fire insurance companies.

Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558.

Assessments of this character certainly are so radically null as to constitute the taking of property without due process.

Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 A. & E. Ann. Cas. 757; First Nat. Bank v. Albright, 208 U. S. 548, 552, 52 L. ed. 614, 616, 28 Sup. Ct. Rep. 349; Pittsburg, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 435, 38 L. ed. 1031, 1039, 14 Sup. Ct. Rep. 1114; Fargo v. Hart, 193 U. S. 490–502, 48 L. ed. 761–766, 24 Sup. Ct. Rep. 498; Chicago, B. & Q. R. Co. v.

Cole, 75 Ill. 591; Pacific Hotel Co. v. Lieb, 83 Ill. 609.

They do not lose their character as the taking of property without due process, because of the possibility of appeal to the state court, for there was that possibility in Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 A. & E. Ann. Cas. 757.

The state court's decision cannot convert that into due process which is no due process.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

The credits sought to be taxed have no situs in Louisiana.

State Tax on Foreign-held Bonds, 15 Wall. 300–319, 21 L. ed. 179–186; New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 A. & E. Ann. Cas. 732.

The effect of the action of the taxing officers and of the decisions of the court is the taxing of property outside of the state, in violation of the 14th Amendment of the Constitution of the United States.

Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 357, 358, 49 L. ed. 1077, 1083, 1084, 25 Sup. Ct. Rep. 669; Selliger v. Kentucky, 213 U. S. 200, 206, 53 L. ed. 761, 764, 29 Sup. Ct. Rep. 449.

An attack upon such an assessment is not an effort to reduce the value of the property in Louisiana which has been overvalued, but is an application to cancel the assessment as to the property outside of Louisiana, regardless of what its value is, and to leave the value of any property ascertained to be in Louisiana untouched.

Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 357, 358, 49 L. ed. 1077, 1083, 1084, 25 Sup. Ct. Rep. 669; Selliger v. Kentucky, 213 U. S. 200, 206, 53 L. ed. 761, 764, 29 Sup. Ct. Rep. 449.

If the thing, of the value of which the assessment is made, and on which the tax is levied, exists as property outside of the State, and not within it, then the act of the state, through her taxing officers, in taxing it, is a taking of property by the state without due process of law, and a denial of the equal protection of the laws, in violation of the 14th Amendment of the Constitution of the United States.

Raymond v. Chicago Union Traction Co. 207 U. S. 26, 36, 52 L. ed. 81, 87, 28 Sup. Ct. Rep. 7, 12 A. & E. Ann. Cas. 757.

A state court may keep within the letter of the statute prescribing forms of procedure, and give parties interested the fullest opportunity to be heard, and yet its action may be a violation of the 14th Amendment of the Constitution of the United States.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226–241, 41 L. ed. 979–986, 17 Sup. Ct. Rep. 581.

The action of the taxing officers of the state is a denial to them of the equal protection of the law, and a taking of their property without due process of law.

Raymond v. Chicago Union Traction Co. supra.

The supreme court of Louisiana, by its judgment, has refused to give effect to this right of the defendants, has refused to consider the proceedings as properly involving cancelation, and has considered it only as involving reduction; has declined to consider that this action on the part of the assessors, after it has found the facts in our favor, would vitiate the assessment, and has therefore, by its judgment, denied to these defendants their rights under the 14h Amendment to the Constitution of the United States, and is denying to them the equal protection of the laws, and permitting their property to be taken without due process of law.

Chicago, B. & Q. R. Co. v. Chicago, supra.

Messrs. **Harry P. Sneed, George H. Terriberry,** and **H. Garland Dupré** argued the cause and filed a brief for defendants in error:

A reduction of an assessment will not be granted in a suit for cancelation, though the record disclosed the assessment to be excessive.

Travelers' Ins. Co. v. Board of Assessors, 122 La. 136, 24 L.R.A.(N.S.) 388, 47 So. 439; Travelers' Ins. Co. v. Board of Assessors, 122 La. 136, 24 L.R.A.(N.S.) 388, 47 So. 439; New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110.

Mr. Justice **Hughes** delivered the opinion of the court:

This suit was brought by the Liverpool & London & Globe Insurance Company of New York, a foreign corporation doing business in the state of Louisiana, to cancel an assessment made by the board of assessors for the parish of Orleans for the year 1906.

The assessment itself is not shown by the record, but, from the testimony, the supreme court of the state concluded "that the property intended to be assessed was the amount due plaintiff by its policy holders in this state for premiums on which credit of thirty and sixty days had been extended." Dealing with the case from this standpoint, that court affirmed a judgment dismissing the suit, giving as its reasons "that the said credits are due in this

state, and have arisen in the course of the business of the plaintiff company done in this state, and are therefore part and parcel of the said business in this state, and as a consequence are taxable here." 122 La. 98, 47 So. 415.

350] *The insurance company brings this writ of error, insisting that the premium accounts did not constitute property taxable in Louisiana, and that in consequence the assessment violated the 14th Amendment of the Constitution of the United States in depriving the company of its property without due process of law.

The assessment was laid under act 170 of 1898. Section 1 of this act, in defining property subject to taxation, includes "all rights, credits, bonds, and securities of all kinds; promissory notes, open accounts, and other obligations . . . and all movable and immovable, corporeal and incorporeal, articles or things of value, owned and held and controlled within the state of Louisiana by any person, in any capacity whatsoever." Section 7 makes it the duty of the tax assessors to place upon the assessment list all property subject to taxation, and provides as follows:

"Provided further, that in assessing mercantile firms the true intent and purpose of this act shall be held to mean the placing of such value upon the stock in trade, all cash, whether borrowed or not, money at interest, open accounts, credits, etc., as will represent in their aggregate a fair average of the capital, both cash and credit, employed in the business of the party or parties to be assessed. And this shall apply with equal force to any person or persons representing in this state business interests that may claim a domicil elsewhere, the intent and purpose being that no nonresident, either by himself or through any agent, shall transact business here without paying to the state a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations, or credits arising from the business done in this state are hereby declared assessable within this state, and at the business domicil of said nonresident, his agent or representative."

In construing this statute, the supreme 351]court of Louisiana *in Metropolitan L. Ins. Co. v. Board of Assessors, 115 La. p. 708, 9 L.R.A.(N.S.) 1240, 116 Am. St. Rep. 179, 39 So. 846, said: "There can be no doubt that the 7th section of the act of 1898 . . . announced the policy of the state touching the taxation of credits and bills of exchange representing an amount of the property of nonresidents equivalent or corresponding to said bills or credits which was utilized by them in the prosecution of their business in the state of Louisiana. The evident object of the statute was to do away with the discrimination theretofore existing in favor of nonresidents as against residents, and place them on an equal footing." Again, in General Electric Co. v. Board of Assessors, 121 La. 116, 46 So. 122, where open accounts arising on the sale of merchandise were the subject of the assessment, the court said: "There can be no serious question but that the legislature has provided that credits due upon open accounts arising out of business done in this state by nonresidents shall be taxed. . . . The state imposes this tax because of her need of the revenue to be derived from it; she extends to the business the protection of her laws, and seeks to make the business bear its just proportion of the burden of taxation. The situation would be, we repeat, unfortunate, not to say deplorable, if the state were left no choice between having to forego his needed revenue, or else handicapping with this tax the business of her own citizens and home corporations in their competition with foreigners for the business to be done here." And his decision was followed in the present case.

This court has had repeated occasion to consider the validity of taxes imposed under the Louisiana act. The case of New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110, arose under chapter 106 of the Statutes of 1890, but the pertinent features of the act were the same. There it appeared that the assessed credits were evidenced by notes secured by mortgages on real estate in New Orleans: that these *notes and mortgages were[352 in that city, in the possession of an agent, who collected the proceeds and the interest as it became due, and deposited the same in a bank in New Orleans to the credit of the plaintiff, the guardian of infant owners, who, like herself, were domiciled in the state of New York. The tax was sustained. In State Assessors v. Comptoir Nat. D'Escompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109, the question arose under the statute of 1898. In that case, a foreign banking company did business in New Orleans and there made loans through a local agent. The loans were made upon collateral security, the customer drawing his check, which was treated as an overdraft and held as a memorandum of the indebtedness. The court decided that the credits so evidenced, created in the Louisiana business, were taxable in that state. In Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499,—also arising under the act of 1898,—the validity of a similar tax was upheld. That

case was one of loans made through the local agent of the insurance company, a New York corporation doing business in Louisiana, to its policy holders upon the security of their policies. The course of business was that, on the approval of a loan at the home office of the company, the company forwarded to the agent a check for the amount, with a note to be signed by the borrower. The agent procured the note to be signed, and forwarded both note and policy to the home office. The agent collected and transmitted the interest, and when the notes were paid, it was to the agent to whom they were sent to be delivered back to the makers. At all other times the notes and the policies securing them were kept at the home office in New York. In Board of Assessors v. New York L. Ins. Co. 216 U. S. 517, 54 L. ed. 597, 30 Sup. Ct. Rep. 385, the so-called credit consisted, in fact, of a payment to the policy holder of a portion of the amount for which the company was bound by its policy. It was found that, despite the fact that notes 353]were given, there was no personal *liability but simply a deduction in account As there was no loan, there was no credit to be taxed; and a decree in the circuit court restraining the collection of the tax was affirmed.

Here an indebtedness actually existed. This is assumed in the objections to the assessment. The indebtedness had its origin in the course of business transacted by the foreign corporation in Louisiana under the laws of that state. If the Louisiana policy holders had given notes for the premiums, which were to be collected through the local agents, there could be no question as to the validity of the tax. The difference between notes given for loans on policies, and notes given for premiums, could not be regarded as a material one so far as the taxing power of the state is concerned. In both cases, the obligations to pay would represent returns to the corporation upon business conducted within the state; in the one, for the moneys loaned, with compensation for their use; in the other, for the contracts of insurance. Nor would the power to tax depend on the presence of the notes within the state. Metropolitan L. Ins. Co. v. New Orleans, supra; Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585. The notes, in these cases, had been removed to the creditor's home; and, despite this removal, they were attributed to the place of origin. Further, if there had been no notes, but the premium accounts had been otherwise evidenced by written instruments, they would have been equally taxable. The "checks" in State Assessors v. Comptoir Nat. D'Escompte, supra, were only memoranda of indebtedness or vouchers. "While called 'checks,' and so referred to in the record and by the parties in their dealings, the instrument delivered to the Comptoir, in form an ordinary check, as though drawn for payment on presentation from moneys deposited, had no such function. The money was paid to the customer upon the security of the collateral, and the so-called check taken and held as a memorandum *of the[354 indebtedness to the Comptoir." (Pp. 400, 401.)

But it is said that the state of Louisiana had no power to tax the credits here in question because they were not evidenced by written instruments. The contention is thus stated in the petition of the insurance company in the state court. "Premiums due on open account to a foreign corporation cannot be taxed. The legislature has not the power to localize an abstract credit away from the domicil of the creditor, the state's power of taxation being limited to persons, property, or business within its jurisdiction. The levying of a tax upon incorporeal things, such as abstract credits, not in so-called 'concrete' form, and without tangible shape, violates the 14th Amendment of the United States Constitution."

The asserted distinction cannot be maintained. When it is said that intangible property, such as credits on open account, have their situs at the creditor's domicil, the metaphor does not aid. Being incorporeal, they can have no actual situs. But they constitute property; as such they must be regarded as taxable, and the question is one of jurisdiction.

The legal fiction expressed in the maxim *mobilia sequuntur personam* yields to the fact of actual control elsewhere. And in the case of credits, though intangible, arising as did those in the present instance, the control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicil. The debt, of course, is not property in the hands of the debtor; but it is an obligation of the debtor, and is of value to the creditor, because he may be compelled to pay; and power over the debtor at his domicil is control of the ordinary means of enforcement. Blackstone v. Miller, 188 U. S. pp. 205, 206, 47 L. ed. 444, 445, 23 Sup. Ct. Rep. 277. Tested by the criteria afforded by the authorities we have cited, Louisiana must be deemed to have had jurisdiction to impose the tax. The credits would have had no existence *save for the permission of Louisiana:[355 they issued from the business transacted under her sanction within her borders; the

sums were payable by persons domiciled within the state, and there the rights of the creditor were to be enforced. If locality, in the sense of subjection to sovereign power could be attributed to these credits, they could be localized there. If, as property, they could be deemed to be taxable at all, they could be taxed there.

The decision in State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179, is not in point. There the tax was on the interest on bonds made and payable out of the state, and issued to and held by nonresidents of the state. See Savings & L. Soc. v. Multnomah County, 169 U. S. p. 428, 42 L. ed. 805, 18 Sup. Ct. Rep. 392; New Orleans v. Stempel, supra, pp. 319, 320; Blackstone v. Miller, supra, p. 206. Nor was the question determined in Murray v. Charleston, 96 U. S. 432, 24 L. ed. 760, where a city attempted to tax its corporate stock, or public debt, owned by nonresidents, and the court limited its opinion to the holding "that no municipality of a state can, by its own ordinances, under the guise of taxation, relieve itself from performing to the letter all that it has expressly promised to its creditors." (P. 448.)

In Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558, it was held that the Federal Constitution does not prohibit a state from taxing her own citizens upon bonds belonging to them, although they were made by debtors resident in other states and secured by mortgage on real estate there situated. The sole inquiry was with respect to the validity of the statute of Connecticut, where the creditor was domiciled. As the court said in New Orleans v. Stempel, supra (p. 321), in referring to the Kirtland Case: "It was assumed that the situs of such intangible property as a debt evidenced by bond was at the domicil of the owner. There was no legislation attempting to set aside that ordinary rule in respect to the matter of situs. On the contrary, the legislature of the state of Connecticut, 356]*from which the case came, plainly reaffirmed the rule, and the court in its opinion summed up the case in these words (p. 499): 'Whether the state of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns only the people of that state, with which the Federal government cannot rightfully interfere.'" See also Kidd v. Alabama, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401.

But, as we have seen, the jurisdiction of the state of his domicil, over the creditor's person, does not exclude the power of another state in which he transacts his business, to lay a tax upon the credits there accruing to him against resident debtors, and thus to enforce contribution for the support of the government under whose protection his affairs are conducted. And that the jurisdiction of the latter state rests upon considerations which are more fundamental than that notes have been given, or that the credits are evidenced in any particular manner, was clearly brought out, in the concluding statement of the opinion in the case of the Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 402, 51 L. ed. 856, 27 Sup. Ct. Rep. 499. There the court said: "Moreover, neither the fiction that personal property follows the domicil of its owner, nor the doctrine that credits evidenced by bonds or notes may have the situs of the latter, can be allowed to obscure the truth. Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277. We are not dealing here merely with a single credit or a series of separate credits, but with a business. The insurance company chose to enter into the business of lending money within the state of Louisiana, and employed a local agent to conduct that business. It was conducted under the laws of the state. The state undertook to tax the capital employed in the business *precisely as it taxed the capital [357 of its own citizens in like situation. For the purpose of arriving at the amount of capital actually employed, it caused the credits arising out of the business to be assessed. We think the state had the power to do this, and that the foreigner doing business cannot escape taxation upon his capital by removing temporarily from the state evidences of credits in the form of notes. Under such circumstances, they have a taxable situs in the state of their origin." Equally, then, had the state the power to tax the premium accounts here involved. They were not withdrawn from its constitutional authority, either by reason of the fact that they were payable in consideration of insurance, instead of loans or goods sold, or by the circumstance that the credits were not evidenced by written instruments. They were none the less enforceable credits arising in the local business.

It is also urged that the assessment was excessive. This question was not suitably presented in the state court, for the suit was brought for the cancelation of the entire assessment upon the ground that, as a whole, it was without warrant of law,

or, if within the statute, was beyond the power of the legislature to authorize. It is said that, so far as the assessment was in excess of the actual credits, it was a nullity, as one of property not in existence. The subject of the assessment, however, was a class of credits which was within the taxing power, and the question is one of amount. Proper opportunity was afforded for its correction if it was too great; and if the plaintiff in error had seasonably sought a reduction, availing itself of the remedy that was open to it under the state law, it could have obtained appropriate relief. Orient Ins. Co. v. Board of Assessors, 124 La. 872, 50 So. 778. In no aspect of the case can it be said that there was want of due process of law.

The judgment is affirmed.

358]*ORIENT INSURANCE COMPANY et al., Plffs. in Err.,

v.

BOARD OF ASSESSORS FOR THE PARISH OF ORLEANS, the City of New Orleans, and John Fitzpatrick, State Tax Collector.

(See S. C. Reporter's ed. 358–361.)

Constitutional law — due process of law — taxing property of nonresidents.

1. Premiums due a foreign insurance company on open acount, though charged to the company's local agents instead of to the policy holders, may be subjected to state taxation without constituting a taking of the company's property without due process of law.

[For other cases, see Constitutional Law, 533–537; Taxes, 314–342, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — excessive taxation.

2. A foreign insurance company cannot claim to have been denied due process of law because the assessments for taxation of the credits due from residents of the state were grossly excessive or the result of mere guesswork, where opportunity was afforded to institute, within a reasonable time fixed by law, a suit to reduce the assessments.

[For other cases, see Constitutional Law, 523–553, in Digest Sup. Ct. 1908.]

[No. 397.]

Argued April 18 and 19, 1911. Decided May 15, 1911.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which affirmed in part a judgment of the Civil District Court for the Parish of Orleans, in that state, reducing, but refusing to cancel, assessments for taxation of credits due a foreign insurance company. Affirmed.

See same case below, 124 La. 872, 50 So. 778.

The facts are stated in the opinion.

Messrs. **Monte M. Lemann** and **Alexander C. King** argued the cause, and with Messrs. Harry H. Hall and J. Blanc Monroe filed briefs for plaintiffs in error.

For their contentions see their briefs as reported in Liverpool, L. & G. Ins. Co. v. Board of Assessors, ante, 762.

Messrs. **Harry P. Sneed, George H. Terriberry,** and **H. Garland Dupré** argued the cause and filed a brief for defendants in error:

The taxation, by the state of Louisiana, of property in the form of credits and bills receivable growing out of business done in that state by foreign insurance companies who have a business domicil therein, is not violative of the Federal Constitution, and especially the 14th Amendment thereto.

13 Am. & Eng. Enc. Law, 2d ed. pp. 860, 861; 1 Cooley, Taxn. 3d ed. 94, 95, notes 1–3; 6 Thomp. Corp. §§ 7900, 8087; 12 Cook, Corp. 4th ed. p. 1080; Burroughs, Taxn. 151; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Liverpool & L. Life & F. Ins. Co. v. Massachusetts, 10 Wall. 573, 19 L. ed. 1031, 100 Mass. 531; Atty. Gen. v. Bay State Min. Co. 99 Mass. 148, 96 Am. Dec. 717, 14 Mor. Min. Rep. 158; Ducat v. Chicago, 10 Wall. 415, 19 L. ed. 973; Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148; Pensacola Teleg. Co.

NOTE.—On the situs, for the purposes of taxation, of debts evidenced by notes and mortgages—see note to Boyd v. Selma, 16 L.R.A. 729.

On situs, for taxation, of debts evidenced by notes or mortgages held by agent residing in different state from principal—see note to New Orleans v. Stempel, 44 L. ed. U. S. 174.

As to taxation of intangible property of nonresidents—see note to Walker v. Jack, 31 C. C. A. 467.

As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On due process of law in revenue proceedings—see note to Read v. Dingess, 8 C. C. A. 398.

v. Western U. Teleg. Co. 96 U. S. 12, 24 L. ed. 711; Carter v. Burr, 113 U. S. 739, 28 L. ed. 1148, 5 Sup. Ct. Rep. 713; Horn Silver Min. Co. v. New York, 143 U. S. 314, 36 L. ed. 168, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; Henderson Bridge Co. v. Kentucky, 166 U. S. 154, 41 L. ed. 954, 17 Sup. Ct. Rep. 532; New York v. Roberts, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58; Metropolitan L. Ins. Co. v. Board of Assessors, 115 La. 708, 9 L.R.A. (N.S.) 1240, 116 Am. St. Rep. 179, 39 So. 846; Beale, Foreign Corp. p. 654; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; Allgeyer v. Louisiana, 165 U. S. 583, 41 L. ed. 833, 17 Sup. Ct. Rep. 427; Gray, Limitations of Taxing Power, p. 70, § 89; Armour Packing Co. v. Savannah, 115 Ga. 140, 41 S. E. 237; Armour Packing Co. v. Augusta, 118 Ga. 552, 98 Am. St. Rep. 128, 45 S. E. 424; People ex rel. Yellow Pine Co. v. Barker, 23 App. Div. 524, 48 N. Y. Supp. 553, affirmed in 155 N. Y. 665, 49 N. E. 1103; Hammond, Taxn. of Business Corp. ¶ 29, p. 22; Beale, Foreign Corp. p. 647, § 488, p. 658, note 2; 1 Cooley, Taxn. 3d ed. 92.

Where an insurance company, by means of agents, writes policies and collects premiums within a state, and designates an officer upon whom papers may be served, it is doing business in the state.

Gray, Limitations of Taxing Power, § 133, p. 103; Paul v. Virginia, 8 Wall. 168, 185, 19 L. ed. 357, 361; 13 Am. & Eng. Enc. Law, pp. 873, 874; Wall v. Equitable Life Assur. Soc. 32 Fed. 273; White v. Connecticut Mut. L. Ins. Co. 4 Dill. 177, Fed. Cas. No. 17,545; Fletcher v. New York L. Ins. Co. 4 McCrary, 440, 13 Fed. 526; Ehrman v. Teutonia Ins. Co. 1 McCrary, 123, 1 Fed. 471; Re Insurance Co. 22 Fed. 109; New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; People ex rel. Badische Anilin & Soda Fabrik v. Roberts, 152 N. Y. 59, 36 L.R.A. 758, 46 N. E. 161; Welty, Assessments, pp. 112, 114, § 49; Dubuque v. Illinois C. R. Co. 39 Iowa, 85; Berry v. Knights Templars' & M. Life Indemnity Co. 46 Fed. 440.

The general principle of *mobilia sequuntur personam* is abolished and done away with in cases where private rights are affected as between citizens of one state and those of another.

Wharton, Confl. L. § 343; Story, Confl. L. p. 543, note a; Norris v. Mumford, 4 Mart. (La.) 20; Ramsey v. Stevenson, 5 Mart. (La.) 23, 12 Am. Dec. 468; Fisk v. Chandler, 7 Mart. (La.) 24; Oliver v. Townes, 2 Mart. N. S. 97; Beirne v. Patton, 17 La. 590; United States v. Bank of United States, 8 Rob. (La.) 414.

The same principle prevails in the public law as in private law.

State v. Martin, 2 La. Ann. 667; Bass v. Chambliss, 9 La. Ann. 391; Prevost's Succession, 12 La. Ann. 577; Schaffer's Succession, 13 La. Ann. 113.

The maxim is not applicable to foreign corporations, especially not to foreign insurance companies, even if it were granted that our contention hitherto made could not be sustained, and that the doctrine of *mobilia sequuntur personam* could not be abolished by positive statute, in so far as nonresident persons or individuals are concerned.

Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; Henderson Bridge Co. v. Kentucky, 166 U. S. 154, 41 L. ed. 954, 17 Sup. Ct. Rep. 532; New York v. Roberts, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58; Bluefields Banana Co. v. Board of Assessors, 49 La. Ann. 48, 21 So. 627; Parker v. Strauss, 49 La. Ann. 1175, 22 So. 329; Comptoir National D'Escompte v. Board of Assessors, 52 La. Ann. 1331, 27 So. 801; Metropolitan L. Ins. Co. v. Board of Assessors, 115 La. 707, 9 L.R.A.(N.S.) 1240, 116 Am. St. Rep. 179, 39 So. 846; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Standard Marine Ins. Co. v. Board of Assessors, 123 La. 720, 29 L.R.A.(N.S.) 59, 49 So. 483; General Electric Co. v. Board of Assessors, 121 La. 116, 46 So. 122; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, ante, 762, — L.R.A.(N.S.) —, 31 Sup. Ct. Rep. 550; Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 A. & E. Ann. Cas. 732; New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; State Assessors v. Comptoir National D'Escompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109.

The manner of correction being prescribed by statute, the statutory remedy is exclusive.

Stanley v. Albany County, 121 U. S. 535, 30 L. ed. 1000, 7 Sup. Ct. Rep. 1234; Monroe v. New Canaan, 43 Conn. 309; Mix v. People, 116 Ill. 265, 4 N. E. 783; Red River & C. Line v. Parker, 41 La. Ann. 1046, 6 So. 896; Abbot v. Bayley, 6 Pick. 89; Williams v. Holden, 4 Wend. 223.

*Mr. Justice **Hughes** delivered the[359 opinion of the court:

This is a writ of error to review a judgment in a consolidated suit brought by a number of foreign insurance corporations doing business in Louisiana, to cancel assessments made by the board of assessors

for the parish of Orleans for the years 1906, 1907, and 1908, and in the alternative for their reduction as excessive.

The assessments, so far as they are in question here, were for premiums due on open account. In the course of the suit, a stipulation was made, setting forth the true amount of these premiums. By the judgment of the supreme court of the state, the assessments for the year 1908 were reduced to the amount shown by the stipulation, but those for the years 1906 and 1907 were sustained on the ground that the suit for reduction had not been brought within the time prescribed by law. 124 La. 872, 50 So. 778.

With respect to the taxability of the premium accounts owing by Louisiana debtors, the question is the same as that presented in the case of Liverpool & L. & G. Ins. Co. v. Board of Assessors (decided this day) 221 U. S. 346, ante, 762, — L.R.A.(N.S.) —, 31 Sup. Ct. Rep. 550.

But it is said, upon the testimony in this record, that the debts were not due to the corporations by the policy holders, but by their Louisiana agents; that the premiums were charged to the agents, and that the corporations themselves gave no credit to the policy holders. In their petition in the state court the plaintiffs alleged that the only credits of any kind for money due to them were "uncollected premiums due under open account." They also set forth that, protesting against the legality of the tax, they had made reports under the statute showing the "uncollected premiums" for the years in question. And in their stipulation "the actual amounts of outstanding premiums" were stated. If, however, it can 360]be said that *these accounts were due from the agents, still this would not avail the plaintiffs. The premiums were the consideration for the insurance contracts; they were the returns from the local business. Charging the premiums to the local agents did not withdraw the credits accruing to the corporations in the business transacted within the state from its taxing power.

It is also insisted that the assessments must be adjudged invalid upon the ground that they were shown to be grossly excessive and to have been the result of mere guesswork; and, further, that the assessors disregarded the reports made by the plaintiffs, and that their applications to be heard were refused because a test case was pending. Whether, with respect to these contentions, any Federal question can be said to have been raised in the state court, is open to serious doubt. But it does not appear that the constitutional rights of the plaintiffs have been violated. It would be going too far to say that the assessments were nullities, or that the plaintiffs had been deprived of their property without due process of law. New York ex rel. Brooklyn City R. Co. v. New York State Tax Comrs. 199 U. S. pp. 51, 52, 50 L. ed. 84, 85, 25 Sup. Ct. Rep. 713. The assessments were in fact made by the officers charged with that duty under the statute; if excessive, there was opportunity for review and correction. The plaintiffs have not been held bound by the assessment by reason of finality in the action of the assessors. See Central R. Co. v. Wright, 207 U. S. p. 139, 52 L. ed. 142, 28 Sup. Ct. Rep. 47. They had right of recourse to the courts of the state. If they are compelled to pay more than the amounts admitted by the stipulation, it is because they did not sue in time. They have procured a suitable reduction of the assessment for the year 1908; and a similar result could have been reached for the years 1906 and 1907 had action been taken within the period prescribed. It was competent for the legislature to fix a reasonable time within which actions for reductions *should be instituted, and[361 there was no violation of the Federal Constitution in adjudging the rights of the plaintiffs accordingly. Kentucky Union Co. v. Kentucky, 219 U. S. pp. 156, 157, ante, 155, 156, 31 Sup. Ct. Rep. 171; Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365.

The judgment of the Supreme Court of Louisiana is affirmed.

Judgment affirmed.

CHRISTOPHER C. WILSON, Plff. in Err.,
v.
UNITED STATES. (No. 759.)

CHRISTOPHER C. WILSON, Appt.,
v.
UNITED STATES. (No. 760.)

CHRISTOPHER C. WILSON, Appt.,
v.
UNITED STATES. (No. 788.)

(See S. C. Reporter's ed. 361–394.)

Grand jury — summoning witnesses — necessity of formal charge.

1. The grand jury may summon and examine witnesses, although there is no cause or specific charge pending before it.

[For other cases, see Grand Jury, in Digest Sup. Ct. 1908.]

NOTE.—Competency of evidence before grand jury—see note to Com. v. Hayden, 28 L.R.A. 318.

On refusal to produce books or papers in response to subpœna, upon ground that they contain private matter—see note to Re Bolster, 29 L.R.A.(N.S.) 716.

On compulsory production of books and papers as unreasonable search or seizure—

Witnesses — subpœna duces tecum — necessity of ad testificandum clause.

2. A subpœna duces tecum is not invalid because it contains no *ad testificandum* clause, but simply directs a corporation, which could not give oral testimony, to produce books.

[For other cases, see Witnesses, II., in Digest Sup. Ct. 1908.]

Witnesses — subpœna duces tecum — form.

3. A subpœna duces tecum directed to a corporation is not illegal because it does not conform to the provisions of U. S. Rev. Stat. § 877, U. S. Comp. Stat. 1901, p. 667, that witnesses required on the part of the United States shall be subpœnaed "to attend to testify generally on their behalf, and not to depart the court without leave thereof or of the district attorney."

[For other cases, see Witnesses, II., in Digest Sup. Ct. 1908.]

Criminal law — rights of accused — list of witnesses.

4. Neither the 6th Amendment to the Federal Constitution, nor U. S. Rev. Stat. § 829, U. S. Comp. Stat. 1901, p. 636, accords the right to the accused to be apprised of the names of the witnesses who appeared before the grand jury.

[For other cases, see Criminal Law, 96-100, in Digest Sup. Ct. 1908.]

Searches and Seizures — production of corporate books.

5. The enforced production before a grand jury engaged in investigating the alleged criminal conduct of corporate officers, directors, and stockholders, of the letter-press copy books of the corporation for two specified months, in the possession of its president, under a subpœna duces tecum directed to the corporation, does not violate the provisions of U. S. Const., 4th Amend., forbidding unreasonable searches and seizures.

[For other cases, see Searches and Seizures, in Digest Sup. Ct. 1908.]

Witnesses — subpœna duces tecum — contempt by a corporate officer.

6. The officer of a corporation having in his possession the books of the corporation, described in a subpœna duces tecum directed to the corporation, must produce the books or be held in contempt.

[For other cases, see Witnesses, II., in Digest Sup. Ct. 1908.]

Witnesses — self-crimination — corporation cannot claim privilege.

7. A corporation cannot resist, upon the ground of the constitutional protection against self-crimination, the compulsory production of its books and papers before the grand jury under a subpœna duces tecum.

[For other cases, see Witnesses, V. c, in Digest Sup. Ct. 1908.]

Witnesses — self-crimination — production of corporate books incriminating officer.

8. The privilege against self-crimination afforded by U. S. Const., 5th Amend., does not protect the officer of a corporation in resisting the compulsory production before the grand jury under a subpœna duces tecum directed to the corporation, of the letter-press copy books of such corporation in his possession, because the contents thereof may tend to incriminate him, even though the inquiry before the grand jury was not directed to the corporation itself.

[For other cases, see Witnesses, V. c, in Digest Sup. Ct. 1908.]

[Nos. 759, 760, and 788.]

Argued March 2 and 3, 1911. Decided May 15, 1911.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment committing an officer of a corporation for contempt in refusing to produce the corporate books before the grand jury. Affirmed. Also

TWO APPEALS from the Circuit Court of the United States for the Southern District of New York to review orders dismissing habeas corpus to inquire into a detention under commitments for contempt. Affirmed.

The facts are stated in the opinion.

Mr. **John B. Stanchfield** argued the cause, and, with Messrs. Louis S. Levy and William M. Parke, filed a brief for plaintiff in error and appellant:

Under the decisions, this court must find from the undisputed facts of this case that:

(a) The disclosure of the contents of the letter-press copy book produced by appellant before the grand jury would tend to incriminate him;

(b) The contents of the letter-press copy book would form a link in the chain of evidence exposing him to indictment;

(c) The contents of said book would form a link in the chain of evidence exposing him to conviction on the two indictments previously found against him in the same court.

Ex parte Chapman, 153 Fed. 371; Re Hale, 139 Fed. 496, affirmed in 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; Foot v. Buchanan, 113 Fed. 156.

The privilege of a witness against producing books and papers under a subpœna

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see note to Consolidated Rendering Co. v. Vermont, 52 L. ed. U. S. 327.

As to particularity required in description of documents in subpœna duces tecum—see note to Ex parte Gould, 31 L.R.A. (N.S.) 835.

As to constitutional protection against being forced to furnish evidence to be used against one's self in a civil case—see note to Levy v. Superior Court, 29 L.R.A. 811.

On the right of officer of a corporation to refuse to turn over its books to a receiver upon the ground that they have a tendency to incriminate him—see note to Manning v. Mercantile Securities Co. 30 L.R.A. (N.S.) 725.

duces tecum when the production thereof would tend to incriminate him is even more fully protected than his privilege of refusing to make answer orally under an ordinary subpœna when his oral answer would tend to incriminate him; because the former privilege is protected by both the 4th and 5th Amendments, while the latter is protected by the 5th Amendment only.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Ex parte Chapman, 153 Fed. 377.

If Wilson would have been protected in his constitutional privilege had he been sworn as a witness, the government's failure to permit him to be sworn cannot deprive him of such protection. He appeared before the grand jury and asked to be sworn. If by being sworn he became entitled to claim a privilege, certainly the government cannot deprive him of that privilege by arbitrarily declining to swear him. Whether he was sworn or not, the effect of the contents of the book would be the same.

United States v. Armour & Co. 142 Fed. 825.

An officer of a corporation who actually holds the physical possession, custody, and control of books or papers of the corporation which he is required by a subpœna duces tecum to produce is entitled to the same protection against exposing the contents thereof, which would tend to incriminate him, as if the books and papers were absolutely his own.

Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370, s. c. 139 Fed. 496; Ex parte Chapman, 153 Fed. 371; Rex v. Purnell, 1 W. Bl. 37; Reg. v. Granatelli, 7 State Tr. N. S. 979; Wigmore, Ev. § 2259.

The subpœna duces tecum addressed to the corporation only was unauthorized and void.

Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; Wertheim v. Continental R. & Trust Co. 21 Blatchf. 246, 15 Fed. 716; Crowther v. Appelby, L. R. 9 C. P. 27, 43 L. J. C. P. N. S. 7, 29 L. T. N. S. 580, 22 Week. Rep. 265; Nelson v. United States, 201 U. S. 92, 115, 116, 50 L. ed. 673, 685, 686, 26 Sup. Ct. Rep. 358; Wigmore, Ev. § 2200; United States v. Ralston, 17 Fed. 903; Re Shaw, 172 Fed. 520.

Solicitor General **Lehmann** argued the cause, and, with Mr. Henry E. Colton, Special Assistant to the Attorney General, filed a brief for defendant in error and appellee:

The grand jury was engaged in an inquiry which gave it authority to summon witnesses and to call for the production of books and papers.

Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370.

The subpœna duces tecum was a valid process.

United States v. American Tobacco Co. 146 Fed. 557; Re American Sugar Ref. Co. 178 Fed. 109; Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. Rep. 178, 12 A. & E. Ann. Cas. 658.

The search and seizure involved in the subpœna duces tecum were not unreasonable, since the subpœna was specific as to what was to be produced thereunder, and what was to be produced thereunder, and it was issued for the lawful purpose of securing material testimony in an investigation in which the grand jury were then engaged.

Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; McAlister v. Henkel, 201 U. S. 90, 50 L. ed. 671, 26 Sup. Ct. Rep. 385; Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. Rep. 178, 12 A. & E. Ann. Cas. 658; United States v. American Tobacco Co. 146 Fed. 557.

Wilson was not required by the subpœna, nor by any of the proceedings thereon, to be a witness against himself. The subpœna called for a book which belonged to the United Wireless Telegraph Company, which had come into the physical custody of Wilson simply as an officer or representative of the company, and had been recalled from such custody by formal action of the board of directors. He was not protecting himself in the possession of his own books and papers, nor refusing simply to be a witness against himself, but was obstructing the company and its representatives, other than himself, in the performance of an order of the court for the production of books of the company, which they were willing to perform.

State v. Davis, 108 Mo. 666, 32 Am. St. Rep. 640, 18 S. W. 894; State ex rel. McClory v. Donovan, 10 N. D. 203, 86 N. W. 709; People v. Henwood, 123 Mich. 317, 82 N. W. 70; State v. Davis, — W. Va. —, 32 L.R.A.(N.S.) 501, 69 S. E. 639; State ex rel. Hay v. Farnum, 73 S. C. 165, 53 S. E. 83; Louisville & N. R. Co. v. Com. 21 Ky. L. Rep. 239, 51 S. W. 167; McElree v. Darlington, 187 Pa. 593, 67 Am. St. Rep. 592, 41 Atl. 456; Pray v. C. A. Blanchard Co. 95 App. Div. 423, 88 N. Y. Supp. 650; People v. Coombs, 158 N. Y. 532, 53 N. E. 527; Ex parte Hedden, 29 Nev. 352, 90 Pac. 737, 13 A. & E. Ann. Cas. 1173; Langdon v. People, 133 Ill. 382, 24 N. E. 874; Bradshaw v. Murphy, 7 Car. & P. 612;

Evans v. Moseley, 2 Dowl. P. C. 364; Perry v. Gibson, 1 Ad. & El. 48, 3 Nev. & M. 462, 3 L. J. K. B. N. S. 158; Sherman v. Barrett, 1 McMull, L. 147; United States v. Armour & Co. 142 Fed. 808.

Mr. Justice Hughes delivered the opinion of the court:

The three cases involve the same question. The first is a writ of error to the circuit court to review a judgment committing the plaintiff in error for contempt. The second is an appeal from an order of the circuit court dismissing a writ of habeas corpus 367]sued out after such commitment. *The third is an appeal from an order dismissing a writ of habeas corpus by which a discharge was sought from a later commitment for a similar contempt.

The contempt consisted in the refusal of the plaintiff in error and appellant, Christopher C. Wilson, to permit the inspection by a grand jury of letter-press copy books in his possession. The books belonged to a corporation of which he was president, and were required to be produced by a subpœna duces tecum.

The circumstances were these: The grand jury impaneled in the circuit court for some time had been inquiring into alleged violations of §§ 5440 and 5480 of the United States Revised Statutes (U. S. Comp. Stat. 1901, pp. 3676, 3696) by Wilson and others. Wilson was the president of the United Wireless Telegraph Company, a corporation organized under the laws of the state of Maine. On August 3, 1910, the grand jury found two indictments against him and certain officers, directors, and stockholders of this corporation, the one charging fraudulent use of the mails and the other a conspiracy for such use. The grand jury continued its investigations and on October 7, 1910, a subpœna duces tecum was issued (set forth in the margin†), which 368]was directed to the *United Wireless Telegraph Company, requiring its appearance before the grand jury and the production by it of the letter-press copy books of the company, "containing copies of letters and telegrams signed or purporting to be signed by the president of said company during the month of May and June, 1909 in regard to an alleged violation of the statutes of the United States by C. C. Wilson."

Service was made upon the company by service upon Wilson, as president, and upon its secretary and two directors. On the return day, Wilson appeared before the grand jury, and in response to questions, when not under oath, stated that he answered the call of the United Wireless Telegraph Company, and declined to answer further questions until he was sworn; and having been sworn, and being asked whether or not the company produced the letter-press copy books called for, he filed a written statement in which, after describing the subpœna, he said:

"3. Said letter-press copy books for the months of May and June, 1909, in said subpœna mentioned, during said months of May and June, 1909, were kept regularly in my office as president of said corporation, and were regularly used by me, and for the most part, if not entirely, by me only, and contained copies of my personal and other correspondence, as well as copies of the correspondence relating to the business and affairs of said corporation. For the greater part of the time during and since May and June, 1909, and all the time during the last month and *more, said[369 letter-press copy books have been and still are in my possession, custody, and control, and as against any other officer or employee of said corporation, or any other person, I have been entitled to such possession, custody, and control. I did not secure, and have not at any time held possession of, said letter-press copy books in anticipation that any subpœna for their production would be served upon me or said corpora-

†The President of the United States of America to United Wireless Telegraph Company, 42 Broadway, New York, N. Y., Greeting:

[Seal]

We command you, that all business and excuses being laid aside, you appear before the grand inquest of the body of the people of the United States of America for the southern district of New York, at a circuit court to be held in the United States Courthouse and Postoffice Building, borough of Manhattan, city of New York, on the 10th day of October, 1910, at 11 o'clock in the forenoon, and that you produce at the time and place aforesaid, the following:

Letter-press copy books of United Wireless Telegraph Company, containing copies of letters and telegrams signed or purporting to be signed by the president of said company during the months of May and June, 1909, in regard to an alleged violation of the statutes of the United States by C. C. Wilson.

And for a failure to produce the aforesaid documents, you will be deemed guilty of a contempt of court, and liable to the penalties of the law.

Witness, the Honorable John M. Harlan, Senior Associate Justice of the United States, at the borough of Manhattan, city of New York, the 7th day of October, 1910.

John A. Shields,
Clerk.

Henry Wise,
U. S. Attorney.

tion, or for the purpose of evading any subpœna or other legal process which might be served upon me or said corporation."

He alleged that he was the "C. C. Wilson" mentioned in the subpœna as the one against whom the inquiry was directed, and described the pending indictments. He stated that the letter-press copy books were essential to the preparation of his defense, and that he was using them for that purpose; that he believed that the matters therein contained would tend to incriminate him; and that he "should not be compelled, directly or indirectly, to furnish or produce said letter-press copy books, as called for by said subpœna," nor to testify in regard to their contents, nor permit them to be used against him. He added that he had the books with him, but that he declined to deliver them to the grand jury, insisting that his refusal was in entire good faith.

The grand jury presented the matter to the court, and Wilson was adjudged to be in contempt, and was committed to the custody of the marshal "until he shall cease to obstruct and impede the United Wireless Telegraph Company from complying with the subpœna duces tecum attached to the above-mentioned presentment, or otherwise purge himself from this contempt." This is the judgment which is the subject of review in the first case (No. 759).

Wilson then petitioned for a writ of habeas corpus, alleging that the commitment was illegal for the reasons (1) that the court was without jurisdiction to enter-
370]tain *the charge of contempt; (2) that there was no "clause" or "action" pending in the court between the United States and any party mentioned in the subpœna, in which the petitioner could be required to testify or give evidence; (3) that the grand jury was not in the exercise of its legitimate authority in prosecuting the investigation set out in the presentment, its powers being limited to the investigation of specific charges against particular persons; and (4) that the subpœna was illegal, unauthorized, and void because it did not comply with § 877 of the United States Revised Statutes (U. S. Comp. Stat. 1901, p. 667), in that it required the person addressed to appear, and not to attend, and did not require the person addressed "to testify generally" in behalf of the United States; and because it was not issued pursuant to an order of court, was addressed to the corporation without mention of any individual or officer, and would not apprise the defendant in the prosecution which might follow of the name of the precise witness who might have appeared against him.

It was further urged, reiterating in substance what had been said to the grand jury, that the petitioner should not be held in contempt, as the subpœna was not directed to him, but merely to the corporation; and generally, that the proceedings were in violation of his rights under the 4th and 5th Amendments of the Constitution of the United States.

The writ was issued, and on return being made of the commitment, was dismissed and the petitioner remanded, and from this order an appeal was taken to this court (No. 760).

Later, on October 28th, 1910, another subpœna duces tecum was issued in the same form, addressed to the United Wireless Telegraph Company, and calling for the same books. It was served on the appellant Wilson and also on the secretary and five directors of the company. On the return day, they appeared before the grand jury, *the appellant Wilson then hav-[371
ing in his possession a letter-press copy book which the subpœna described, but upon demand being made it was not produced before the grand jurors for their inspection. The foreman then directed the production of the books on the following day, when the same persons again appeared, Wilson still having the book above mentioned, and the demand and refusal were repeated.

Thereupon the grand jury, through the district attorney, made an oral presentment to the court, in the presence of Wilson and the others who had been served with the subpœna, that the corporation and its officers and directors were in contempt, and specifically with respect to Wilson, that he was "preventing the corporation from complying with the process." On behalf of the directors before the court, it was stated that they had made efforts to obtain the books for production before the grand jury, but that Wilson had declined to surrender them. They presented the minutes of a meeting of the board of directors held on that day, at which these directors, constituting a majority of the board, had passed a resolution demanding of Wilson the possession of the letter-press copy books called for by the subpœna "for the production of the same before the Federal grand jury." The court again adjudged Wilson to be in contempt, and ordered his commitment "until he delivers to the United Wireless Telegraph Company the said books called for by said subpœna, and ceases to obstruct and impede the process of this court, or otherwise purge himself of this contempt." A writ of habeas corpus was then issued upon a petition alleging the same objections to the subpœna and commitment which had been set forth in the petition for the former writ. On return the

writ was dismissed and the petitioner appealed (No. 788).

We may first consider the objections to the validity of the subpœna and then the claim of privilege.

372] *The objections to the jurisdiction on the ground that there was no "cause" or "specific charge" pending before the grand jury were made and answered in Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370, and require no further examination.

But the question is also presented whether the subpœna was unauthorized, and hence void, because it was not directed to an individual, but to a corporation. It is urged that its form was unusual and unwarranted, in that it did not require anyone to attend and to testify, but simply directed a corporation, which could not give oral testimony, to produce books.

While a subpœna duces tecum ordinarily contains the *ad testificandum* clause, this cannot be regarded as essential to its validity. The power to compel the production of documents is, of course, not limited to those cases where it is sought merely to supplement or aid the testimony of the person required to produce them. The production may be enforced independently of his testimony, and it was held long since that the writ of subpœna duces tecum was adequate for this purpose. As was said by Lord Ellenborough in Amey v. Long, 9 East, p. 484: "The right to resort to means competent to compel the production of written, as well as oral, testimony, seems essential to the very existence and constitution of a court of common law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them." Where the subpœna duces tecum contains the usual *ad testificandum* clause, still it is not necessary for the party requiring the production to have the person producing the documents sworn as a witness. They may be proved by others. 3 Wigmore, Ev. §§ 1894, 2200; Davis v. Dale, Moody & M. 514; Summers v. Moseley, 2 Cromp. & M. 477, 4 Tyrw. 158, 3 L. J. Exch. N. S. 128; Rush v. Smith, 1 Cromp. M. & R. 94, 2 Dowl. P. C. 687, 4 Tyrw. 674, 3 L. J. Exch. N. S. 355; Perry v. Gibson, 1 Ad. & El. 48, 3 Nev. & M. 462, 3 L. J. K. B. N. S. 158; Martin v. Williams, 18 Ala. 190; The Treasurer v. Moore, 3 Brev. 373]550; *Sherman v. Barrett, 1 McMull. L. 163; Aiken v. Martin, 11 Paige, 499; note to Wertheim v. Continental R. & Trust Co. 15 Fed. 726.

"I always thought," said Parke, J., in Perry v. Gibson, supra, "that a subpœna duces tecum had two distinct objects, and that one might be enforced without the other." In Summers v. Moseley, supra, the function of the writ was carefully considered and the judgment was rendered after consultation with the judges of the other courts. It was argued that "the *duces tecum* part of the writ is only compulsory as ancillary to the *ad testificandum* part." But the reasoning of the court negatived the contention; and it was ruled that the person subpœnaed was "compellable to produce the document in his possession without being sworn, the party calling upon him to produce it not having occasion to ask him any question." Bayley, B., said: "The origin of the subpœna duces tecum does not distinctly appear. It has been said on the part of the defendant that it was not introduced or known in practice till the reign of *Charles* the Second, and it may be that in its present form the subpœna duces tecum was not known or made use of until that period; but no doubt can be entertained that there must have been some process similar to the subpœna duces tecum to compel the production of documents, not only before that time, but even before the statute of the 5th of *Elizabeth*. Prior to that statute, there must have been a power in the Crown (for it would have been utterly impossible to carry on the administration of justice without such power) to require the attendance in courts of justice of persons capable of giving evidence, and the production of documents material to the cause, though in the possession of a stranger. The process for that purpose might not be called a subpœna duces tecum, but I may call it a subpœna to produce; the party called upon in pursuance of such a process not as a witness, but simply to produce, would do so or not, and if he did not, I can entertain no doubt that *it would have been open to the[374 party for whom he was called to make an application to the court in the ensuing term to punish him for his contempt in not producing the document in obedience to such subpœna. Whether he could require to be sworn not *ad testificandum*, but true answer to make to such questions as the court should demand of him touching the possession or custody of the document, is not now the question. *Perhaps* he might; but we are clearly of opinion that he has no right to require that a party bringing him into court for the mere purpose of producing a document should have him sworn in such a way as to make him a witness in the cause, when it may often happen that he is a mere depository, and knows nothing of the documents of which he has the custody."

Treating the requirement to produce as

separable from the requirement to testify generally what one knows in the cause, it follows that the latter may be omitted from the subpœna without invalidating the former. This course does not impair any right either of the opposing party or of the person responding to the subpœna. The latter may still have the opportunity to which he has been held entitled (Aiken v. Martin, supra), of showing under oath the reasons why he should not be compelled to produce the document. For this right does not depend upon the *ad testificandum* clause, but is incident to the requirement to produce.

Where the documents of a corporation are sought, the practice has been to subpœna the officer who has them in his custody. But there would seem to be no reason why the subpœna duces tecum should not be directed to the corporation itself. Corporate existence implies amenability to legal process. The corporation may be sued; it may be compelled by mandamus, and restrained by injunction, directed to it. Possessing the privileges of a legal entity, and having rec-
375]ords, books, and papers, it is under *a duty to produce them when they may properly be required in the administration of justice.

There is no merit in the appellant's contention with respect to the application of § 877 of the United States Revised Statutes. The provision of the section that witnesses required on the part of the United States shall be subpœnaed "to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney," is in the interest of convenient and economical administration and has no bearing upon the questions here involved. It is said that, under the form of writ used in this case, the defendant in the prosecution which might follow an indictment by the grand jury would not be apprised of the name of the precise witness who might have appeared against him, and § 829 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 636) and the 6th Amendment of the Federal Constitution are invoked. The contention ignores the fact that the writ calls for books, and not for oral testimony; and, aside from this, neither the constitutional provision nor the statute accords the right to be apprised of the names of the witnesses who appeared before the grand jury. Even in cases of treason and other capital offenses, under § 1033 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 722), the required list of witnesses is only of those who are to be produced on the trial. Logan v. United States, 144 U. S. p. 304, 36 L. ed. 443, 12 Sup. Ct. Rep. 617; United States v. Curtis, 4 Mason, 232, Fed. Cas. No. 14,905; Balliet v. United States, 64 C. C. A. 201, 129 Fed. 692.

Nor was the process invalid under the 4th Amendment. The rule laid down in the case of Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, is not applicable here. In that case, an information for the forfeiture of goods under the customs act of June 22, 1874 [18 Stat. at L. 186, chap. 391, U. S. Comp. Stat. 1901, p. 2018], it was held that the enforced production "of the private books and papers" of the owner of the goods sought to be forfeited, under the provisions of § 5 of that act, was "compelling him to be a witness against himself within the *meaning of the 5th Amendment," and[376 was also "the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the 4th Amendment." But there is no unreasonable search and seizure when a writ, suitably specific and properly limited in its scope, calls for the production of documents which, as against their lawful owner to whom the writ is directed, the party procuring its issuance is entitled to have produced. In the present case, the process was definite and reasonable in its requirements, and it was not open to the objection made in Hale v. Henkel, supra (pp. 76, 77). Addressed to the corporation, and designed to enforce its duty, no ground appears upon which the corporation could have resisted the writ. And the corporation made no objection of any sort. The appellant did not attempt to assert any right on its part; his conduct was in antagonism to the corporation, so far as its attitude is shown. A majority of the directors, not including the appellant, appeared before the court and urged their solicitude to comply with the writ. They presented their formal action, taken at a meeting of the board, in which they demanded of the appellant the delivery of the books for production before the grand jury.

Concluding, then, that the subpœna was valid, and that its service imposed upon the corporation the duty of obedience, there can be no doubt that the appellant was likewise bound by it unless, with respect to the books described, he could claim a personal privilege. A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience,

and may be punished for contempt. The applicable principle was thus stated by Chief 377]Justice *Waite in Leavenworth County v. Sellew, 99 U. S. p. 627, 25 L. ed. 335, where a peremptory mandamus was directed against a municipal board: "As the corporation can only act through its agents, the courts will operate upon the agents through the corporation. When a copy of the writ which has been ordered is served upon the clerk of the board, it will be served on the corporation, and be equivalent to a command that the persons who may be members of the board shall do what is required. If the members fail to obey, those guilty of disobedience may, if necessary, be punished for the contempt. Although the command is in form to the board, it may be enforced against those through whom alone it can be obeyed. . . . While the board is proceeded against in its corporate capacity, the individual members are punished in their natural capacities for failure to do what the law requires of them as the representatives of the corporation." See also Leavenworth v. Kinney, 154 U. S. 642, and 24 L. ed. 336, 14 Sup. Ct. Rep. 1198; People ex rel. Davis v. Sturtevant, 9 N. Y. 277, 39 Am. Dec. 536.

The appellant asserts his privilege against self-crimination. There is no question, of course, of oral testimony, for he was not required to give any. Undoubtedly it also protected him against the compulsory production of his private books and papers. Boyd v. United States, supra; Ballmann v. Fagin, 200 U. S. p. 195, 50 L. ed. 437, 26 Sup. Ct. Rep. 212. But did it extend to the corporate books?

For there can be no question of the character of the books here called for. They were described in the subpœna as the books of the corporation, and it was the books so defined which, admitting possession, he withheld. The copies of letters written by the president of the corporation in the course of its transactions were as much a part of its documentary property, subject to its control and to its duty to produce when lawfully required in judicial proceedings, as its ledgers and minute books. It was said in the appellant's statement before the grand jury that the books con-378]tained copies of his "personal *and other correspondence, as well as copies of the correspondence relating to the business and affairs" of the corporation. But his personal letters were not demanded; these the subpœna did not seek to reach; and as to these no question of violation of privilege is presented. Plainly he could not make these books his private or personal books by keeping copies of personal letters in them. Had the appellant merely sought to protect his personal correspondence from examination, it would not have been difficult to have provided, under the supervision of the court, for the withdrawal of such letters from scrutiny. Indeed, on the hearing of the second presentment, the court suggested their removal from the books. But the appellant was not content with protection against the production of his private letters; he claimed the privilege to withhold the corporate books and the documents which related to corporate matters, and with respect to which he had acted in his capacity as the executive officer of the corporation. And that is the right here asserted.

It is at once apparent that the mere fact that the appellant himself wrote, or signed, the official letters copied into the books, neither conditioned nor enlarged his privilege. Where one's private documents would tend to incriminate him, the privilege exists although they were actually written by another person. And where an officer of a corporation has possession of corporate records which disclose his crime, there is no ground upon which it can be said that he will be forced to produce them if the entries were made by another, but may withhold them if the entries were made by himself. The books are no more his private books in the latter case than in the former; if they have been held pursuant to the authority of the corporation, that authority is subject to termination. In both cases production tends to criminate: and if requiring him to produce compels him to be a witness against himself in the one case, it does so equally in the *other. There[379 are other facts which serve to sharpen the claim of privilege, but are not determinative. Thus, there were two indictments pending against the appellant, and the inquiry before the grand jury was also directed against him. If, however, the privilege existed with respect to these books in his hands, it would have been likewise available had there been no prior indictments, and had the immediate investigation concerned violations of law by others. The privilege holds although the pursuit of the person required to produce has not yet begun; it is the incriminating tendency of the disclosure, and not the pendency of the prosecution against the witness, upon which the right depends. Counselman v. Hitchcock, 142 U. S. pp. 562, 563, 35 L. ed. 1113, 1114, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195.

We come, then, to the broader contention of the appellant,—thus stated in the argument of his counsel: "An officer of a corporation who actually holds the physical

possession, custody, and control of books or papers of the corporation, which he is required by a subpœna duces tecum to produce, is entitled to the same protection against exposing the contents thereof which would tend to incriminate him, as if the books and papers were absolutely his own." That is, the power of the courts to require their production depends not upon their character as corporate books and the duty of the corporation to submit them to examination, but upon the particular custody in which they may be found. If they are in the actual custody of an officer whose criminal conduct they would disclose, then, as this argument would have it, his possession must be deemed inviolable, and, maintaining the absolute control which alone will insure protection from their being used against him in a criminal proceeding, he may defy the authority of the corporation whose officer or fiduciary he is, and assert against the visitatorial power of the state, and the authority of the government in enforcing its laws, an impassable barrier.

380] *But the physical custody of incriminating documents does not of itself protect the custodian against their compusory production. The question still remains with respect to the nature of the documents and the capacity in which they are held. It may yet appear that they are of a character which subjects them to the scrutiny demanded and that the custodian has voluntarily assumed a duty which overrides his claim of privilege. This was clearly implied in the Boyd Case, where the fact that the papers involved were the *private* papers of the claimant was constantly emphasized. Thus, in the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal dereliction. If he has embezzled the public moneys and falsified the public accounts, he cannot seal his official records and withhold them from the prosecuting authorities on a plea of constitutional privilege against self-crimination. The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established. There the privilege which exists as to private papers cannot be maintained.

There are abundant illustrations in the decisions. Thus, in Bradshaw v. Murphy, 7 Car. & P. 612, it was held that a vestry clerk who was called as a witness could not, on the ground that it might incriminate himself, object to the production of the vestry books kept under the statute 58 Geo. III., chap. 69, § 2. In State ex rel. Hay v. Farnum, 73 S. C. 165, 53 S. E. 83, it appeared that a legislative committee had been appointed to investigate the affairs of the state dispensary, and it was provided that it should have excess to *all books of the in-[381 stitution or of any officer or employee thereof. In anticipation, the state dispenser removed certain books from the files, defending his action on the plea that they contained private matter which the committee had no right to inspect. The court ruled that it was the "obvious public duty of any officer to keep books, letters, and other documents relating to the business of his office and to the manner in which he has discharged or failed to discharge its duties in the place where the public business with which he is charged is conducted, subject to examination by any of the committees appointed by the general assembly, and upon an application for mandamus to compel him to perform this obvious public duty, it is essential for the court to ascertain the facts and inform itself whether there has been an actual removal of public documents or other public property and a refusal to restore them for examination." In State ex rel. McClory v. Donovan, 10 N. D. 203, 86 N. W. 709, the defendant was a druggist who was required by statute to keep a record of all sales of intoxicating liquors made by him, which should be subject to public inspection at reasonable times. It was held that the privilege against self-crimination was not available to him with respect to the books kept under the law, for they were "public documents, which the defendant was required to keep, not for his private uses, but for the benefit of the public, and for public inspection." On similar grounds, in State v. Davis, 108 Mo. 666, 32 Am. St. Rep. 640, 18 S. W. 894, the court sustained a statute requiring druggists to preserve the prescriptions they compounded and to produce them in court when required. See also State v. Davis, — W. Va. —, 32 L.R.A.(N.S.) 501, 69 S. E. 639; People v. Coombs, 158 N. Y. 532, 53 N. E. 527; Louisville & N. R. Co. v. Com. 21 Ky. L. Rep. 239, 51 S. W. 167; State v. Smith, 74 Iowa, 580, 38 N. W. 492; State v. Cummins, 76 Iowa, 133, 40 N. W. 124; People v. Henwood, 123 Mich. 317, 82 N. W. 70; Langdon v. People, 133 Ill. 382, 24 N. E. 874.

The fundamental ground of decision in

382]this class of *cases is that where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection.

What, then, is the status of the books and papers of a corporation which has not been created as a mere instrumentality of government, but has been formed pursuant to voluntary agreement, and hence is called a private corporation? They are not public records in the sense that they relate to public transactions, or, in the absence of particular requirements, are open to general inspection, or must be kept or filed in a special manner. They have reference to business transacted for the benefit of the group of individuals whose association has the advantage of corporate organization. But the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It cannot resist production upon the ground of self-crimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law, and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitatorial power of the state, and in the authority of the national government where the corporate activities are in the domain subject to the powers of Congress.

This view, and the reasons which sup-383]port it, have so *recently been stated by this court in the case of Hale v. Henkel, supra, that it is unnecessary to do more than to refer to what was there said (pp. 74, 75):

"Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the state. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the state or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the state, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the state, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

"Upon the other hand, the corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate *its contracts and find[384 out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation which is charged with a criminal violation of the statute may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

". . . Being subject to this dual sovereignty, the general government possesses the same right to see that its own laws are respected as the state would have with respect to the special franchises vested in it by the laws of the state. The powers of the general government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress. It is not intended

to intimate, however, that it has a general visitatorial power over state corporations." See also Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. Rep. 178, 12 A. & E. Ann. Cas. 658; Hammond Packing Co. v. Arkansas, 212 U. S. 322, pp. 348, 349, 53 L. ed. 530, 543, 544, 29 Sup. Ct. Rep. 370, 15 A. & E. Ann. Cas. 645.

The appellant held the corporate books subject to the corporate duty. If the corporation were guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violations of law, he could not withhold the books to protect himself from the effect of their disclosures. The reserved power of visitation would seriously be embarrassed, if not 385]wholly defeated in *its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation. No personal privilege to which they are entitled requires such a conclusion. It would not be a recognition, but an unjustifiable extension, of the personal rights they enjoy. They may decline to utter upon the witness stand a single self-criminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers. But the visitatorial power which exists with respect to the corporation of necessity reaches the corporate books, without regard to the conduct of the custodian.

Nor is it an answer to say that in the present case the inquiry before the grand jury was not directed against the corporation itself. The appellant had no greater right to withhold the books by reason of the fact that the corporation was not charged with criminal abuses. That, if the corporation had been so charged, he would have been compelled to submit the books to inspection, despite the consequences to himself, sufficiently shows the absence of any basis for a claim on his part of personal privilege as to them; it could not depend upon the question whether or not another was accused. The only question was whether, as against the corporation, the books were lawfully required in the administration of justice. When the appellant became president of the corporation, and as such held and used its books for the transaction of its business committed to his charge, he was at all times subject to its direction, and the books continuously remained under its control. If another took his place, his custody would yield. He could assert no personal right to retain the corporate books against any demand of government which the corporation was bound to recognize.

We have not overlooked the early English decisions to *which our attention has[386 been called (Rex v. Purnell, 1 W. Bl. 37, 1 Wils. 239; Reg. v. Granatelli, 7 State Tr. N. S. 979; see also Rex v. Cornelius, 2 Strange, 1210), but these cannot be deemed controlling. The corporate duty, and the relation of the appellant as the officer of the corporation to its discharge, are to be determined by our laws. Nothing more is demanded than that the appellant should perform the obligations pertaining to his custody, and should produce the books which he holds in his official capacity in accordance with the requirements of the subpœna. None of his personal papers are subject to inspection under the writ, and his action in refusing to permit the examination of the corporate books demanded fully warranted his commitment for contempt.

The judgment and orders of the Circuit Court are affirmed.

Mr. Justice **McKenna**, dissenting:

I am unable to concur with my brethren, and if the application of a constitutional provision—indeed, a constitutional provision whose purpose is the protection of personal liberty—was not involved, I might not even signify opposition. The application of the Constitution of the United States, especially as it may affect personal privileges, is the most serious duty of the court. It is sure to have consequence beyond the instance, and justifies the expression of the views a member of the court may have about it.

The facts are stated in the opinion, but they are not all of equal significance; indeed, may confuse unless distinguished. I put to one side, therefore, all consideration of the process by which the letter-press books were brought into court or before the grand jury. They were taken there, of course, in deference—in submission, it may be better to say—to the command of the law expressed in the subpœna. *Resistance to that was not of-[387 fered by Wilson, nor was it necessary. Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524. His constitutional right was asserted afterwards. With Wilson, then, and the books in his possession, we have to deal, and the rights he had in such situation; and let us keep in mind that it was his guilt under the laws that was under investigation and which the books were sought for the purpose of exposing. Three indictments had already been found against him. Crime, therefore, had been formally charged, and further crime was being investigated,—not crime

by the corporation, but crime by him, and the proof, it was supposed, lay in the books. They were sought for no other reason. They were demanded of him to convict him. To the demand he answered that the Constitution of his country protected him from producing evidence against himself. And he was certainly asked to produce such evidence. The books were in his possession in an assertion of right over them against everybody. In the transactions they recorded he was a participant, and, it may be, the only doer. It is made something of in the opinion that the corporation was willing to have the books surrendered. The more unmistakable, therefore, was the claim of Wilson a personal privilege. And let it be kept in mind that it was his own privilege that he claimed, not that of the corporation; and I pass by as irrelevent a consideration of what disclosures could have been required of it, even if it had been accused of crime and there had been pending an inquiry against it.

Upon what ground was the privilege denied? Upon the ground that the books were not his property, but that of the corporation, and they are assimilated in the opinion to public documents,—a consideration I pass for the present. How far, as affecting the privilege, is the rule of the title to property to be carried? Every rule may be tested by what can be done under it. Whenever a privilege is claimed against the protection of books, or, of 388]course, other *property, may an issue be raised as to title, and upon its decision by the court, the right to the privilege be determined, or shall the rule only be applied when such issue is not made? And what of partnership property, or property otherwise owned in common? Does the degree of interest affect the rule? In the case at bar, Wilson asserted the right to hold the books against the corporation. However, such considerations are, in my view, of minor importance, and I instance them only to show to what uncertainties we may go when we leave the clear and simple directness of the privilege against self-incrimination. As the privilege is a guaranty of personal liberty, it should not be qualified by construction, and a distinction based on the ownership of the books demanded as evidence is immaterial. Such distinction has not been regarded except in the case of public records, as will be exhibited by a review of the authorities.

In Reg. v. Granatelli, 7 State Tr. N. S. 979, 986, Prince Granatelli was prosecuted for breach of the foreign enlistment act in fitting out certain vessels to be used in hostilities against the King of the Two Sicilies. A witness was subpœnaed to produce an agreement whereby Granatelli agreed to buy the vessels of a certain navigation company of which the witness was the secretary. The witness refused to produce it, on the ground that it might contain matter that might criminate himself or other parties for whom he was interested. It was ruled that he could not be compelled to produce the agreement.

In Rex v. Cornelius, 2 Strange, 1210, an information was granted against the defendants, who were justices of the peace, for taking money for granting licenses to alehouse keepers. A rule was applied for to inspect the books of the corporation. It was refused, on the ground that it would in effect oblige a defendant indicted for misdemeanor to furnish evidence against himself.

*In Rex v. Punnell, 1 W. Bl. 37, 1[389 Wils. 239, an information was exhibited against the defendant, who was the vice chancellor of Oxford, for neglect of his duty for not punishing certain persons who had spoken treasonable words in the streets of Oxford. The attorney general moved for a rule directed to the proper officers of the university to permit their books and archives to be inspected to furnish evidence against the defendant. The motion was attempted to be supported "on a suggestion that the King, being a visitor of the university, had a right to inspect their books whenever he thought proper." It was argued besides that "when a man is a magistrate, and as such has books in his custody, his having the office shall not secrete those books which another vice chancellor must have produced." The rule was refused, the court saying: "We know no instance wherein this court has granted a rule to inspect books in a criminal prosecution nakedly considered." The corporations in those cases were considered as private, as observed by Wigmore on Evidence, notes to § 2259. For the same reason, in Rex v. Worsenham, 1 Ld. Raym. 705, the production of customhouse books in an information against customhouse officers for forging a customhouse bond was not compelled. And in Reg. v. Mead, 2 Ld. Raym. 927, books of the defendant, who, with eight others, was incorporated as highway surveyors, they being considered of a private nature, were not required to be produced. Such corporations would, no doubt, be regarded to-day as public, as observed by Wigmore, and he cites cases in which certain records were deemed public, as follows: In a libel suit a parish vestry book required by statute to be kept; registered pharmacist's reports filed as required by law; in a criminal

prosecution for unlawful railroad charges, a tariff sheet publicly posted; a druggist's record of sales kept under a statute to charge him with illegal liquor selling. By a statute in Massachusetts, "no official paper 390]*or record" produced by a witness at a legislative hearing is to be within the privilege against self-crimination.

As a deduction from the cases I have cited, the rule is laid down in Wigmore on Evidence to be: "Where the corporate misconduct involves also the claimant's misconduct, or where the document is in reality the personal act of the claimant, though nominally that of the corporation, its disclosures are virtually his own, and to that extent his privilege protects him from producing them." [§ 2259.]

It would unduly extend this opinion to review the cases which are said to oppose Wigmore's deduction, but as Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370, is cited in the opinion of the court, I will refer to it briefly.

It was there held that an officer of a corporation could not refuse to produce its books on the ground that they would criminate the corporation. What privilege an officer of the corporation had from producing the books on the ground that they might criminate him was not necessary to decide, as immunity from prosecution was given by statute for any matter as to which he should testify. It may be contended that it is a natural inference from the decision that but for the immunity granted he could have claimed such privilege. See also Nelson v. United States, 201 U. S. 92, 50 L. ed. 673, 26 Sup. Ct. Rep. 358. Circuit Judge Gilbert, in a well-considered opinion in Ex parte Chapman, 153 Fed. 371, made such deduction from Hale v. Henkel, and discharged Chapman from custody to which he had been committed for refusing to produce for the inspection of a grand jury the books and papers belonging to a corporation of which he was an officer.

The weight of authority, therefore, is against the power of a court to compel the production of books of a private corporation by anyone whom they would criminate. And the cases seem right on principle. The spirit of the privilege is that a witness shall not be used in any way to his crimination. When that may be the effect 391]of any evidence *required of him, be it oral or documentary, he may resist. He cannot be made use of at all to secure the evidence. This must necessarily be the extent of the privilege. Rex v. Punnell, supra, is specially in point. The solicitor general for the Crown, replying to the objection that no one was bound to furnish evidence against himself, said: "Agreed. but a distinction may be made. When a man is a magistrate, and as such has books in his custody, his having the office shall not secrete those books, which another vice chancellor must have produced. Besides, the statutes are not in the vice chancellor's custody only, but also in the hands of the *custos archivorum*."

And the constitutional protection is not measured by the effect, great or small, on the prosecution. It may be invoked even though the prosecution may be defeated. It is the contemplation of the provision of the Constitution that such may be the result, and that it is less evil than requiring a person to aid in his conviction of crime.

Neither plausible arguments, therefore, nor considerations of expediency should prevail against or limit a principle deemed important enough to be made constitutional. Such a principle should be adhered to firmly. It is said in Boyd v. United States, 116 U. S. 616, 635, 29 L. ed. 746, 752, 6 Sup. Ct. Rep. 524, that "constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

In a case of seizure and forfeiture of certain property under the customs-revenue laws for fraudulent invoicing, Boyd entered a claim for the property. Before the trial it became important to know the quantity and value of the property. In obedience to an order issued by the court *under a[392 statute of the United States, Boyd produced the invoices of the property, but objected to their inspection, on the ground that in a suit for forfeiture no evidence can be compelled from the claimants, and also that the statute, so far as it compelled production of the evidence to be used against him, was unconstitutional and void. It was held that the order of the court and the statute violated both the 4th and 5th Amendments of the Constitution of the United States, notwithstanding that the statute could trace its purpose back to one passed in 1863, which had been sustained by decisions in the circuit and district courts, and notwithstanding it also had been sustained by such decisions. The case has been criticized, but it has endured and has become the foundation of other decisions. Indeed, eminent legal names may be cited in criticism, if not ridicule, of the policy expressed by the 5th Amendment,

that is, the policy of protection against self-crimination. It is declared to have no logical relation to the abuses that are said to sustain it, and that the pretense for it, so far as based on hardship, is called an "old woman's reason" (also a "lawyer's reason") and a "double distilled and trebled refined sentimentality." So far as based on unfairness, it is called "the fox hunter's reason," its basis being that a criminal and a fox must have a chance to escape, the subsequent pursuit being made thereby more interesting. And it is asked, supposing a witness upon the stand in a prosecution for robbbery, "a question is put, the effect of which, were he to answer it, might be to subject him to conviction in respect to another robbery, attended with murder" (such high offenses give emphasis to the argument),—"on the ground of public utility and common sense, is there any reason why the collateral advantage thus proffered by fortune to justice should be forcgone?" 5 Bentham, Judicial Ev. pp. 229 et seq. A reply would be difficult if government had no other concern than the punishment of crime.

393] *If the government had no other concern, short cuts to conviction would be justified and commendable in proportion to their shortness. The general warrants which John Wilkes resisted were such a cut; so were writs of assistance issued in Colonial times. Their inducement was the detection of crime, and yet popular rights were vindicated in the resistance to the first, and the "child Independence was born" by resistance to the second.

I will not pause to vindicate the privilege of the 5th Amendment against considerations of expediency, nor to inquire whether it is a well-reasoned principle, one logically following from abuses, properly adapted to the facts of life when it was adopted, or, if so then, not now. It has passed from polemics and has secured the sanction of constitutional law. Courts cannot change it, or add to it, or take from it to suit the "condition of modern civilization," as it was suggested in a case submitted with this. It is as vital now as when ordained, and is not uncertain. It is plain and direct as to the source of criminating evidence. The accused person cannot be made the source. What Lord Camden denominated "an argument of utility" should not prevail now, as it did not in Westminster Hall when he pronounced his great judgment against general warrants. Indeed, English courts, as I have shown, have never wavered nor felt constrained by the demands of criminal justice to depart from or qualify in any way the strength of the privilege. Is it possible that a written constitution is more flexible in its adaptations than an unwritten one, and that the spirit of English liberty is firmer or more consistent than that of American liberty, or discerns more clearly the danger of relaxing the strictness of any of the guaranties of personal rights?

A limitation by construction of any of the constitutional securities for personal liberty is to be deprecated. A people may grow careless and overlook at what cost and through what travail they acquired even 394]the least of their liberties. *The process of deterioration is simple. It may even be conceived to be advancement, and that intelligent self-government can be trusted to adapt itself to occasion, not needing the fetters of a predetermined rule. It may come to be considered that a constitution is the cradle of infancy, that a nation grown up may boldly advance in confident security against the abuses of power, and that passion will not sway more than reason. But what of the end when the lessons of history are ignored, when the barriers erected by wisdom gathered from experience are weakened or destroyed? And weakened or destroyed they may be when interest and desire feel their restraint. What, then, of the end? Will history repeat itself? And this is not a cry of alarm. *"Obsta principiis"* was the warning of Mr. Justice Bradley in Boyd v. United States against the attempt of the government to break down the constitutional privilege of the citizen by attempting to exact from him evidence of fraud against the customs laws. I repeat the warning. The present case is another attempt of the same kind, and should be treated in the same way.

WILLIAM DREIER, Plff. in Err.,
v.
UNITED STATES. (No. 358.)

WILLIAM DREIER, Appt.,
v.
WILLIAM HENKEL, U. S. Marshal for the Southern District of New York. (No. 359.)

(See S. C. Reporter's ed. 394–400.)

Witnesses — self-crimination — production of corporate records incriminating officer.

A corporate officer cannot urge his constitutional privilege against self-crimination to excuse his refusal to produce the

Note.—On the right of officer of a corporation to refuse to turn over its books to a receiver upon the ground that they have a tendency to incriminate him—see note to Manning v. Mercantile Securities Co. 30 L.R.A.(N.S.) 725.

corporate records in his custody before the grand jury under a subpœna duces tecum directed to him, because their contents may tend to incriminate him.

[For other cases, see Witnesses, V. c, in Digest Sup. Ct. 1908.]

[Nos. 358 and 359.]

Argued October 21, 1910. Ordered for reargument before full bench November 28, 1910. Reargued March 2, 1911. Decided May 15, 1911.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a commitment for contempt in disobeying a subpœna duces tecum. Also

AN APPEAL from the Circuit Court of the United States for the Southern District of New York to review an order dismissing a writ of habeas corpus to inquire into the detention under such commitment. Affirmed.

The facts are stated in the opinion.

Mr. **W. Wickham Smith** argued the cause, and, with Mr. John K. Maxwell, filed a brief for plaintiff in error and appellant:

Dreier had an absolute right to refuse to produce books for the consideration of the grand jury, or to give testimony, upon the ground that to do so might tend to incriminate him.

Burr's Trial, 244; Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Ballmann v. Fagin, 200 U. S. 186, 50 L. ed. 433, 26 Sup. Ct. Rep. 212; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Ex parte Chapman, 153 Fed. 371; Re Kanter, 117 Fed. 356; Re Hess, 134 Fed. 109; Foot v. Buchanan, 113 Fed. 156; Re Nachman, 114 Fed. 995; Re Smith, 112 Fed. 509; Re Shera, 114 Fed. 207; Edelstein v. United States, 9 L.R.A.(N.S.) 236, 79 C. C. A. 328, 149 Fed. 642; United States v. Goldstein, 132 Fed. 789; People ex rel. Taylor v. Forbes, 143 N. Y. 219, 38 N. E. 303; Lamson v. Boyden, 160 Ill. 613, 43 N. E. 781; Emery's Case, 107 Mass. 172, 9 Am. Rep. 22.

Assistant to the Attorney General **Kenyon** argued the cause, and, with Attorney General Wickersham and Mr. E. O. Harrison, Special Assistant to the Attorney General, filed a brief for defendant in error and appellee:

The search and seizure clause of the 4th Amendment does not interfere with the power of the courts to compel the production of documentary evidence through a subpœna duces tecum.

Summers v. Moseley, 2 Cromp. & M. 477, 4 Tyrw. 158, 3 L. J. Exch. N. S. 128; Wertheim v. Continental R. & Trust Co. 21 Blatchf. 246, 15 Fed. 718; Amey v. Long, 9 East, 473, 6 Esp. 116, 9 Revised Rep. 589, 1 Campb. 16, 180; Bull v. Loveland, 10 Pick. 9; United States Exp. Co. v. Henderson, 69 Iowa, 40, 28 N. W. 426; Grecnl. Ev. 469a; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563; Hale v. Henkel, 201, U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370.

A corporation can be compelled to furnish information, upon the order of a proper judicial tribunal, concerning the conduct of its business, even though such information might be incriminatory.

Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 348, 349, 53 L. ed. 530, 543, 544, 29 Sup. Ct. Rep. 370, 15 A. & E. Ann. Cas. 645; Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 553, 52 L. ed. 327, 335, 28 Sup. Ct. Rep. 178, 12 A. & E. Ann. Cas. 658; American Tobacco Co. v. Werckmeister, 207 U. S. 284, 302, 52 L. ed. 208, 218, 28 Sup. Ct. Rep. 72, 12 A. & E. Ann. Cas. 595.

Mr. Justice **Hughes** delivered the opinion of the court:

The plaintiff in error and appellant, William Dreier, was subpœnaed to produce before the grand jury in the circuit court certain books and papers of the Lichtenstein Millinery Company, a New York corporation, of which he was the secretary. The grand jury was conducting an inquiry with respect to alleged violations of the customs laws by N. Hayes and others. The subpœna contained the *ad testificandum* clause, but the only question presented is with respect to the demand for the corporate documents. For his refusal to produce them for the inspection of the grand jury, Dreier was committed for contempt. The first case (No. 358) is a writ of error to the circuit court to review the judgment holding him to be in contempt, and directing his commitment; and the second (No. 359) is an appeal from an order dismissing a writ of habeas corpus. The contention of Dreier in both cases is *that the contents of the[400

As to constitutional protection against being forced to furnish evidence to be used against one's self in a civil case—see note to Levy v. Superior Ct. 29 L.R.A. 811.

On refusal to produce books or papers in response to subpœna, upon ground that they contain private matter—see note to Re Bolster, 29 L.R.A.(N.S.) 716.

books and papers would tend to incriminate him, and that the proceedings to compel their production were in violation of the 5th Amendment of the Constitution of the United States.

It is urged that if he had a privilege, his conduct was such as to constitute a waiver. But it is not necessary to consider the case in this aspect. Dreier was not entitled to refuse the production of the corporate records. By virtue of the fact that they were the documents of the corporation in his custody, and not his private papers, he was under obligation to produce them when called for by proper process. Wilson v. United States (decided this day), 221 U. S. 361, ante, 771, 31 Sup. Ct. Rep. 538. In that case the writ was directed to the corporation, and here it was addressed to the custodian. As he had no privilege with respect to the corporate books and papers, it was his duty to obey.

Affirmed.

Mr. Justice **McKenna** concurs in the result upon the ground of waiver.

GRAND TRUNK WESTERN RAILWAY COMPANY, Plff. in Err.,
v.
RAILROAD COMMISSION OF INDIANA, William J. Wood, Henry M. Dowling, John F. McClure, and the Chicago, Indianapolis, & Louisville Railway Company.

(See S. C. Reporter's ed. 400–404.)

Constitutional law — impairing contract obligations — grade crossings.

A contract between two intersecting railway companies, imposing upon the junior road the duty of constructing and properly maintaining the physical crossing of the two roads, and providing and maintaining semaphores or other signals, and the requisite watchman to take charge of and operate the same, is not unconstitutionally impaired by a subsequent order of the state railroad commission, directing the installation and use of an interlocking plant at such crossing, and apportioning between the two companies the expense of executing the order.

[For other cases, see Constitutional Law, IV. g, in Digest Sup. Ct. 1908.]

[No. 138.]

Submitted April 19, 1911. Decided May 15, 1911.

IN ERROR to the Appellate Court of the State of Indiana to review a judgment which affirmed a judgment of the Circuit Court of Lake County, in that state, sustaining a demurrer to the complaint in a suit to secure the annulment or modification of an order of the state railroad commission directing the installation and use of an interlocking plant at the crossing of two railroads, and apportioning between them the expense of executing the work. Affirmed.

See same case below, 40 Ind. App. 168, 81 N. E. 524.

The facts are stated in the opinion.

Mr. **Samuel Parker** submitted the cause for plaintiff in error:

The contract should be considered in view of the positions of the parties to it at the time of its execution, the occasion which gave rise to it, the designs and purposes of the parties in making it, and the obvious object desired to be accomplished by it.

1 Addison, Contr. § 182; Torrence v. Shedd, 156 Ill. 194, 41 N. E. 95, 42 N. E. 171; Chicago, R. I. & P. R. Co. v. Denver & St. L. R. Co. v. Grand Rapids & I. R. 277, 12 Sup. Ct. Rep. 479; New York, C. & R. G. R. Co. 143 U. S. 596, 36 L. ed. Co. 116 Ind. 60, 18 N. E. 182; Cravens v. Eagle Cotton Mills Co. 120 Ind. 11, 21 N. E. 981.

Messrs. **E. C. Field** and **H. R. Kurrie** submitted the cause for defendants in error:

The practical interpretation of an agreement by a party to it is always a consideration of great weight.

Brooklyn L. Ins. Co. v. Dutcher, 95 U. S. 269, 24 L. ed. 410; Topliff v. Topliff, 122 U. S. 121, 30 L. ed. 1110, 7 Sup. Ct. Rep. 1057.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This is a suit to secure the annulment or modification of an order of the Railroad Commission of Indiana, directing the installation and use of an interlocking plant at the crossing of two railroads in that state, and apportioning between them the expense of executing the order. The suit proceeds upon the theory that a contract between the owners of the roads, entered into before the enactment of the statute upon which the order rests, imposes upon the junior road all the expense of maintaining and guarding the crossing, in whatever manner may be essential to make its use safe and convenient, and that the order, by imposing a part of the expense of its

Note.—As to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

403]execution upon *the other road, impairs the obligation of the contract, and therefore is void.

The appellate court of the state, having regard to the terms of the contract and to the conditions existing when it was made, twenty-five years before, held that it did not provide for or contemplate any such elaborate system of protection and guarding the crossing as is involved in the use of an interlocking plant, and therefore that the expense entailed by the order was not within the purview of the contract. And that court, after observing that the statute invested the commission with the authority to make a just, but not an arbitrary, apportionment of the expense, and that the apportionment as made did not appear to be unjust or arbitrary, sustained the order. 40 Ind. App. 168, 81 N. E. 524.

Observing first, that the order is a legislative act by an instrumentality of the state exercising delegated authority (Prentis v. Atlantic Coast Line R. Co. 211 U. S. 210, 226, 53 L. ed. 150, 158, 29 Sup. Ct. Rep. 67), is of the same force as if made by the legislature, and so is a law of the state within the meaning of the contract clause of the Constitution (New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 612, 8 Sup. Ct. Rep. 741; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 148, 45 L. ed. 788, 791, 21 Sup. Ct. Rep. 575; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 590, 52 L. ed. 630, 633, 28 Sup. Ct. Rep. 341), we come to consider whether it does impair the obligation of the contract. Obviously it does not, if the contract creates no obligation respecting the expense which the order entails.

The contract is set forth at length in the state court's opinion, and need not be reproduced here. It declares explicitly that the duty of constructing and properly maintaining the physical crossing of the two roads, and bearing the expense incident thereto, shall rest with the junior road, but its only provision respecting what shall be done in the way of guarding the crossing is that "good and substantial semaphores or other signals, and . . . the requisite watchmen to take charge of and operate the same," shall be provided and maintained 404]by that road at *its "individual expense." There is no reference to an interlocking plant, nor any general language that would include one. The words "semaphores or other signals" do not do so. An interlocking plant is so much more than a signaling device that it is quite beyond their usual meaning. That meaning has been applied to them during twenty-five years of practice under the contract, and another ought not to be substituted now.

We conclude, as did the state court, that the contract does not embrace the expense which the order entails, and therefore that the order does not, by apportioning that expense, impair the obligation of the contract.

But to avoid any misapprehension that otherwise might arise, we deem it well to observe that we do not, by what is here said, suggest or imply that the contract, if its terms were broad enough to include the expense in question, would be an obstacle to the apportionment of that expense under the state statute. See Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 71–74, 42 L. ed. 948, 953, 954, 18 Sup. Ct. Rep. 513; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437.

Affirmed.

SARGEANT & LAHR, Charles Sargeant, F. A. Lahr, and Mrs. Frank A. Lahr, Plffs. in Err.,

v.

HERRICK & STEVENS, C. E. Herrick, E. B. Stevens, John Watson, and Mrs. John Watson, His Wife.

(See S. C. Reporter's ed. 404–408.)

Tax — state taxation of Federal property — land grant not perfected.

The equitable title to the land did not pass from the United States, so as to make it liable to state taxation, upon the location of a military bounty land warrant, issued under the act of March 3, 1855 (10 Stat. at L. 701, chap. 207), by one who was not the lawful owner and holder of such warrant, since such location did not operate as a payment of the purchase price, which was essential to the right to a patent.

[For other cases, see Taxes, 175–183, in Digest Sup. Ct. 1908.]

[No. 149.]

Argued April 25, 1911. Decided May 15, 1911.

IN ERROR to the Supreme Court of the State of Iowa to review a decree which affirmed a decree of the District Court of Clay County, in that state, in favor of plaintiffs in a suit to quiet title. Reversed.

See same case below, 140 Iowa, 590, 132 Am. St. Rep. 281, 117 N. W. 751.

The facts are stated in the opinion.

NOTE.—On limitations of taxing power from mutual independence of Federal and state governments—see note to Grether v. Wright, 23 C. C. A. 515.

On powers of state to tax—see note to Dobbins v. Erie County, 10 L. ed. U. S. 1022.

Mr. **Robert Healy** argued the cause, and, with Messrs. M. F. Healy and Charles A. Clark, filed a brief for plaintiffs in error:

The tax title acquired by defendants in error through Simmons and his grantees is invalid for the following reasons:

1st. In determining the rights of a purchaser under a tax sale, the maxim *caveat emptor* is rigidly applied as against the purchaser at such a sale.

Holt v. Hemphill, 3 Ohio, 232; Braxton v. Rich, 47 Fed. 178; Games v. Stiles, 14 Pet. 322, 10 L. ed. 476; Stead v. Course, 4 Cranch, 403, 2 L. ed. 660.

2d. A tax sale of public land which is exempt from taxation conveys no title to the purchaser.

Young v. Charnquist, 114 Iowa, 116, 86 N. W. 205; McGoon v. Scales, 9 Wall. 23, 19 L. ed. 545; Bonner v. Phillips, 77 Ala. 427; Hall v. Dowling, 18 Cal. 619; People ex rel. McCrea v. United States, 93 Ill. 30, 34 Am. Rep. 155; McCaslin v. State, 99 Ind. 428; Braxton v. Rich, 47 Fed. 178.

3d. The assignment of the warrant to Schaffer by Hutson was fraudulent; and where the warrant, or the assignment thereof, upon which land is located, is fraudulent, the locator obtains no such equitable title to the land as will subject the land to taxation. In other words, the government retains such an interest in the land as exempts it from taxation.

Hussman v. Durham, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253; Union P. R. Co. v. McShane, 22 Wall. 444, 22 L. ed. 747; Kansas P. R. Co. v. Prescott, 16 Wall. 603, 21 L. ed. 373; Bronson v. Kukuk, 3 Dill. 490, Fed. Cas. No. 1,929, Pitts v. Clay, 27 Fed. 635; Calder v. Keegan, 30 Wis. 126; Kohn v. Barr, 52 Kan. 269, 34 Pac. 880; Reynolds v. Plymouth County, 55 Iowa, 90, 7 N. W. 468; Durham v. Hussman, 88 Iowa, 29, 55 N. W. 11; Topeka Commercial Secur. Co. v. McPherson, 7 Okla. 332, 54 Pac. 489; State v. Itasca Lumber Co. 100 Minn. 355, 111 N. W. 276; Sjoli v. Dreschel, 199 U. S. 564, 50 L. ed. 311, 26 Sup. Ct. Rep. 154.

4th. The courts hold that even where lands have been earned by a railroad company under a congressional grant, but to which there are conflicting claims thereto, and the legal title to them is still in the United States, such lands are not taxable.

Dickerson v. Yetzer, 53 Iowa, 681, 6 N. W. 41; Grant v. Iowa R. Land Co. 54 Iowa, 673, 7 N. W. 113; Doe v. Iowa R. Land Co. 54 Iowa, 657, 7 N. W. 118; Campbell v. Spears, 120 Iowa, 670, 94 N. W. 1126; Central P. R. Co. v. Howard, 52 Cal. 227.

5th. Where the deed or patent is suspended because there is a contest pending in the land office between claimants, the land is not subject to taxation.

Topeka Commercial Secur. Co. v. McPherson, 7 Okla. 332, 54 Pac. 489; Clearwater Timber Co. v. Shoshone County, 155 Fed. 612.

Neither the legal nor the equitable title to the land in question passed from the government, so as to subject said land to taxation, until the issue of the patent to plaintiffs in error in 1904. This title rightfully related back to the assignment to Stanley, but this is solely for the purposes of justice, and not to validate the tax title.

Gibson v. Chouteau, 13 Wall. 92, 20 L. ed. 534; Grant v. Iowa R. Land Co. 54 Iowa, 677, 7 N. W. 113; Clearwater Timber Co. v. Shoshone County, 155 Fed. 625; Reynolds v. Plymouth County, 55 Iowa, 93, 7 N. W. 468; Calder v. Keegan, 30 Wis. 126.

No brief was filed for defendants in error.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This is a suit to quiet the title to 80 acres of land in the state of Iowa, and the facts, in so far as they are material here, are these: In 1857, Hartzell I. Shaffer located upon the land a military bounty land warrant, issued to Jacob Hutson under the act of Congress of March 3, 1855 (10 Stat. at L. 701, chap. 207), and received from the local land office a certificate of location. Shortly thereafter he transferred the certificate and his right to the warrant and to the land to Amos Stanley. When the location was reported to the General Land Office, that office suspended it because Hutson had made two assignments of the warrant, the first to William Maltby and the second to Shaffer, and because there was no relinquishment by Maltby. In 1875, Stanley, or a transferee of his, surrendered the certificate of location to the General Land Office, and withdrew the warrant for the purpose of straightening out the difficulty arising from its double assignment, if *that[406 could be done. But apparently nothing was accomplished in that direction, for the warrant never was returned. The suspension continued until 1904, when Sargeant & Lahr, who had succeeded to the rights of Stanley, perfected the location by substituting the government price of the land for the warrant. This was done under rule 41 of the circular of the Land Department relating to such locations, which reads as follows (27 Land Dec. 225):

"When a valid entry is withheld from patent on account of the objectionable character of the warrant located thereon, the

parties in interest may procure the issue of a patent by filing in the office for the district in which the lands are situate an acceptable substitute for the said warrant. The substitution must be made in the name of the original locator, and may consist of a warrant, cash, or any kind of scrip legally applicable to the class of lands embraced in the entry."

At the time of the substitution, Sargeant & Lahr received from the local land office a certificate of purchase, issued in Stanley's name, and later in the same year received a patent issued in his name, and reciting that it was predicated upon the substitution of the purchase price for the warrant. In 1875 the land was sold for the nonpayment of taxes levied upon it by the officers of Clay county, Iowa, two years before, and whatever title passed under that sale is held by Herrick & Stevens, who were the plaintiffs in the trial court. Sargeant & Lahr, who were the defendants, claim under the warrant location as ultimately perfected through the substitution of the purchase price, and then passed to patent. The trial court sustained the tax title and entered a decree for the plaintiffs, which was affirmed by the supreme court of the state. 140 Iowa, 590, 132 Am. St. Rep. 281, 117 N. W. 751.

As the state was without power to tax the land until the equitable title passed 407]from the United States, and as *that title did not pass until there was a full compliance with all the conditions upon which the right to a patent depended (Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 505, 33 L. ed. 687, 692, 10 Sup. Ct. Rep. 341), it is apparent that the validity of the tax title depends upon the question whether the location of the warrant in 1857, without more, gave a right to a patent.

Among the conditions upon compliance with which such a right depends, none has been deemed more essential than the payment of the purchase price, which, in this instance, could have been made in money or by a warrant like the one actually used. The warrant was assignable and was usable at a rate which made it the equivalent of the price of the land. And had Shaffer been the lawful owner and holder of the warrant, there could be no doubt that its location by him would, without more, have entitled him to a patent. But, as the General Land Office found, in effect, that he was not the lawful owner or holder of the warrant, and as that finding is conclusive in the circumstances in which it is brought into this case, it is perfectly plain that the location of the warrant did not, without more, give a right to a patent. In other words, that location did not operate as a payment of the purchase price, and so did not operate to pass the equitable title from the United States. Besides, until the payment in 1904, it was wholly uncertain that the location ever would be perfected, there being no obligation upon anyone to perfect it. It follows that during the intervening years the United States had such an interest in the land as to make its taxation by the state void.

The case of Hussman v. Durham, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253, is like this in all material respects, the most noticeable difference being that there the assignment to the locator was forged, while here it was ineffectual because of a prior assignment. In that case this court, after holding, in substance, that the doctrine of relation cannot be invoked to give effect *to a title resting upon the[408 wrongful taxation of land while both the legal and the equitable title were in the United States, said:

"Confessedly, though a formal certificate of location was issued in 1858, there was then in fact no payment for the land, and the government received nothing until 1888. During these intervening years, whatever might have appeared upon the face of the record, the legal and the equitable title both remained in the government. The land was therefore not subject to state taxation. Tax sales and tax deeds issued during that time were void. The defendant took nothing by such deeds. No estoppel can be invoked against the plaintiff. His title dates from the time of payment in 1888. The defendant does not hold under him, and has no tax title arising subsequently thereto."

For these reasons we hold that the Supreme Court of the state erred in sustaining the tax title.

Reversed.

TEXAS & NEW ORLEANS RAILROAD COMPANY and Louisiana Western Railroad Company, and Their Surety, the United States Fidelity & Guaranty Company, Plffs. in Err.,

v.

FANNIE MILLER, G. W. Miller, William D. Miller, Dorrace H. Miller, and Fannie Miller, Suing as Next Friend, etc.

(See S. C. Reporter's ed. 408–417.)

Error to state court — scope of review — non-Federal questions.

1. Whether or not a statute of a sister state, alleged to create contract obligations

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. West-

protected against impairment by the contract clause of the Federal Constitution, has been repealed by subsequent legislation, presents no Federal question for review on writ of error from the Federal Supreme Court to a state court, where there was neither allegation nor proof that the court of last resort in the state where the legislation was enacted had considered the question or made any ruling upon it.

[For other cases, see Appeal and Error, 2070–2226, in Digest Sup. Ct. 1908.]

Error to state court — review of non-Federal questions — local practice.

2. A decision of a state court in an action founded on a statute of another state creating an action for death, qualified by a one-year's limitation, that the failure to plead the statute in the complaint was cured by its inclusion in the answers, filed more than one year after the death, presents no question as to the full faith and credit to be given such statute, so as to sustain a writ of error from the Federal Supreme Court, but involves nothing more than a question of local pleading and practice.

[For other cases, see Appeal and Error, 2209–2226, in Digest Sup. Ct. 1908.]

Error to state court — frivolousness of Federal question — impairing contract obligations.

3. The question whether a provision in a railway charter exempting the company from liability for the death of any person in its service, even if caused by its negligence, created a contract right protected against repeal by the contract clause of the Federal Constitution, is sufficiently substantial to sustain a writ of error from the Federal Supreme Court to a state court.

[For other cases, see Appeal and Error, 1133–1136, in Digest Sup. Ct. 1908.]

Constitutional law — impairng contract obligations — what contracts protected — police power.

4. A provision in a railway charter ex-

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ern Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States on a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L.R.A. 471.

As to what is the record for the purpose of showing the jurisdiction of the Supreme Court of the United States of a writ of error to a state court—see note to Home for Incurables v. New York, 63 L.R.A. 329.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On error to state courts in cases presenting merely abtract or moot questions—see note to Campbell v. California, 50 L. ed. U. S. 382.

On error to state courts in cases presenting questions of impairment of contract obligations—see note to Osborne v. Clark, 51 L. ed. U. S. 619.

On review of decisions of state courts presenting questions of full faith and credit—see note to Allen v. Alleghany Co. 49 L. ed. U. S. 551.

As to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Fletcher v. Peck. 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

Questions of local practice and procedure on writ of error from Federal Supreme Court to a state court.

As pointed out in the note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513, on what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts, it is the Federal character of the controversy which furnishes the basis for the exercise of this jurisdiction. And as will be seen from a perusal of the note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571, the scope of review in such cases is confined to an examination of the Federal questions involved. Hence, decisions as to the Federal or non-Federal character of questions of local practice and procedure are of equal value here, whether the Supreme Court was speaking with reference to jurisdiction or to scope of review.

It is obvious that questions which relate solely to state practice are not Federal. F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; Ludeling v. Chaffe, 143 U. S. 301, 36 L. ed. 313, 12 Sup. Ct. Rep. 439; Tripp v. Santa Rosa Street R. Co. 144 U. S. 126, 36 L. ed. 371, 12 Sup. Ct. Rep. 655; Buena Vista County v. Iowa Falls & S. C. R. Co. 112 U. S. 165, 28 L. ed. 680, 5 Sup. Ct. Rep. 84; Renaud v. Abbott, 116 U. S. 277, 29 L. ed. 629, 6 Sup. Ct. Rep. 1194; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48.

Such are questions respecting evidence. Sherman v. Grinnell, 144 U. S. 198, 36 L. ed. 403, 12 Sup. Ct. Rep. 574; Baldwin v. Kansas, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; Wood v. Brady, 150 U. S. 18. 37 L. ed. 981, 14 Sup. Ct. Rep. 6; Brooks v. Missouri, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; Marsh v. Citizens' Ins. Co. 131 U. S. ccxiii Appx. and 25 L. ed. 90; Central P. R. Co. v. California, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766;

empting the company from liability for the death of any person in its service, even if caused by its negligence, creates no contract right protected by the contract clause of the Federal Constitution, since the subject is one over which the legislature possesses a regulating but not a contracting power.

[For other cases, see Constitutional Law, 1068–1074, in Digest Sup. Ct. 1908.]

[No. 831.]

Submitted April 17, 1911. Decided May 15, 1911.

IN ERROR to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of the District Court of Harris County, in that state, in favor of plaintiffs in an action against a railroad company for the death of an employee. Affirmed.

See same case below (Tex. Civ. App.) 128 S. W. 1165.

The facts are stated in the opinion.

Messrs. **Maxwell Evarts, H. M. Garwood,** and **A. L. Jackson** submitted the cause for plaintiffs in error:

The refusal to consider a Federal question which is controlling in a case is equivalent to a decision against the Federal right involved therein.

Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217.

In order to show that the court of civil appeals decided a given Federal question, it is not necessary that the express language of the opinion should so recite, but

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Martin v. Marks, 97 U. S. 345, 24 L. ed. 940; Williams v. Norris, 12 Wheat. 117, 6 L. ed. 571; Los Angeles Farming & Mill. Co. v. Los Angeles, 217 U. S. 217, 54 L. ed. 736, 30 Sup. Ct. Rep. 452.

Errors of the state court in construing the common law on the subject of reading depositions of witnesses do not present any Federal question which can be reviewed by the Supreme Court of the United States on a writ of error to the state court. West v. Louisiana, 194 U. S. 258, 48 L. ed. 965, 24 Sup. Ct. Rep. 650.

But the question as to the competency and legal effect of the evidence as bearing upon a question of Federal law is said to be a Federal one. Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704.

And, while error in the admission of evidence to establish the boundaries of a Spanish land grant confirmed by act of Congress cannot be reviewed in the Supreme Court of the United States on writ of error to a state court, yet when evidence is admitted as competent for this purpose, and it is sought to give it effect for other purposes which involve questions over which the Supreme Court has jurisdiction, then the decision of a state court on the effect of such evidence may be considered and its judgment reversed or affirmed in a similar manner as if a like question had arisen in the highest court of a state when reviewing the proceedings of inferior courts. Mackay v. Dillon, 4 How. 421, 11 L. ed. 1038.

The admissibility in a state court, in justification of an alleged trespass, of evidence to prove a forfeiture and right of seizure under the neutrality laws of the United States, is a Federal question which will support the appellate jurisdiction of the Supreme Court of the United States. Gelston v. Hoyt, 3 Wheat. 246, 4 L. ed. 381.

The admission of evidence in a criminal case, which the highest state court decides did not violate the rights of the accused under the state Constitution and laws, cannot involve a question of due process of law of sufficient merit to sustain a writ of error from the Supreme Court of the United States. Barrington v. Missouri, 205 U. S. 483, 51 L. ed. 890, 27 Sup. Ct. Rep. 582.

The exclusion from evidence in a suit to quiet title, of a letter written by the Secretary of the Interior to the Commissioner of the General Land Office, which is clearly *res inter alios acta*, can present no Federal question which will sustain a writ of error from the Supreme Court of the United States to a state court. Chapman & D. Land Co. v. Bigelow, 206 U. S. 41, 51 L. ed. 953, 27 Sup. Ct. Rep. 679.

Questions of pleading, when considered solely as questions of state practice, are also obviously not Federal. National Foundry & Pipe Works v. Oconto Water Supply Co. 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; Johnson v. Drew, 171 U. S. 93, 43 L. ed. 88, 18 Sup. Ct. Rep. 800.

A decision of the highest state court that a plea, when construed most stronly against the pleader, does not disclose the defense that the note in suit was given to a foreign corporation in pursuance of business carried on in another state without compliance with the statutory conditions upon which its right to do business there depended, involves purely a local question which will not sustain a writ of error from the Federal Supreme Court. Allen v. Alleghany Co. 196 U. S. 458, 49 L. ed. 551, 25 Sup. Ct. Rep. 311.

The objections that the information in contempt was not supported by an affidavit until after it was filed, and that the suits referred to in the published articles complained of as constituting the contempt were not then pending, present questions of local law, which will not sustain a writ of error from the Federal Supreme Court to a state court. Patterson v. Colorado, 205 U. S. 454, 51 L. ed. 879, 27 Sup. Ct. Rep. 556, 10 A. & E. Ann. Cas. 689.

The dismissal of the petition of the owner for the assessment and taxation of his lands

for the purpose of jurisdiction of this court it is sufficient that the state court by its decision necessarily adjudicated the defense claimed under the Louisiana incorporating act.

El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 90, 54 L. ed. 108, 30 Sup. Ct. Rep. 21; Wabash R. Co. v. Adelbert College, 208 U. S. 38–44, 52 L. ed. 379–382, 28 Sup. Ct. Rep. 182; Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397; San José Land & Water Co. v. San José Ranch Co. 189 U. S. 179–181, 47 L. ed. 765–769, 23 Sup. Ct. Rep. 487; Fire Asso. of Philadelphia v. New New York, 119 U. S. 110–129, 30 L. ed. 342–350, 7 Sup. Ct. Rep. 108; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Mallett v. North Carolina, 181 U. S. 589–590, 45 L. ed. 1015, 1016, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241.

The fact that the Texas court took cognizance of this case, and undertook to apply the Louisiana statute conferring this right of action for injuries resulting in death, would seem to logically imply the conception of that court that the Louisiana act was not in the nature of a police regulation; for the statutory right of action in the state of Texas for injuries resulting in death awards damages only to certain designated relatives, and strictly as compensation, and not upon principles of public policy.

International & G. N. R. Co. v. McDonald, 75 Tex. 46, 12 S. W. 860; Hays v. Houston & G. N. R. Co. 46 Tex. 272;

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to escape the forfeiture provided by the Kentucky act of March 15, 1906, art. 3, because such petition did not contain a description of the land sufficient to identify it, involves no Federal question which can be reviewed by the Federal Supreme Court on writ of error to a state court, unless the ruling was so arbitrary and baseless as to amount to a deprivation of due process of law. Kentucky Union Co. v. Kentucky, 219 U. S. 140, ante, 137, 31 Sup. Ct. Rep. 171.

The refusal of a state court to permit the filing of a plea setting up a Federal question does not necessarily involve a decision of such question so as to sustain the appellate jurisdiction of the Supreme Court of the United States, where the state court may have refused such permission either because the plea was not filed until more than nine months after the declaration, and not until the case was called for trial, or because such plea, which went in terms to the whole declaration, and prayed judgment, was clearly bad as to the second count in the declaration. Western U. Teleg. Co. v. Wilson, 213 U. S. 52, 53 L. ed. 693, 29 Sup. Ct. Rep. 403.

The action of the trial court in allowing plaintiff to amend at the trial by increasing his claim for damages over defendant's objection that he was thereby deprived of his right to remove the cause to a Federal court, to which he would have been entitled had that amount been claimed when the suit was commenced or the amendment made at an earlier stage of the case, does not amount to a decision against the right of removal, so as to give the Supreme Court of the United States jurisdiction to review the judgment of the state court, where no application for such removal was made. Northern P. R. Co. v. Austin, 135 U. S. 315, 34 L. ed. 218, 10 Sup. Ct. Rep. 758.

The decision of a state court that the Federal questions alleged to be involved in mandamus proceedings were entirely put out of the case by the facts set forth in the return to the alternative writ, presenting a question obviously not of a Federal character, will not be reviewed by the Federal Supreme Court, where there is nothing in the case to justify a suspicion that the Federal questions were sought to be avoided, or were avoided by giving an unreasonable construction to the pleadings. Vandalia R. Co. v. Indiana, 207 U. S. 359, 52 L. ed. 246, 28 Sup. Ct. Rep. 130.

No Federal question respecting due process of law or full faith and credit, which will sustain a writ of error from the Federal Supreme Court to the highest court of a state, is involved in a suit in which the state court, after reversing a judgment for defendant on the ground that a judgment of a Federal circuit court, set up as *res judicata* in a special replication to two of four pleas in set-off, was binding, decided on rehearing that, conceding the judgment of the Federal court to be binding as to the two pleas to which the replication of *res judicata* applies, judgment for defendant can be upheld upon the other two pleas referring to earlier stages of the same transaction; nor does it matter that the Federal Supreme Court may think the state court wrong in believing that there is evidence to support these pleas. Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30.

The decision of the highest court of a state that the verdict of a jury was to be taken as rendered upon the second count in the declaration involves no Federal question. Delaware City, S. & P. S. B. Nav. Co. v. Reybold, 142 U. S. 636, 35 L. ed. 1141, 12 Sup. Ct. Rep. 290.

Whether the bondholders of a corporation are indispensable parties to a suit instituted by the attorney general in the name of the state to enforce a forfeiture of the company's charter for an alleged violation of its terms is not a Federal question. New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691.

Whether an action to foreclose a lien for assessments for street improvements is *in rem* or *in personam* under the state practice is not a Federal question. Wood v. Brady, 150 U. S. 18, 37 L. ed. 981, 14 Sup. Ct. Rep. 6.

Gulf, C. & S. F. R. Co. v. Moore, 69 Tex. 157, 6 S. W. 631; Texas & P. R. Co. v. Garcia, 62 Tex. 292; Houston & T. C. R. Co. v. Cowser, 57 Tex. 293; International & G. N. R. Co. v. Kindred, 57 Tex. 491.

Assuming that the Louisiana act did not award damages on the same principles and theory of the Texas act, there would have been an insurmountable obstacle to the recognition and enforcement of the Louisiana act by the courts of Texas on principles of comity, according to the repeated decisions of those courts.

Mexican Nat. R. Co. v. Jackson, 89 Tex. 107, 31 L.R.A. 276, 59 Am. St. Rep. 28, 33 S. W. 857; DeHarn v. Mexican Nat. R. Co. 86 Tex. 71, 23 S. W. 381; St. Louis, I. M. & S. R. Co. v. McCormick, 71 Tex. 660, 1 L.R.A. 804, 9 S. W. 540.

Indeed, if the object of the Louisiana act of 1884 was in any sense penal in its nature, it would not be transitory, and under the general law would not be enforceable in the courts of other states, beyond the jurisdiction of the state of Louisiana.

Boston & M. R. Co. v. Hurd, 56 L.R.A. 193, 47 C. C. A. 615, 108 Fed. 116; Higgins v. Central New England & W. R. Co. 155 Mass. 176, 31 Am. St. Rep. 544, 29 N. E. 534; Nelson v. Chesapeake & O. R. Co. 88 Va. 971, 15 L.R.A. 583, 14 S. E. 838.

The state courts, having considered and adopted the Louisiana statute as the in-

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An instruction that the jury should be governed by the law as given them by the court, and the court's refusal to allow counsel to read in argument portions of an opinion of the state supreme court, raise no question which will give the Supreme Court of the United States jurisdiction to review a judgment of the state court, where no reference was made to any portion of the Federal laws or Constitution giving the defendant any such right. Brooks v. Missouri, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443.

But a party who insists, by way of objection to or requests for instructions, upon a construction of a Federal statute which will lead to a judgment in his favor, sets up a claim of a right or immunity under such statute within the meaning of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, governing writs of error from the Supreme Court of the United States to state courts. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616.

The refusal of a state court to set aside the submission of a suit in equity in order to give complainant time to obtain the deposition of witnesses, where there was ample time before the submission to have done so, does not raise any Federal question, but is a decision upon a matter of practice under the state procedure. Thorington v. Montgomery, 147 U. S. 490, 37 L. ed. 252, 13 Sup. Ct. Rep. 394.

The decision of a state court confirming the sale of mortgaged property as a whole and in one parcel under decree of foreclosure, though it was capable of decision into parts, involves no question of Federal law which will give the Supreme Court of the United States jurisdiction to review such decision. French v. Hopkins, 124 U. S. 524, 31 L. ed. 536, 8 Sup. Ct. Rep. 589.

The construction and effect of a prior decree of a state court, and how far it bound the state, and whether or not it bound parties subsequently coming in, are matters of state procedure, the rulings upon which cannot present any question which will sustain a writ of error from the Federal Supreme Court to a state court. King v. West Virginia, 216 U. S. 92, 54 L. ed. 396, 30 Sup. Ct. Rep. 225.

Mere error in administering the criminal law of a state, or in the conduct of a criminal trial,—no Federal right being invaded or denied,—cannot be considered by the Supreme Court of the United States on writ of error to a state court. Gibson v. Mississippi, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; McDonald v. Massachusetts, 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389; Moore v. Missouri, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179.

Whether or not the state Constitution was complied with in the proceedings on a criminal trial is not a Federal question. Baldwin v. Kansas, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; Brooks v. Missouri, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443.

A decision of the highest state court that the defendant in a criminal case has been tried in accordance with the local procedure, although the names of all the witnesses were not indorsed on the indictment, cannot be reviewed in the Supreme Court of the United States on the theory that a meritorious Federal question was involved in the claim that the accused was a subject of Great Britain, and, by virtue of treaties, the law of nations, the laws and Constitution of the United States, and the laws of the state, was entitled to know who were the witnesses against him. Barrington v. Missouri, 205 U. S. 483, 51 L. ed. 890, 27 Sup. Ct. Rep. 582.

An exception to the ruling by the state court with reference to the right of the public to be admitted to the court room presents no Federal question giving the Supreme Court of the United States jurisdiction to review the judgment of the state court, where no reliance was placed on any Federal law. Brooks v. Missouri, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443.

Exceptions to rulings of the state court claimed to deprive defendant of an impartial jury give no jurisdiction to the Supreme Court of the United States to review the judgment of a state court, where it is not

dispensable basis for the judgment, and this solely through the medium of the defendant's pleading, which was filed more than two years after the death, on the theory that such pleading when so filed became available as a declaration in behalf of the plaintiffs below, could not ignore the provision of that same act fixing and limiting the period of the right created, without involving necessarily a refusal to give full faith and credit to the act.

Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; San José Land & Water Co. v. San José Ranch Co. 189 U. S. 179–181, 47 L. ed. 765–769, 23 Sup. Ct. Rep. 487; Fire Asso. of Philadelphia v. New York, 119 U. S. 110–129, 30 L. ed. 342–350, 7 Sup. Ct. Rep. 108.

Mr. **John W. Parker** submitted the cause for defendants in error:

The charter provision affected a subject falling clearly within the police power of the state.

Pennsylvania R. Co. v. Miller, 132 U. S. 75, 33 L. ed. 267, 10 Sup. Ct. Rep. 34.

The exemption was in no sense a property right, nor one for which a consideration could have passed from the company. At most it was but a privilege, and, being such, was revocable at the will of the legislature.

Cooley, Const. Lim. p. 338.

A provision in a charter of an insurance company, which limited a suit on the policy to the county where the company was located, has been held to pertain to the remedy, and to be subject to change by a general law upon the subject.

Sanders v. Hillsborough Ins. Co. 44 N. H. 238.

Mr Justice **Van Devanter** delivered the opinion of the court:

In that view of it which must be accepted here, this case may be stated as follows: It was an action to recover damages for the death of a locomotive engineer, resulting *from the derailment of an engine[413 which he was driving while in the service of two railroad companies which were jointly operating a line of railroad through the states of Louisiana and Texas. The derailment and ensuing death occurred in Louisiana, June 1, 1905, and proximately were caused by the negligence of the two companies. One of the companies was incorporated by a Louisiana statute of March 30, 1878, which contained a provision exempting the company from liability for the death of any person in its service, even if caused by its negligence. Laws of Louisiana 1878, No. 21, § 17, p. 267. Another Louisiana statute, enacted July 10, 1884, and still in force, conferred upon designated relatives a right to recover the damages sustained by them through the death of a person, negligently caused by another, but subjected the right to the limitation that the action to enforce it should be begun within one year from the death. Laws of Louisiana 1884, No. 71, p. 94. Merrick's Rev. Civ. Code, art. 2315.

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claimed that the Federal Constitution guaranteed to him such a jury.

The extent to which the party accused of crime who is a witness in his own behalf may be examined is a question of state law as administered in the courts of the state, and not of Federal law. Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22.

The question as to the propriety of consolidating several offenses in one complaint is purely one of state practice. O'Neil v. Vermont, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693.

The refusal of a state court to grant, for local prejudice, the change of venue asked for in a criminal case, cannot involve a Federal question of sufficient merit to sustain a writ of error from the Federal Supreme Court, where the highest state court, after reviewing the testimony, decided that such refusal was not an abuse of the discretion vested in the trial court. Barrington v. Missouri, supra.

Whether a continuance of a criminal case was properly refused by the trial court in the exercise of the discretion intrusted to it by the statutes of the state is for the state courts to decide, and their action presents no Federal question. Davis v. Texas, 139 U. S. 651, 35 L. ed. 300, 11 Sup. Ct. Rep. 675.

The time or manner in which a state court sees fit to approve the bond of a receiver of the property of a corporation convicted of violating the state anti-trust laws presents no substantial Federal question under U. S. Const. 14th Amendment, which will sustain a writ of error from the Federal Supreme Court to the state court. Waters–Pierce Oil Co. v. Texas, 212 U. S. 112, 53 L. ed. 431, 29 Sup. Ct. Rep. 227.

The contention that a state court, in appointing a receiver of a foreign corporation convicted of violating state anti-trust laws, upon the testimony already heard and the conviction already had, deprived the corporation of rights under U. S. Const. 14th Amendment, does not present a substantial Federal question which will sustain a writ of error from the Federal Supreme Court to the state court. Ibid.

The granting or refusing of a motion for a new trial is a matter of discretion, which is not reviewable in the Supreme Court of the United States upon writ of error to a state court. Smith v. Missis-

Within the time so prescribed the relatives so designated commenced in the district court of Harris county, Texas, an action to recover from the two railroad companies the damages sustained by the engineer's death. The complaint, although stating all the facts essential to a recovery under the statute, was defective as a complaint in the Texas court, because it did not conform to the rule prevailing in that state that statutes of other states cannot be noticed judicially, but must be pleaded. More than a year after the death, the defendants answered the complaint, and in their answers recognized the existence of the statute upon which the plaintiffs' action was founded, made allegations respecting it, and sought to enforce the one-year limitation therein. At the trial the statutes of 1878 and 1884 were both duly proved, and upon all the evidence the finding and judgment were for the plaintiffs. The defendants appealed to the court of civil appeals of the state, where the judgment was 414]affirmed (128 S. W. 1165), *and then sued out this writ of error. In the trial court, and again in the court of civil appeals, it was held (1) that the exempting provision in the statute of 1878 was repealed by the statute of 1884, and (2) that what appeared in the answers respecting the statute of 1884 cured the defect in the complaint, and required that it be treated as an adequate and timely assertion of a right under that statute. In the assignments of error here these rulings are challenged upon the theory, which also was advanced in the state courts, that the exempting provision in the statute of 1878 was a contract, and could not be repealed consistently with the contract clause of the Federal Constitution, and that, if that provision was validly repealed by the statute of 1884, the answers filed more than a year after the death could not be treated as curing the defect in the complaint without disregarding the one-year limitation, and thereby violating the full-faith-and-credit clause of the Constitution.

The case is now before us on a motion to dismiss, with which is united a motion to affirm.

The doctrine that a corporate charter is a contract which the Constitution of the United States protects against impairment by subsequent state legislation is ever limited in the area of its operation by the equally well-settled principle that a legislature can neither bargain away the police power nor in any wise withdraw from its successors the power to take appropriate measures to guard the safety, health, and morals of all who may be within their jurisdiction. Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; Douglas v. Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199. In the first of these cases it was said:

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does ex-

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sippi, 162 U. S. 592, 40 L. ed. 1082, 16 Sup. Ct. Rep. 900.

Questions as to the time within which and the grounds upon which a bill of review can be maintained in the state court are not reviewable by the Supreme Court of the United States on writ of error to such court. Central Nat. Bank v. Stevens, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403.

Where the highest state court affirms the judgment of the court below because no transcript of record was filed in that court, there has been no decision of a Federal question conferring jurisdiction on the Supreme Court of the United States. Matheson v. Bank of Alabama, 7 How. 260, 12 L. ed. 692.

The dismissal of an appeal by a state court on the ground that it was prematurely taken disposes of no Federal question, and cannot be reviewed in the Supreme Court of the United States. Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co. 172 U. S. 472, 43 L. ed. 520, 19 Sup. Ct. Rep. 268.

The refusal of the highest court of a state to permit the defense of a discharge in bankruptcy to be set up in that court as a new defense raises no Federal question. Wolf v. Stix, 96 U. S. 541, 24 L. ed. 640.

And the decision of the highest state court on a second appeal, refusing to reopen the questian involved upon the first hearing to let in a Federal defense presented by new pleas filed without leave of court after the cause had been remanded for a new trial, settles merely a matter of state practice, which cannot be inquired into by the Supreme Court of the United States. Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240.

The decision of the highest court of a state that the determination of the trial court, based on conflicting testimony, that the original locators of a mining claim had resumed their assessment work, within the meaning of U. S. Rev. Stat. § 2324, U. S. Comp. Stat. 1901, p. 1426, before an attempted adverse relocation, was conclusive on appeal, does not amount to a denial of the right of relocation claimed under that section, so as to permit a review in the Supreme Court of the United States on writ of error. Yosemite Gold Min. & Mill. Co. v. Emerson, 208 U. S. 25, 52 L. ed. 374, 28 Sup. Ct. Rep. 196.

415]tend to the *protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, devest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *Salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

The fact that the provision in question was embodied in the statute incorporating the Louisiana company does not suffice to show that it became a part of the charter contract, for obviously nothing became a part of that contract that was not within the contracting power of the legislature. Such of the provisions of the statute as were within that power became both a law and a contract and were within the protection of the contract clause of the Constitution, but such of them as were not within that power became a law only, and were as much subject to amendment or repeal as if they had been embodied in a separate enactment. As was said by this court in Stone v. Mississippi, supra: "It is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain."

The subject to which the provision in question relates is the civil liability of a railroad company for the death of its employees, resulting from its negligence. That is a matter of public concern, and not of mere private right. It is closely connected with the safety of the employees, and undobutedly belongs to that class of subjects over which the legislature possesses a regulatory but not a contracting power. Manifestly, therefore, the charter contract did not embrace that provision, and the contract clause of the Constitution did not prevent its repeal.

There is some discussion in the briefs as 416]to whether the *provision was repealed by the statute of 1884, which was in apparent conflict with it, but upon this record that is not a Federal question. There was neither allegation nor proof that the court of last resort in Louisiana had considered the question or made any ruling upon it, and so it became the duty of the Texas courts, which do not take judicial notice of decisions of courts of other states, to decide the question according to their independent judgment. Louisville & N. R. Co. v. Melton, 218 U. S. 36, 52, 54 L. ed. 921, 927, 30 Sup. Ct. Rep. 676. This they did, and no Federal right being involved, their decision is not subject to review by this court. Eastern Bldg. & L. Asso. v. Ebaugh, 185 U. S. 114, 46 L. ed. 830, 22 Sup. Ct. Rep. 566.

Of the ruling that the defect in the complaint was cured by the answers little need be said. While recognizing that the right created by the Louisiana statute was qualified by the one-year limitation, and that the Texas courts could not disregard the qualification without impinging upon the full-faith-and-credit clause of the Constitution, we think the claim that they did disregard it is quite untenable. The action was begun within the time prescribed, and what the Texas courts really held was that the omission from the complaint of an essential allegation was cured by its inclusion in the answers. In so holding, they but gave effect to a generally recognized rule upon the subject. United States v. Morris, 10 Wheat. 246, 286, 6 L. ed. 314, 323. There was no shifting from one right of action to another, as in Union P. R. Co. v. Wyler, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877, and United States v. Dalcour, 203 U. S. 408, 423, 51 L. ed. 248, 251, 27 Sup. Ct. Rep. 58, but, on the contrary, an adherence to the right originally asserted. In these circumstances nothing more was involved than a question of pleading and practice in the Texas courts, and its decision by them is final.

Although regarding the question presented under the contract clause of the Constitution as sufficiently substantial to sustain our jurisdiction, we think it is so manifest *that it was decided rightly[417 by the Texas courts that the case ought not to be retained for further argument. See Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023; Richardson v. Louisville & N. R. Co. 169 U. S. 128, 42 L. ed. 687, 18 Sup. Ct. Rep. 268; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 49, 54 L. ed. 921, 926, 30 Sup. Ct. Rep. 676.

The motion to dismiss is denied, and that to affirm is granted.

Affirmed.

TEXAS & NEW ORLEANS RAILROAD COMPANY and Louisiana Western Railroad Company, and Their Surety, the United States Fidelity & Guaranty Company, Plffs. in Err.,

v.

FELIX GROSS and Theresa Gross.

(See S. C. Reporter's ed. 417.)

This case is governed by the decision in Texas & N. O. R. Co. v. Miller, ante, 789.

[No. 832.]

Submitted April 17, 1911. Decided May 15, 1911.

IN ERROR to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of the District Court of Harris County, in that state, in favor of plaintiffs in an action against a railroad company for the death of an employee. Affirmed.

See same case below (Tex. Civ. App.) 128 S. W. 1173.

Messrs. **Maxwell Evarts, H. M. Garwood**, and **A. L. Jackson** submitted the cause for plaintiffs in error.

Mr. **John W. Parker** submitted the cause for defendants in error.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This is a companion case with Texas & N. O. R. Co. v. Miller, just decided [221 U. S. 408, ante, 789, 31 Sup. Ct. Rep. 534], and arose out of the derailment of the same engine. It took substantially the same course in the state courts (— Tex. Civ. App. —, 128 S. W. 1173), and presents substantially the same questions.

For the reasons given in the other case, the motion to dismiss is denied, and that to affirm is granted.

Affirmed.

418]*SAMUEL GOMPERS, John Mitchell, and Frank Morrison, Petitioners,

v.

BUCK'S STOVE & RANGE COMPANY.

(See S. C. Reporter's ed. 418-452.)

Injunction — against boycott — verbal acts.

1. A court of equity may enjoin the continuance of a boycott, although spoken words or written matter were used as one of the instrumentalities by which the boycott was made effective.

[For other cases, see Injunction, I. e, in Digest Sup. Ct. 1908.]

Appeal — in contempt proceeding — reversible error — sentence on defective count.

2. A decree adjudging each defendant guilty of the independent acts set out in separate paragraphs of a petition charging them with contempt of an injunction order, and consolidating sentence without indicating how much of the punishment was imposed for the disobedience in any particular instance, should be reversed if it appears that the defendants have been sentenced on any charge which, in law or in fact, does not constitute a disobedience of the injunction.

[For other cases, see Appeal and Error, VIII. m, 2, in Digest Sup. Ct. 1908.]

Contempt — civil or criminal — punishment.

3. A punitive sentence appropriate only to a proceeding at law for criminal contempt where the contempt consisted in doing that which had been prohibited by an injunction could not properly be imposed in contempt proceedings which were instituted, entitled, tried, and, up to the moment of sentence, treated, as a part of the original cause in equity.

[For other cases, see Contempt, II. e, in Digest Sup. Ct. 1908.]

Contempt — effect of settlement of main cause — dismissal.

4. A proceeding in equity for civil contempt consisting in doing that which was forbidden by an injunction, where the only remedial relief possible was a fine payable to the complainant, must be dismissed without prejudice to the power and right of the court granting the injunction to punish for contempt by proper proceedings, where there has been a complete settlement between the parties of all the matters involved in the original equity cause.

[No. 372.]

Argued January 27 and 30, 1911. Decided May 15, 1911.

ON WRIT of Certiorari to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, punishing by imprisonment an alleged contempt of an injunction against the continuance of a boycott. Reversed and remanded, with directions to dismiss the proceedings without prejudice.

See same case below, 33 App. D. C. 516.

Statement by Mr. Justice **Lamar**:

This is a proceeding to reverse a judgment finding that Samuel Gompers, John Mitchell, and Frank Morrison were guilty of contempt in violating the terms of an injunction restraining them from continuing a boycott, or from publishing any statement that there was or had been a boycott against the Buck's Stove & Range Company. The contempt case grew out of litigation

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NOTE.—On restraining boycotts, strikes, and other combinations by employees interfering with commerce and business—see note to Shine v. Fox Bros. Mfg. Co. 86 C. C. A. 313.

On the right of labor union to notify persons not to deal with a certain individual —see notes to American Federation of Labor v. Buck's Stove & Range Co. 32 L.R.A.(N.S.) 748; Lindsay & Co. v. Montana Federation of Labor, 18 L.R.A.(N.S.) 707; and Hey v. Wilson, 16 L.R.A.(N.S.) 85.

As to whether proceeding for contempt for violation of injunction is civil or criminal—see note to Vilter Mfg. Co. v. Humphrey, 13 L.R.A.(N.S.) 591.

reported in 33 App. D. C. 83, 32 L.R.A. (N.S.) 748. It will only be necessary to briefly refer to the facts set out in that record.

The American Federation of Labor is composed of voluntary associations of labor unions with a large membership. It publishes the American Federationist, which has a wide circulation among the public and the 420]Federation. *Samuel Gompers is president and editor of the paper. John Mitchell is vice president of the Federation and president of the United Mine Workers, one of the affiliated unions. Frank Morrison has charge of the circulation of the paper. The Federation had a difference as to the hours of labor with the Buck's Stove & Range Company, of which J. W. Van Cleave was president, who was also president of the American Manufacturers' Association. This controversy over the hours of work resulted in a boycott being declared against the Buck's Stove & Range Company, and it was thereupon declared "unfair" and was published in the American Federationist on the "Unfair" and "We Don't Patronize" lists. The company filed in the supreme court of the District of Columbia its bill against the Federation, the defendants above named and other officers, alleging that the defendants had entered into a conspiracy to restrain the company's state and interstate business, in pursuance of which they had boycotted it, published it on the unfair lists, and had by threats also coerced merchants and others to refrain from buying Buck's products for fear that they themselves would be boycotted if they continued to deal with that company. The result of the boycott had been to prevent persons from dealing with it, and had greatly lessened its business and caused irreparable damage.

After a lengthy hearing, the court, on December 18, 1907, signed a temporary injunction, which became effective when the bond required was given on December the 23d. The order is published in the margin.† 421] *Thereafter testimony was regularly taken, and on March 23d, 1908, the injunction was made permanent with provisions almost identical with the temporary order of December 17, 1907.

From this final decree the defendants appealed, but before *a decision was[422 had, the Buck's Stove & Range Company began contempt proceedings by filing in the supreme court of the District a petition entitled "Buck's Stove & Range Company, plaintiff, v. The American Federation of Labor et al., defendants, No. 27,305, Equity," alleging that petitioner had "filed in this cause its original bill of complaint, naming as defendants, among others, Samuel Gompers, Frank Morrison, and John Mitchell." All of the record and testimony in the original cause was made a part of the petition, as follows:

"Reference is hereby made to the original bill and exhibits filed, the answer and amended answer of the defendants, the testimony taken on both sides, the original order restraining and enjoining the defendants *pendente lite*, and the final decree in the cause, and each and every other paper and proceeding in this cause from the institution of the suit to the filing of this *petition, and it is prayed that the[423 same may be taken and read as a part thereof at any and all hearings on this petition, whether in this court or on appeal from its decision herein rendered."

Some of the publications were charged to be in violation of the terms of the temporary injunction, dated December 23, 1907, and others were alleged to be in violation of the final decree dated March 23, 1908.

The petition set out in nine distinct paragraphs the speeches, editorials, and publications made at different times by the several defendants, charging that in each instance they continued and were intended to continue the boycott, and to republish the fact that the complainant was or had been on the "unfair list." It concluded by alleging that by the devices, means, speeches, and publications set forth, and in contempt of court, the defendants had disobeyed its orders and violated the injunction. The

†Ordered that the American Federation of Labor, Samuel Gompers, Frank Morrison, . . . John Mitchell, . . . their and each of their agents, servants, attorneys, confederates, and any and all persons acting in aid of or in conjunction with them or any of them, be, and they are hereby, restrained and enjoined until the final decree in said cause from conspiring, agreeing, or combining in any manner to restrain, obstruct, or destroy the business of the complainant, or to prevent the complainant from carrying on the same without interference from them or any of them, and from interfering in any manner with the sale of the product of the complainant's factory or business by defendants, or by any other person, firm, or corporation, and from declaring or threatening any boycott against the complainant or its business, or the product of its factory, or against any person, firm, or corporation engaged in handling or selling the said product, and from abetting, aiding, or assisting in any such boycott, and from printing, issuing, publishing, or distributing through the mails, or in any other manner, any copy or copies of the American Federationist, or any other printed or written newspapers, magazine, circular, letter, or other document or in-

prayer was (1) that the defendants be required to show cause why they should not be attached for contempt, and adjudged by the court to be in contempt of its order and its decree in this cause, and be punished for the same. (2) And that petitioner may have such other and further relief as the nature of its case may require. Signed: Buck's Stove & Range Company, by J. W. Van Cleve, President. It was also sworn to by the president of the company and signed by its solicitors.

A rule to show cause issued, requiring each of the defendants to show cause why they should not be adjudged to be in contempt and be punished for the same. Each of the defendants answered under oath, and, as treating the contempt proceeding as a part of the original cause, admitted the allegations as to the history of the litigation in paragraphs 2, 3, 4, and 5 of the petition, but "for greater accuracy refer to the record in this cause." Publications were admitted, but explained. Each of the defendants denied under oath that he had 424]been in disregard or *contempt of the court's order, and denied that any of the acts and charges complained of constituted a violation of the order. There were several issues of fact on which much evidence was taken. This related to the question of intent, and whether there had been a purpose and plan to evade any injunction which might be granted. There was also an issue as to whether John Mitchell had put a resolution to the convention of the United Mine Workers; whether Samuel Gompers and Frank Morrison had rushed the mailing of the January issue of the American Federationist, on December 22, so as to avoid the injunction dated December 17, which became operative on giving bond by complainant on December 23; and also whether they had thereafter sold and circulated copies of this issue containing the Buck's Stove Company on the "Unfair" and "We Don't Patronize" lists. Evidence was taken partly by deposition, partly before an examiner in chancery.

Each of the defendants was called as a witness by the complainant, and each testified as to facts on which the allegation of intent or evasion was based, and as to the publications, speeches, and resolutions which he was accused of having made, and which the petition alleged constituted an act of disobedience and contempt of court.

"The court made a special finding as to two of the nine charges, and then found

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strument whatsoever, which shall contain or in any manner refer to the name of the complainant, its business or its product in the "We Don't Patronize," or the "Unfair" list of the defendants, or any of them, their agents, servants, attorneys, confederates, or other person or persons acting in aid of or in conjunction with them, or which contains any reference to the complainant, its business or product, in connection with the term "Unfair" or with the "We Don't Patronize" list, or with any other phrase, word, or words of similar import, and from publishing or otherwise circulating, whether in writing or orally, any statement or notice of any kind or character whatsoever, calling attention of the complainant's customers, or of dealers or tradesmen, or the public, to any boycott against the complainant, its business or its product, or that the same are, or were, or have been declared to be "unfair," or that it should not be purchased or dealt in or handled by any dealer, tradesman, or other person whomsoever, or by the public, or any representation or statement of like effect or import, for the purpose of, or tending to, any injury to or interference with the complainant's business, or with the free and unrestricted sale of its product, or of coercing or inducing any dealer, person, firm, or corporation, or the public, not to purchase, use, buy, trade in, deal in, or have in possession stoves, ranges, heating apparatus, or other product of the complainant, and from threatening or intimidating any person or persons whomsoever from buying, selling, or otherwise dealing in the complainant's product, either directly or through orders, directions, or suggestions to committees, associations, officers, agents, or others, for the performance of any such acts or threats as hereinbefore above specified, and from in any manner whatsoever impeding, obstructing, interfering with, or restraining the complainant's business, trade, or commerce, whether in the state of Missouri or in other states and territories of the United States, or elsewhere wheresoever, and from soliciting, directing, aiding, assisting, or abetting any person or persons, company or corporation, to do or cause to be done any of the acts or things aforesaid.

And it is further ordered by the court that this order shall be in full force, obligatory and binding upon the said defendants and each of them and their said officers, members, agents, servants, attorneys, confederates, and all persons acting in aid of or in conjunction with them, upon the service of a copy thereof upon them or their solicitors or solicitor of record in this cause: Provided, The complainant shall first execute and file in this cause, with a surety or sureties to be approved by the court or one of the justices thereof, an undertaking to make good to the defendants all damage by them suffered or sustained by reason of wrongfully and inequitably suing out this injunction, and stipulating that the damages may be ascertained in such manner as the justice of this court shall direct, and that, on dissolving the injunction, he may give judgment thereon against the principal and sureties for said damages in the decree itself, dissolving the injunction.

that all three of the defendants were guilty of the several acts charged in paragraphs 17 and 26; that respondents Gompers and Morrison were guilty of the several acts charged in the 16th and 20th paragraphs; that respondent Morrison was guilty of the acts charged in the 25th paragraph; and that respondent Gompers was guilty of the several acts charged in the paragraphs 19, 21, 22, and 23. The finding concluded:

"The court, being fully advised in the premises, it is by it, this 23d day of December, A. D. 1908, considered that the 425]said respondents, Samuel *Gompers, Frank Morrison, and John Mitchell, are guilty of contempt in their said disobedience of the plain mandates of the said injunctions; and it is therefore ordered and adjudged that the said respondent Frank Morrison be confined and imprisoned in the United States jail in the District of Columbia for and during a period of six months; that the said respondent John Mitchell be confined and imprisoned in the said jail for and during a period of nine months; and that the respondent Samuel Gompers be confined and imprisoned in the said jail for and during a period of twelve months; said imprisonment as to each of said respondents to take effect from and including the date of the arrival of said respective respondents at said jail."

On the same day the defendants entered an appeal, which was allowed, and bail fixed. After notice to the defendants the complainant moved "the court to amend or supplement its decree by awarding to it its costs against the defendants under the proceedings in contempt against them." This motion was granted in an order which recited that "upon consideration of the motion of complainant, filed in the above cause, for award of its costs in the contempt proceedings in said cause against the defendants Samuel Gompers, John Mitchell, and Frank Morrison, and after argument by the solicitors of the respective parties, the motion is granted, and it is ordered that the complainant, the Buck's Stove & Range Company, do recover against the defendants named, its costs in the said contempt proceeding, to be taxed by the clerk, and that it have execution therefor as at law."

The parties also entered into a stipulation, the material portions of which are as follows:

"For the purpose of avoiding unnecessary cost in the matter of the appeal by the defendants Samuel H. Gompers, John Mitchell, and Frank Morrison from the judgment against them under the contempt proceedings in the above entitled cause, it 426]is stipulated that, . . . with *the approval of the court of appeals, the record in the above cause [Buck's Stove & Range Co. v. American Federation of Labor et al.:] . . . may be read from by either party to the appeal in said contempt proceedings, in so far as the same may be relevant and material, with like effect as if the said record of the original cause were embraced in the transcript, in the appeal from the said contempt proceedings."

This stipulation was signed by counsel for the defendants and for the Buck's Stove & Range Company.

The petition in the contempt proceeding, the answer, orders, final decree, amended decree, and stipulations, were all entitled in the original cause, "Buck Stove & Range Company v. The American Federation of Labor, Samuel Gompers, John Mitchell, Frank Morrison, et al." The appeal papers in the court of appeals of the District were, and those here on certiorari are, entitled "Samuel Gompers, John Mitchell, and Frank Morrison, appellants, v. The Buck Stove & Range Company."

On December 23d, 1908, the defendants were found guilty of contempt, and on the same day they appealed. On March 26, 1909, the court of appeals rendered its decision in favor of the Buck's Stove Company on the appeal from the decree of March 23d, 1908, and found that the decree was, in some respects, erroneous, and modified it accordingly. From that decision both parties appealed to this court,—the Buck's Stove Company contending that it was error to modify in any respect; the American Federation of Labor et al. contending that the court of appeals erred in not reversing and setting aside as a whole the decree granting the injunction.

There subsequently came on to be heard in the court of appeals of the District of Columbia the appeal from the decree in the contempt proceeding. On that hearing the Buck's Stove & Range Company moved to dismiss the appeal, because the evidence had not been incorporated *in a bill[427 of exceptions, claiming that it was a criminal proceeding and was governed by the practice applicable to law cases. This motion was resisted by the defendants, who contended that the contempt proceedings were a part of the equity cause, and that the case was to be governed by equity practice, in which the whole record could be examined on appeal.

The court of appeals held that the proceeding was for criminal contempt, and that for want of a bill of exceptions it could not examine the testimony, but must treat the findings of fact by the judge as conclusive, and limit its consideration to the question whether, as a matter of law,

the petition charged and the finding found acts which amounted to a violation of the injunction. It held that some of the facts alleged did constitute a good charge of contempt, and as each of the defendants was found to be guilty of at least one of such acts of disobedience constituting a violation of the injunction and a contempt of court, it held that the conviction must be sustained. This ruling was put on the ground that on a general verdict of guilty, the conviction and sentence on an indictment containing several counts, some of which were bad, must stand, if those which were good would sustain the sentence. It therefore not only refused to examine the evidence, to determine whether the proof was sufficient to sustain the conviction, but it also declined to consider the sufficiency of the other charges in the petition, of which the defendants were also found guilty. It affirmed the judgment of the supreme court of the District. The defendants thereupon applied for and obtained a writ of certiorari.

The appeal and cross appeal in the original cause of the Buck's Stove & Range Company v. American Federation of Labor were heard here together. During the argument it appeared that the parties had settled their differences, and on the ground 428]that the questions were moot *this court dismissed both appeals. 219 U. S. 581, ante, 345, 31 Sup. Ct. Rep. 472. Following this disposition of those appeals, and on the same day, the contempt case was called, and was argued by counsel for the Buck's Stove & Range Company and counsel for Samuel Gompers, Frank Morrison, and John Mitchell.

Messrs. **Alton B. Parker** and **Jackson H. Ralston** argued the cause, and, with Messrs. F. L. Siddons, W. E. Richardson, and John T. Walker, filed a brief for petitioners:

The contempt proceedings were civil, not criminal.

Re Nevitt, 54 C. C. A. 622, 117 Fed. 460; Bessette v. W. B. Conkey Co. 194 U. S. 328, 48 L. ed. 1002, 24 Sup. Ct. Rep. 665; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; Fischer v. Hayes, 19 Blatchf. 184, 7 Fed. 96; Garrigan v. United States, 23 L.R.A.(N.S.) 1295, 89 C. C. A. 494, 163 Fed. 19; Indianapolis Water Co. v. American Strawboard Co. 75 Fed. 972; Hendryx v. Fitzpatrick, 19 Fed. 813.

An order of a court in excess of its power in a case or proceeding within its jurisdiction as to parties and subject-matter is void; of no more force than if it had acted without jurisdiction of either the parties or the subject-matter; a mere nullity which cannot be made the basis of a proceeding for contempt or any proceeding whatever; and a party sentenced for disobedience of such an order will be discharged on habeas corpus.

Ex parte Rowland, 104 U. S. 604, 26 L. ed. 861; Ex parte Harding, 120 U. S. 782, 30 L. ed. 824, 7 Sup. Ct. Rep. 780; Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; Ex parte Terry, 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77; Re Coy, 127 U. S. 731, 32 L. ed. 274, 8 Sup. Ct. Rep. 1263; Ex parte Reed, 100 U. S. 13, 25 L. ed. 538; Ex parte Clark, 100 U. S. 399, 25 L. ed. 715; Ex parte Curtis, 106 U. S. 371, 27 L. ed. 232, 1 Sup. Ct. Rep. 381; Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935, 4 Am. Crim. Rep. 283; Re Tyler, 149 U. S. 180, 37 L. ed. 694, 13 Sup. Ct. Rep. 785; Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; Ex parte Parks, 93 U. S. 18, 23 L. ed. 787; Re Mills, 135 U. S. 263, 34 L. ed. 107, 10 Sup. Ct. Rep. 762; Ex parte Lange, 18 Wall. 163, 21 L. ed. 872; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; Re Nielsen, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672.

As an attribute of citizenship, every person has a right to speak, print, and circulate any statement or any speech in any terms he may see fit, subject only to responsibility for damages, to be ascertained in a civil action brought by any other person who shall claim to have sustained injury thereby, or to a penalty previously declared by legislative enactment to be imposed, and enforced by due process in a court of common law.

Patterson v. Colorado, 205 U. S. 454, 463–465, 51 L. ed. 879, 881, 882, 27 Sup. Ct. Rep. 556, 10 A. & E. Ann. Cas. 689; Life Asso. of America v. Boogher, 3 Mo. App. 173; State ex rel. Liversey v. Civil Dist. Judge, 34 La. Ann. 741; Lindsay & Co. v. Montana Federation of Labor, 37 Mont. 264, 18 L.R.A.(N.S.) 707, 127 Am. St. Rep. 722, 96 Pac. 127; Marks & H. Jeans Clothing Co. v. Watson, 168 Mo. 133, 56 L.R.A. 951, 90 Am. St. Rep. 440, 67 S. W. 391; Marlin Fire Arms Co. v. Shields, 171 N. Y. 384, 59 L.R.A. 310, 64 N. E. 163; 15 Parl. Deb. 341; May, Const. History of England; H. C. 1795, 32 Parl. Hist. 419.

The decision of the court of appeals can only be accounted for on one of two grounds, either (1) The court overlooked, at the moment of decision, that the existence of a secondary boycott was essential to the affirmance of the order; or (2) That it felt

constrained, in the absence of the testimony, to presume that there was evidence of a secondary boycott.

Gray v. Building Trades Council, 91 Minn. 171, 63 L.R.A. 760, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 A. & E. Ann. Cas. 172.

There is no remedy for an abuse of the right of free speech and the freedom of the press, except an action at law for damages or a criminal prosecution.

Patterson v. Colorado, 205 U. S. 454, 51 L. ed. 879, 27 Sup. Ct. Rep. 556, 10 A. & E. Ann. Cas. 689; Fleming v. Newton, 1 H. L. Cas. 363; Story, Const. § 1885; De Lolme, Const. England, 872; Abbott's Law Dict.; Negley v. Farrow, 60 Md. 176, 45 Am. Rep. 715; Cooley, Const. Lim. § 441; Kent, Com. 24; Gee v. Pritchard, 2 Swanst. 413, 19 Revised Rep. 87; Martin v. Wright, 6 Sim. 297; Seeley v. Fisher, 11 Sim. 581, 10 L. J. Ch. N. S. 274; Clark v. Freeman, 11 Beav. 112, 17 L. J. Ch. N. S. 142, 12 Jur. 149; Francis v. Flinn, 112 U. S. 385, 30 L. ed. 165, 6 Sup. Ct. Rep. 1148; Balliet v. Cassidy, 104 Fed. 705; Montgomery Ward & Co. v. South Dakota Retail Merchants' & H. Dealers' Asso. 150 Fed. 418

Messrs. **J. J. Darlington** and **Daniel Davenport** argued the cause and filed a brief for respondent:

The injunction was not invalid as being in violation of the constitutional right of free speech and a free press.

Rocky Mountain Bell Teleph. Co. v. Montana Federation of Labor, 156 Fed. 822; Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 22 L.R.A.(N.S.) 607, 128 Am. St. Rep. 492, 114 S. W. 997; Graham v. St. Charles Street R. Co. 47 La. Ann. 214, 27 L.R.A. 416, 49 Am. St. Rep. 366, 16 So. 806; State v. Goodwin, 37 La. Ann. 713; Reynolds v. Davis, 198 Mass. 300, 17 L.R.A. (N.S.) 162, 84 N. E. 457; Sherry v. Perkins, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; Erdman v. Mitchell, 207 Pa 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327; Purvis v. Local No. 500, U. B. C. & J. 214 Pa. 348, 12 L.R.A.(N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 A. & E. Ann. Cas. 275; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Goldberg, B. & Co. v. Stablemens' Union Local No. 8760, 149 Cal. 432, 8 L.R.A.(N.S.) 460, 117 Am. St. Rep. 145, 86 Pac. 806, 9 A. & E. Ann. Cas. 1219; Re Chiles (Texas v. White) 22 Wall. 157–167, 22 L. ed. 819–822; Beck v. Railway Teamsters' Protective Union, 118 Mich. 498 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; State v. Stewart, 59 Vt. 286, 59 Am. Rep. 710, 9 Atl. 559; Coeur d'Alene Consol. Min. Co. v. Miners' Union, 19 L.R.A. 382, 51 Fed. 267; Thomas v. Cincinnati, N. O. & T. P. R. Co. 4 Inters. Com. Rep. 788, 62 Fed. 805; National Teleph. Co. v. Kent, 156 Fed. 176; People v. Croswell. 3 Johns. Cas. 337; Gilbert v. Mickle, 4 Sandf. Ch. 357; Story, Const. § 1885; Ogden, Libel & Slander, chap. 11; Kent, Com. pp. 393, 394.

Circulars, placards, banners, inscriptions, letters, verbal notices, demands, and claims, however expressed, in aid of boycotts, have been held the proper subjects of injunction.

Sherry v. Perkins, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; My Maryland Lodge No. 186 v. Adt, 100 Md. 249, 68 L.R.A. 752, 59 Atl. 721; Jackson v. Stanfield, 137 Ind. 592, 23 L.R.A. 588, 36 N. E. 345, 37 N. E. 14; Gray v. Building Trades Council, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 A. & E. Ann. Cas. 172; Brown v. Jacobs' Pharmacy Co. 115 Ga. 439, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; Erdman v. Mitchell, 207 Pa. 79, 63 L.R.A. 534, 99 Am. St. Rep. 783, 56 Atl. 327; Purvis v. Local No. 500, U. B. C. & J. 214 Pa. 348, 12 L.R.A.(N.S.) 642, 112 Am. St. Rep. 757, 63 Atl. 585, 6 A. & E. Ann. Cas. 275; Emack v. Kane, 34 Fed. 46; Casey v. Cincinnati Typographical Union No. 3, 12 L.R.A. 193, 45 Fed. 135; Leowe v. California Federation of Labor, 139 Fed. 71; Rocky Mountain Bell Teleph. Co. v. Montana Federation of Labor, 156 Fed. 809; National Teleph. Co. v. Kent, 156 Fed. 173.

The instances in which Congress and the various state legislatures have prohibited publications of various kinds, which prohibitions have been sustained by the highest courts as not abridging the constitutional freedom of speaking and writing, are almost innumerable.

State v. McKee, 73 Conn. 28, 49 L.R.A. 542, 84 Am. St. Rep. 124, 46 Atl. 409; Re Banks, 56 Kan. 243, 42 Pac. 693; State v. Sykes, 28 Conn. 225; Lottery Case (Champion v. Ames) 188 U. S. 321, 356, 47 L. ed. 492, 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; State v. McCabe, 135 Mo. 450, 34 L.R.A. 130, 58 Am. St. Rep. 589, 37 S. W. 123; Com. v. Blanding, 3 Pick. 313, 15 Am. Dec. 214; People v. Most, 171 N. Y. 423, 58 L.R.A. 509, 64 N. E. 175.

Unlimited license of unlawful speech or publication without any check or hindrance, except by way of punishment for the commission of the offense, is not granted by the Constitution.

16 Cyc. Law & Proc. pp. 106–109; 2 Pom. Eq. Jur. § 630; Beach, Modern Law of Eq. Jur. § 780; Cowan v. Fairbrother, 118 N. C. 406, 32 L.R.A. 829, 54 Am. St. Rep.

733, 24 S. E. 212; Continental Ins. Co. v. Fire Underwriters, 67 Fed. 312; Davis v. New England R. Pub. Co. 203 Mass. 470, 25 L.R.A.(N.S.) 1024, 133 Am. St. Rep. 318, 89 N. E. 565; Citizens' Light, Heat & P. Co. v. Montgomery Light & Water Power Co. 171 Fed. 557; Bell v. Singer Mfg. Co. 65 Ga. 458; Pratt Food Co. v. Bird, 148 Mich. 632, 118 Am. St. Rep. 601, 112 N. W. 701; Davison v. Duncan, 7 El. & Bl 231, 26 L. J. Q. B. N. S. 104, 3 Jur. N. S. 613, 5 Week. Rep. 253; Stebbins v. Merritt, 10 Cush. 27; Brown v. Jacobs' Pharmacy Co. 115 Ga. 429, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; Walker v. Cronin, 107 Mass. 556; Arthur v. Oakes, 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 257, 63 Fed. 310, 9 Am. Crim. Rep. 169; Moran v. Dunphy, 177 Mass. 487, 52 L.R.A. 115, 83 Am. St. Rep. 289, 59 N. E. 125; Aikens v. Wisconsin, 195 U. S. 205, 49 L. ed. 154, 25 Sup. Ct. Rep. 3; Bitterman v. Louisville & N. R. Co. 207 U. S. 206–228, 52 L. ed. 172–185, 28 Sup. Ct. Rep. 91, 12 A. & E. Ann. Cas. 693; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 A. & E. Ann. Cas. 815; Bigelow v. Calumet & H. Min. Co. 155 Fed. 876; Minnesota v. Northern Securities Co. 194 U. S. 70, 71, 48 L. ed. 880, 881, 24 Sup. Ct. Rep. 598.

It is the right to hear and decide a question, and not the manner in which such question is decided, which constitutes jurisdiction.

People ex rel. Davis v. Sturtevant, 9 N. Y. 266, 59 Am. Dec. 536; Central U. Teleg. Co. v. State, 110 Ind. 206, 10 N. E. 922, 12 N. E. 136; Pokegama Sugar-Pine Lumber Co. v. Klamath River Lumber & Improv. Co. 86 Fed. 539; Forrest v. Price, 52 N. J. Eq. 16, 29 Atl. 215; Re Sawyer, 124 U. S. 220, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; People ex rel. Cauffman v. Van Buren, 136 N. Y. 255, 20 L.R.A. 446, 32 N. E. 775; Rhode Island v. Massachusetts, 12 Pet. 718, 9 L. ed. 1258; People v. Bouchard, 6 Misc. 459, 27 N. Y. Supp. 202.

Even the want of jurisdiction in some cases—*e. g.*, where the pecuniary amount involved is insufficient, or where the inadequacy of the remedy at law is erroneously assumed—will be insufficient to render the court's action void when attacked collaterally.

Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; Re Tyler, 149 U. S. 181, 37 L. ed. 694, 13 Sup. Ct. Rep. 785; Re Eaton, 51 Fed. 804.

The disobeyed order must be one wholly without the jurisdiction of the court which made it, so that it was, when made, *coram non judice*, in order to render a judgment in contempt reviewable.

Dodd v. Una, 40 N. J. Eq. 706, 5 Atl. 155.

Even if it be doubtful whether a court has jurisdiction of a case, it has jurisdiction, until its judgment declining jurisdiction is announced, to make orders preserving existing conditions; and a wilful disregard of those orders constitutes contempt.

United States v. Shipp, 203 U. S. 563, 51 L. ed. 319, 27 Sup. Ct. Rep. 165, 8 A. & E. Ann. Cas. 265; United States v. Shipp, 214 U. S. 386, 53 L. ed. 1041, 29 Sup. Ct. Rep. 637.

A fortiori, where the jurisdiction is not in dispute, and the only question is whether the court, in exercising it, reached a correct conclusion, disobedience and defiance of its orders must constitute that offense.

Fisher v. Hepburn, 48 N. Y. 53; Bangs v. Duckinfield, 18 N. Y. 596; Davis v. Packard, 10 Wend. 71; Hagerman v. Sutton, 91 Mo. 528, 4 S. W. 73; Chase v. Christianson, 41 Cal. 253; Rorer, Judicial Sales, § 59; Gray v. Bowles, 74 Mo. 423; Freeman, Judgm. § 118; Babb v. Bruere, 23 Mo. App. 608; Gilbert v. Priest, 65 Barb. 448; People ex rel. Gaynor v. McKane, 78 Hun, 154, 28 N. Y. Supp. 981; Rhodus v. Manning, 217 U. S. 597, 54 L. ed. 896, 30 Sup. Ct. Rep. 696; Richards v. West, 3 N. J. Eq. 456; Ketchum v. Edwards, 153 N. Y. 539, 47 N. E. 918; Franklin Union No. 4 v. People, 220 Ill. 367, 4 L.R.A.(N.S.) 1001, 110 Am. St. Rep. 248, 77 N. E. 176.

Mr. Justice **Lamar**, after making the foregoing statement, delivered the opinion of the court:

The defendants, Samuel Gompers, John Mitchell, and Frank Morrison, were found guilty of contempt of court in making certain publications prohibited by an injunction from the supreme court of the District of Columbia. They were sentenced to imprisonment for twelve, nine, and six months respectively, and this proceeding is prosecuted to reverse that judgment.

The order alleged to have been violated was granted in the equity suit of the "Buck's Stove & Range Company v. *The[436 American Federation of Labor and others," in which the court issued an injunction restraining all the defendants from boycotting the complainant, or from publishing or otherwise making any statement that the Buck's Stove & Range Company was, or had been, on the "Unfair" or "We Don't Patronize" lists. Some months later the complainant filed a petition in the cause, alleging that the three defendants above named, parties to the original cause, in

contempt of court and in violation of its order, had disobeyed the injunction by publishing statements which either directly or indirectly called attention to the fact that the Buck's Stove & Range Company was on the "Unfair" list, and that they had thereby continued the boycott which had been enjoined.

The defendants filed separate answers under oath, and each denied: (1) That they had been in contempt or disregard of the court's orders. (2) That the statements complained of constituted any violation of the order; and, on the argument, (3) contended that if the publication should be construed to amount to a violation of the injunction, they could not be punished therefor, because the court must not only possess jurisdiction of the parties and the subject-matter, but must have authority to render the particular judgment. Insisting, therefore, that the court could not abridge the liberty of speech or freedom of the press, the defendants claim that the injunction as a whole was a nullity, and that no contempt proceeding could be maintained for any disobedience of any of its provisions, general or special.

If this last proposition were sound, it would be unnecessary to go further into an examination of the case, or to determine whether the defendants had in fact disobeyed the prohibitions contained in the injunction. Ex parte Rowland, 104 U. S. 612, 26 L. ed. 864. But we will not enter upon a discussion of the constitutional question raised, for the general provisions of the [437]injunction did not, in terms *restrain any form of publication. The defendant's attack on this part of the injunction raises no question as to an abridgment of free speech, but involves the power of a court of equity to enjoin the defendants from continuing a boycott which, by words and signals, printed or spoken, caused or threatened irreparable damage.

Courts differ as to what constitutes a boycott that may be enjoined. All hold that there must be a conspiracy causing irreparable damage to the business or property of the complainant. Some hold that a boycott against the complainant, by a combination of persons not immediately connected with him in business, can be restrained. Others hold that the secondary boycott can be enjoined, where the conspiracy extends not only to injuring the complainant, but secondarily coerces or attempts to coerce his customers to refrain from dealing with him by threats that unless they do, they themselves will be boycotted. Others hold that no boycott can be enjoined unless there are acts of physical violence, or intimidation caused by threats of physical violence.

But whatever the requirement of the particular jurisdiction, as to the conditions on which the injunction against a boycott may issue, when these facts exist, the strong current of authority is that the publication and use of letters, circulars, and printed matter may constitute a means whereby a boycott is unlawfully continued, and their use for such purpose may amount to a violation of the order of injunction. Reynolds v. Davis, 198 Mass. 300, 17 L.R.A. (N.S.) 162, 84 N. E. 457; Sherry v. Perkins, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; Davis v. New England R. Pub. Co. 203 Mass. 470, 25 L.R.A.(N.S.) 1024, 133 Am. St. Rep. 318, 89 N. E. 565; Brown v. Jacobs' Pharmacy Co. 115 Ga. 431, 452, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; Gray v. Building Trades' Council, 91 Minn. 183, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 A. & E. Ann. Cas. 172; Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 472, 22 L.R.A.(N.S.) 607, 128 Am. St. Rep. 492, 114 S. W. 997; Thomas v. Cincinnati, N. O. & T. P. R. Co. 4 Inters. Com. Rep. 788, 62 Fed. 803, 821; Continental Ins. Co. v. Fire Underwriters, 67 Fed. 312; Beck v. Railway Teamsters' Protective Union, 118 Mich. 527, 42 L.R.A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; Pratt Food Co. v. Bird, 148 Mich. 632, 118 Am. St. Rep. 601, 112 N. W. 701; Barr v. Essex Trades' Council, 53 N. J. Eq. 102, 30 Atl. 881. *See also Lud-[438 wig v. Western U. Teleg. Co. 216 U. S. 156, 54 L. ed. 427, 30 Sup. Ct. Rep. 280; Bitterman v. Louisville & N. R. Co. 207 U. S. 206, 52 L. ed. 172, 28 Sup. Ct. Rep. 91, 12 A. & E. Ann. Cas. 693; Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637; Scully v. Bird, 209 U. S. 489, 52 L. ed. 903, 28 Sup. Ct. Rep. 597.

While the bill in this case alleged that complainant's interstate business was restrained, no relief was asked under the provisions of the Sherman anti-trust act. But if the contention be sound that no court, under any circumstances, can enjoin a boycott if spoken words or printed matter were used as one of the instrumentalities by which it was made effective, then it could not do so, even if interstate commerce was restrained by means of a blacklist, boycott, or printed device to accomplish its purpose. And this, too, notwithstanding § 4 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3201) of that act provides that where such commerce is unlawfully restrained, it shall be the duty of the Attorney General to institute proceedings in equity to prevent and enjoin violations of the statute.

In Loewe v. Lawler, 208 U. S. 306, 52 L. ed. 505, 28 Sup. Ct. Rep. 301, 13 A. &

E. Ann. Cas. 815, the statute was held to apply to any unlawful combination resulting in restraint of interstate commerce. In that case the damages sued for were occasioned by acts which, among other things, did include the circulation of advertisements. But the principle announced by the court was general. It covered any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital, or unlawful combinations of labor; and we think, also, whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words, or printed matter.

The court's protective and restraining powers extend to every device whereby property is irreparably damaged or commerce is illegally restrained. To hold that the 439]*restraint of trade under the Sherman anti-trust act, or on general principles of law, could be enjoined, but that the means through which the restraint was accomplished could not be enjoined, would be to render the law impotent.

Society itself is an organization, and does not object to organizations for social, religious, business, and all legal purposes. The law, therefore, recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association. By virtue of this right, powerful labor unions have been organized.

But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights, and appealing to the preventive powers of a court of equity. When such appeeal is made, it is the duty of government to protect the one against the many, as well as the many against the one.

In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published gives the words "Unfair," "We Don't Patronize," or similar expressions, a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called "verbal acts," and as much subject to injunction as the use of any other force whereby property is unlawfully damaged. When the facts in such cases warrant it, a court having jurisdiction of the parties and subject-matter has power to grant an injunction.

Passing, then, to the consideration of the question as to whether the defendants disobeyed the injunction and were *there-[440 fore guilty of contempt, we are met with the objection that, for want of a bill of exceptions, we must treat the decree as conclusive as to the fact of disobedience, and can only examine the petition and the finding to determine whether one charges and the other finds acts which constitute a contempt of court. This view was adopted by the majority of the court of appeals, which treated this as a criminal proceeding, refused to examine the testimony, and affirmed the judgment in analogy to the rule that, on a general verdict of guilty upon an indictment containing several counts, some of which were bad, the conviction would not be reversed if there was one good count warranting the judgment.

The rule originated in cases where the finding of guilt was by the jury while the sentence was by the judge. In such cases the presumption is that the judge ignored the finding of the jury on the bad counts, and sentenced only on those which were sufficient to sustain the conviction.

But there is no room for such presumption here. The trial judge made no general finding that the defendants were guilty. But in one decree he adjudged that each defendant was respectively guilty of the nine independent acts set out in separate paragraphs of the petition. Having found that each was guilty of these separate acts, he consolidated the sentence without indicating how much of the punishment was imposed for the disobedience in any particular instance. We cannot suppose that he found the defendants guilty of an act charged unless he considered that it amounted to a violation of the injunction. Nor can we suppose that, having found them guilty of these nine specific acts, he did not impose some punishment for each. Instead, therefore, of affirming the judgment if there is one good count, it should be reversed if it should appear that the defendants have been sentenced on any count which, in law or in fact, did not constitute a disobedience of the injunction.

*But, in making such investigation,[441 it is again insisted that this is a proceeding at law for criminal contempt, where the findings of fact by the trial judge must be treated as conclusive, and that our investigation must be limited solely to the question whether, as a matter of law, the acts

of alleged disobedience set out in the finding constitute contempt of court.

This contention on the part of the Buck's Stove & Range Company prevents a consideration of the case on its merits, and makes it necessary to enter into a discussion of questions more or less technical, as to whether this was a proceeding in equity or at law. Where results so controlling depend upon proper classification, it becomes necessary carefully to consider whether this was a case at law for criminal contempt, where the evidence could not be examined, for want of a bill of exceptions; or a case in equity for civil contempt, where the whole record may be examined on appeal and a proper decree entered.

Contempts are neither wholly civil nor altogether criminal. And "it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both." Bessette v. W. B. Conkey Co. 194 U. S. 329, 48 L. ed. 1002, 24 Sup. Ct. Rep. 665. But in either event, and whether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant has disobeyed the order, and a prayer that he be attached and punished therefor. It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, pay-
442]able to the complainant, but also *in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order.

For example: If a defendant should refuse to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance required by a decree for specific performance, he could be committed until he complied with the order. Unless there were special elements of contumacy, the refusal to pay or to comply with the order is treated as being rather in resistance to the opposite party than in contempt of the court. The order for imprisonment in this class of cases, therefore, is not to vindicate the authority of the law, but is remedial, and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, as aptly said in Re Nevitt, 54 C. C. A. 622, 117 Fed. 451, "he carries the keys of his prison in his own pocket." He can end the sentence and discharge himself at any moment by doing what he had previously refused to do.

On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done, nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense. Such imprisonment operates not as a remedy coercive in its *nature, but solely as punishment for[443 the completed act of disobedience.

It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. But such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or *vice versa*.

The fact that the purpose of the punishment could be examined with a view to determining whether it was civil or criminal is recognized in Doyle v. London Guarantee & Acci. Co. 204 U. S. 605, 607, 51 L. ed. 644, 645, 27 Sup. Ct. Rep. 313, where it was said that "while it is true that the fine imposed is not made payable to the opposite party, compliance with the order relieves from payment, and in that event there is no final judgment of either fine or imprisonment. . . . The proceeding is against a party, the compliance with the order avoids the punishment, and there is nothing in the nature of a criminal suit or judgment imposed for public purposes upon a defendant in a criminal proceed-

ing." Bessette v. W. B. Conkey Co. 194 U. S. 328, 48 L. ed. 1002, 24 Sup. Ct. Rep. 665; Re Nevitt, 54 C. C. A. 622, 117 Fed. 448; Howard v. Durand, 36 Ga. 359, 91 Am. Dec. 767; Phillips v. Welch, 11 Nev. 187.

The distinction between refusing to do an act commanded (remedied by imprisonment until the party performs the required act), and doing an act forbidden (punished by imprisonment for a definite term), is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment.

In this case the alleged contempt did not consist in the defendant's refusing to [444]do any affirmative act required, *but rather in doing that which had been prohibited. The only possible remedial relief for such disobedience would have been to impose a fine for the use of complainant, measured in some degree by the pecuniary injury caused by the act of disobedience. Rapalje, Contempts, §§ 131–134; Wells, F. & Co. v. Oregon R. & Nav. Co. 9 Sawy. 601, 19 Fed. 20; Re North Bloomfield Gravel Min. Co. 11 Sawy. 590, 27 Fed. 795; Sabin v. Fogarty, 70 Fed. 483.

But when the court found that the defendants had done what the injunction prohibited, and thereupon sentenced them to jail for fixed terms of six, nine, and twelve months, no relief whatever was granted to the complainant, and the Buck's Stove & Range Company took nothing by that decree.

If, then, as the court of appeals correctly held, the sentence was wholly punitive, it could have been properly imposed only in a proceeding instituted and tried as for criminal contempt. The question as to the character of such proceedings has generally been raised, in the appellate court, to determine whether the case could be reviewed by writ of error or on appeal. Bessette v. W. B. Conkey Co. 194 U. S. 324, 48 L. ed. 997, 24 Sup. Ct. Rep. 665. But it may involve much more than mere matters of practice. For, notwithstanding the many elements of similarity in procedure and in punishment, there are some differences between the two classes of proceedings which involve substantial rights and constitutional privileges. Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself. Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; United States v. Jose, 63 Fed. 951; State v. Davis, 50 W. Va. 100, 40 S. E. 331, 14 Am. Crim. Rep. 282; King v. Ohio & M. R. Co. 7 Biss. 529, Fed. Cas. No. 7,800; Sabin v. Fogarty, 70 Fed. 482; Drakeford v. Adams, 98 Ga. 724, 25 S. E. 833.

There is another important difference. Proceedings for *civil contempt are be-[445 tween the original parties, and are instituted and tried as a part of the main cause. But, on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause. The court of appeals, recognizing this difference, held that this was not a part of the equity cause of the Buck's Stove & Range Company v. American Federation of Labor, and said that "the order finding the defendants guilty of contempt was not an interlocutory order in the injunction proceeding. It was in a separate action, one personal to the defendants, with the defendants on one side and the court vindicating its authority on the other." [33 App. D. C. 567.]

In this view we cannot concur. We find nothing in the record indicating that this was a proceeding with the court, or more properly the government, on one side and the defendants on the other. On the contrary, the contempt proceedings were instituted, entitled, tried, and, up to the moment of sentence, treated as a part of the original cause in equity. The Buck's Stove & Range Company was not only the nominal, but the actual, party on the one side, with the defendants on the other. The Buck's Stove Company acted throughout as complainant in charge of the litigation. As such and through its counsel, acting in its name, it made consents, waivers, and stipulations only proper on the theory that it was proceeding in its own right in an equity cause, and not as a representative of the United States, prosecuting a case of criminal contempt. It appears here also as the sole party in opposition to the defendants; and its counsel, in its name, have filed briefs and made arguments in this court in favoring affirmance of the judgment of the court below.

But, as the court of appeals distinctly held that this was not a part of the equity cause, it will be proper to set out in some detail the facts on this subject as they appear in the record.

*In the first place the petition was[446 not entitled "United States v. Samuel Gompers et al." or "In re Samuel Gompers et al.," as would have been proper, and, according to some decisions, necessary, if the proceedings had been at law for criminal contempt. This is not a mere matter of form, for manifestly every citizen, however unlearned in the law, by mere inspection of

the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution, whether it sought to benefit the complainant or vindicate the court's authority. He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge against him, but to know that it is a charge, and not a suit. United States v. Cruikshank, 92 U. S. 542, 559, 23 L. ed. 588, 593.

Inasmuch, therefore, as proceedings for civil contempt are a part of the original cause, the weight of authority is to the effect that they should be entitled therein. But the practice has hitherto been so unsettled in this respect that we do not now treat it as controlling, but only as a fact to be considered along with others, as was done in Worden v. Searle, 121 U. S. 25, 30 L. ed. 857, 7 Sup. Ct. Rep. 814, in determining a similar question. Thus considering it, we find that the petition instituting the contempt proceeding was entitled in the main cause, "Buck's Stove & Range Company, plaintiff, v. American Federation of Labor et al., defendants, No. 27,305, Equity," and that the answers of the defendants, every report by the examiner in chancery, every deposition, motion, and stipulation, every order, including the final decree and the amended decree, were all uniformly entitled in the equity cause. Not only the pleadings in the original cause, but all the testimony, oral and written, was, by reference in the petition, made a part of the contempt proceedings. The trial judge quoted largely from this oral testimony thus in-
447]troduced in bulk, and the severity *and character of the sentence indicate that he was largely influenced by this evidence, which disclosed the great damage done to the complainant's business by the boycott before the injunction issued.

It is argued the defendants' answers concluded with a statement that, as questions of criminal and quasi criminal intent were involved, a jury was better qualified to pass on the issue than a judge, and in the event he should be of opinion that the charges had not been sworn away, they moved that issues of fact should be framed and submitted to a jury. Such a motion was not inconsistent with the theory that this was a proceeding for civil contempt in equity, but was in strict accord with the practice under which questions of fact may be referred by the chancellor to a jury for determination.

In proceedings for civil contempt, the complainant, if successful, is entitled to costs. Rapalje, Contempts, § 132. And evidently on the theory that this was a civil proceeding, and to be governed by the rules applicable to an equity cause, the Buck's Stove & Range Company moved the court to amend the decree so as to award to it "its costs." After argument by solicitors for both parties, the motion was granted, and the court adjudged that the complainant do recover against the defendants its costs in said contempt proceeding. This ruling was no doubt correct, as this was a civil case, but could not have been granted in a proceeding for criminal contempt, where costs are not usually imposed in addition to the imprisonment. Where they are awarded, they go to the government, for the use of its officers, as held by Justice Miller, on circuit. Durant v. Washington County, Woolw. 377, Fed. Cas. No. 4,191.

In another most important particular the parties clearly indicated that they regarded this as a civil proceeding. The complainant made each of the defendants a witness for the company, and, as such, each was required to testify *against him-[448 self,—a thing that most likely would not have been done or suffered if either party had regarded this as a proceeding at law for criminal contempt, because the provision of the Constitution that "no person shall be compelled in any criminal case to be a witness against himself" is applicable not only to crimes, but also to quasi-criminal and penal proceedings. Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

Both on account of the distinct ruling to the contrary by the court of appeals, and the importance of the results flowing from a proper classification, we have with some detail discussed the facts appearing in the record, showing that both parties treated this as a proceeding which was a part of the original equity cause. In case of doubt this might, of itself, justify a determination of the question in accordance with the mutual understanding of the parties, and the procedure adopted by them. But there is another and controlling fact, found in the brief but sufficient prayer with which the petition concludes. We have already shown that in both classes of cases there must be allegation and proof that the defendant was guilty of contempt, and a prayer that he be punished. The classification, then, depends upon the question as to whether the punishment is punitive, in vindication of the court's authority, or whether it is remedial, by way of a coercive imprisonment, or a compensatory fine, payable to the complainant. Bearing these distinctions in mind, the prayer of the petition is significant and determinative. After setting out in detail the acts of

alleged disobedience, the petition closes with the following prayers: (1) "That the defendants show cause why they should not be adjudged in contempt of court and be punished for the same;" and (2) "that petitioner may have such other and further relief as the nature of its case may require."

"Its case," not the government's case. "That petitioner may have relief," not that 449]the court's authority *may be vindicated. The Buck's Stove & Range Company was not asserting the rights of the public, but seeking "such other and further relief as the nature of its case may require." If it had asked that the defendants be forced to pay a fine to the government, or be punished by confinement in jail, there could have been no doubt that punishment pure and simple was sought.

On the other hand, if it had prayed that the court impose a fine payable to the Buck's Stove & Range Company, the language would have left no doubt that remedial punishment was sought. It is not different in principle, if, instead of praying specifically for a fine payable to itself, it asks generally for "such relief as the nature of its case may require." In either event such a prayer was appropriate to a civil proceeding, and under it the court could have granted that form of relief to which the petitioner was entitled. But, as the act of disobedience consisted not in refusing to do what had been ordered, but in doing what had been prohibited by the injunction, there could be no coercive imprisonment, and therefore the only relief, if any, which "the nature of petitioner's case" admitted, was the imposition of a fine, payable to the Buck's Stove & Range Company.

There was therefore a departure—a variance—between the procedure adopted and the punishment imposed, when, in answer to a prayer for remedial relief, in the equity cause, the court imposed a punitive sentence appropriate only to a proceeding at law for criminal contempt. The result was as fundamentally erroneous as if in an action of "A vs. B, for assault and battery," the judgment entered had been that the defendant be confined in prison for twelve months.

If, then, this sentence for criminal contempt was erroneously entered in a proceeding which was a part of the equity cause, it would be necessary to set aside the order of imprisonment, examine the 450]testimony, and thereupon *make such decree as was proper, according to the practice in equity causes on appeal. And if, upon the examination of the record, it should appear that the defendants were in fact and in law guilty of the contempt charged, there could be no more important duty than to render such a decree as would serve to vindicate the jurisdiction and authority of courts to enforce orders and to punish acts of disobedience. For while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration, whose judgments and decrees would be only advisory.

If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery.

This power "has been uniformly held to be necessary to the protection of the court from insults and oppression while in the ordinary exercise of its duty, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of citizens." Bessette v. W. B. Conkey Co. 194 U. S. 333, 48 L. ed. 1004, 24 Sup. Ct. Rep. 665.

There has been general recognition of the fact that the courts are clothed with this power, and must be authorized to exercise it without referring the issues of fact or law to another tribunal or to a jury in the same tribunal. For, if there was no such authority in the first instance, there would be no power to enforce its orders if they were disregarded in such independent investigation. Without authority to act promptly and independently the courts could not administer public justice or enforce the rights of private litigants. Bessette v. W. B. Conkey Co. 194 U. S. 337, 48 L. ed. 1005, 24 Sup. Ct. Rep. 665.

Congress, in recognition of the necessity of the case, has *also declared (Rev.[451 Stat. 725, U. S. Comp. Stat. 1901, p. 583) that the courts of the United States "shall have power . . . to punish by fine or imprisonment . . . contempts of their authority," including "disobedience . . . by any party . . . to any lawful . . . order . . . of the said courts." But the very amplitude of the power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper. For that reason we can proceed no further in this case, because it is both unnecessary and improper to

make any decree in this contempt proceeding.

For, on the hearing of the appeal and cross appeal in the original cause in which the injunction was issued, it appeared from the statement of counsel in open court that there had been a complete settlement of all matters involved in the case of Buck's Stove & Range Co. v. American Federation of Labor. This court therefore declined to further consider the case, which had become moot, and those two appeals were dismissed. 219 U. S. 581, ante, 345, 31 Sup. Ct. Rep. 472. When the main case was settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled,—of course, without prejudice to the power and right of the court to punish for contempt by proper proceedings. Worden v. Searls, 121 U. S. 27, 30 L. ed. 858, 7 Sup. Ct. Rep. 814. If this had been a separate and independent proceeding at law for criminal contempt, to vindicate the authority of the court, with the public on one side and the defendants on the other, it could not, in any way, have been affected by any settlement which the parties to the equity cause made in their private litigation.

But, as we have shown, this was a proceeding in equity for civil contempt, where the only remedial relief possible was a fine, payable to the complainant. The company prayed "for such relief as the nature of its case may require," and when the main cause was terminated by a settlement of all differences between the parties, the complainant did not require, and was not entitled to, 452]any *compensation or relief of any other character. The present proceeding necessarily ended with the settlement of the main cause of which it is a part. Bessette v. W. B. Conkey Co. 194 U. S. 328, 333, 48 L. ed. 1002, 1004, 24 Sup. Ct. Rep. 665; Worden v. Searls, 121 U. S. 27, 30 L. ed. 858, 7 Sup. Ct. Rep. 814; State v. Nathans, 49 S. C. 207, 27 S. E. 52. The criminal sentences imposed in the civil case, therefore, should be set aside.

The judgment of the Court of Appeals is reversed, and the case remanded, with directions to reverse the judgment of the Supreme Court of the District of Columbia, and remand the case to that court with direction that the contempt proceedings instituted by the Buck's Stove & Range Company be dismissed, but without prejudice to the power and right of the Supreme Court of the District of Columbia to punish by a proper proceeding, contempt, if any, committed against it.

Reversed.

MONTELLO SALT COMPANY, Plff. in Err.,
v.
STATE OF UTAH.

(See S. C. Reporter's ed. 452–467.)

Public lands — grant to state — lands included.

Only such saline lands as should be selected as a part of the other lands granted and not specifically located were granted to the state of Utah by the provisions of the enabling act of July 16, 1894 (28 Stat. at L. 109, chap. 138), § 8, granting to the state for university purposes public lands to the extent of two townships in quantity, and in addition 110,000 acres, to be selected and located as therein provided, "and including all the saline lands in said state."

[For other cases, see Public Lands, 59–65, in Digest Sup. Ct. 1908.]

[No. 136.]

Argued April 21, 1911. Decided May 29, 1911.

IN ERROR to the Supreme Court of the State of Utah to review a decree which affirmed a decree of the District Court of the Third Judicial District in that state, in favor of the state in a suit to establish its title to salt lands. Reversed and remanded for further proceedings.

See same case below, 34 Utah, 458, 98 Pac. 549.

The facts are stated in the opinion.

Messrs. **S. T. Corn** and **Jesse R. Barton** argued the cause, and, with Messrs. James N. Kimball, W. L. Maginnis, and S. A. McGinnis, filed a brief for plaintiff in error:

The settled rule of construction is that a public grant, whether of property, franchises, or privileges, is construed strictly in favor of the public. Whatever is not unequivocally granted is withheld.

Sutherland, Stat. Constr. § 387; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 740, 23 L. ed. 634, 637; Dubuque & P. R. Co. v. Litchfield, 23 How. 66, 16 L. ed. 500; Barden v. Northern P. R. Co. 154 U. S. 288, 321, 38 L. ed. 992, 999, 14 Sup. Ct. Rep. 1030.

"And" and "or" are considered of less importance in construing statutes, and their direct meaning is more readily departed from, than other words; and, if necessary to give effect to the intention of the parties to an instrument, will be excluded or disregarded altogether.

Chicago, B. & Q. R. Co. v. Bartlett, 120 Ill. 603, 11 N. E. 867; Witherspoon v. Hernigan, 97 Tex. 98, 76 S. W. 447; People v. Lytle, 7 App. Div. 553, 40 N. Y. Supp.

161; Boyles v. McMurphy, 55 Ill. 236; Simpson v. Morris, 3 Yeates, 104.

The ordinary signification of the term "including" as defined by the dictionaries, both Webster and the Standard, is "to confine within; to hold; to contain; to shut up; embrace, and involve."

See also 4 Words & Phrases, p. 3500; Re Goetz, 71 App. Div. 272, 75 N. Y. Supp. 750; Neher v. McCook County, 11 S. D. 422, 78 N. W. 998; Brainard v. Darling, 132 Mass. 218; Henry v. Henry, 81 Ky. 342.

There is no canon of statutory construction more emphatic than that every legislative enactment is to be construed to comply with the intent of the legislature, when that intent can be ascertained.

Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Maben v. Rosser, — Okla. —, 103 Pac. 674; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; Newhall v. Sanger, 92 U. S. 761, 23 L. ed. 769; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; Moore v. Magrath, Cowp. pt. 1, p. 9; United States v. Northern P. R. Co. 170 Fed. 498, affirmed in 101 C. C. A. 117, 176 Fed. 706.

In construing a statute, aid may be derived from attention to the state of things as it appeared to the legislature when the statute was enacted:

United States v. Union P. R. Co. 91 U. S. 72, 23 L. ed. 224; Platt v. Union P. R. Co. 99 U. S. 48, 25 L. ed. 424; Smith v. Townsend, 148 U. S. 490, 37 L. ed. 533, 13 Sup. Ct. Rep. 634; Johnston v. Morris, 19 C. C. A. 229, 44 U. S. App. 303, 72 Fed. 890.

The government has pursued a very liberal policy toward the new states admitted into the Union, granting in each instance large tracts of land from the public domain to aid in education, construction of internal improvements, charities, and even in the support of penal institutions; but with only four exceptions (counting the grant to Utah), these grants have been definite and certain in quantity, and, as it happens, these exceptions all relate to salt springs or saline lands, and will be more specifically mentioned further on. Also, whenever the courts have been called upon to construe these grants as to the quantity or character of the thing granted, it has invariably been held that, unless otherwise clearly stated, neither minerals nor saline lands nor salt springs are granted.

Morton v. Nebraska, 21 Wall. 660, 22 L. ed. 639, 12 Mor. Min. Rep. 451; United States v. Northern P. R. Co. 170 Fed. 498, 101 C. C. A. 117, 176 Fed. 706; Garrard v. Silver Peak Mines, 82 Fed. 578; Mullan v. United States, 118 U. S. 271, 30 L. ed. 170, 6 Sup. Ct. Rep. 1041; Ivanhoe Min. Co. v. Keystone Consol. Min. Co. 102 U. S. 167, 26 L. ed. 126, 13 Mor. Min. Rep. 214; Newhall v. Sanger, 92 U. S. 761, 23 L. ed. 769; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634.

Allowing something for the ever-growing liberality of Congress in matters of education and public charities, yet it must be presumed that it was not the intention to treat Utah materially different from its predecessors, and especially not materially different from the immediately surrounding states. It is this intention of Congress that must be determined by this court, and that intention must govern.

United States v. Raisch, 144 Fed. 486; Hawaii v. Mankichi, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787, 12 Am. Crim. Rep. 465; People ex rel. Atty. Gen. v. Utica Ins. Co. 15 Johns. 381, 8 Am. Dec. 243; Lau Ow Bew v. United States, 144 U. S. 47, 59, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517; Board of Works v. Spackman, L. R. 13 Q. B. Div. 887, 53 L. J. Mag. Cas. N. S. 142, 51 L. T. N. S. 760; New York Indians v. United States, 170 U. S. 1, 42 L. ed. 927, 18 Sup. Ct. Rep. 531; Heydenfeldt v. Daney Gold & S. Min. Co. 93 U. S. 634, 23 L. ed. 995, 13 Mor. Min. Rep. 204.

Mr. **William D. Riter** argued the cause, and, with Mr. Albert R. Barnes, Attorney General of Utah, and Messrs. Waldemar Van Cott and Edward M. Allison, Jr., filed a brief for defendant in error:

Congress not infrequently uses "including" in the sense of "also."

United States v. Pierce, 77 C. C. A. 425, 147 Fed. 199; Hiller v. United States, 45 C. C. A. 229, 106 Fed. 73.

"Including" is not a word of limitation; rather is it a word of enlargement, and in ordinary signification implies that something else has been given beyond the general language which precedes it.

Re Goetz, 71 App. Div. 272, 75 N. Y. Supp. 750.

The lawmaker is presumed to know the rules of grammar.

United States v. Goldenberg, 168 U. S. 95, 103, 42 L. ed. 394, 398, 18 Sup. Ct. Rep. 3.

It is a familiar rule of statutory construction, that effect must be given, if possible, to every word in a statute.

Washington Market Co. v. Hoffman, 101 U. S. 112, 115, 25 L. ed. 782, 783; Allen v. Louisiana, 103 U. S. 80, 84, 26 L. ed.

318, 319; Montclair Twp. v. Ramsdell, 107 U. S. 147, 152, 27 L. ed. 431, 432, 2 Sup. Ct. Rep. 391; United States v. Fisher, 109 U. S. 143, 145, 27 L. ed. 885, 886, 3 Sup. Ct. Rep. 154; Murphy v. Utter, 186 U. S. 95, 111, 46 L. ed. 1070, 1078, 22 Sup. Ct. Rep. 776.

The rule of construction invoked by the plaintiff in error, that a public grant is construed strictly against the grantee, can come into play only where there is a real and substantial doubt as to what Congress intends.

United States v. Denver & R. G. R. Co. 150 U. S. 1, 14, 37 L. ed. 975, 979, 14 Sup. Ct. Rep. 11; Richmond, F. & P. R. Co. v. Louisa R. Co. 13 How. 71, 86, 14 L. ed. 55, 62.

The enabling act being a compact between the United States and the state of Utah, it should receive the same construction as an ordinary contract.

Tennessee v. Whitworth, 117 U. S. 129, 137, 29 L. ed. 830, 832, 6 Sup. Ct. Rep. 645.

Where a state is the grantee, a more liberal rule of construction prevails.

Indiana v. Milk, 11 Biss. 197, 11 Fed. 389.

Mr. Justice **McKenna** delivered the opinion of the court:

The question in the case is whether § 8 of the enabling act of the state of Utah [28 Stat. at L. 109, chap. 138] granted to the state all of the saline lands within the state, or only enabled them to be selected as part of other lands granted and not specifically located.

Section 8 reads as follows:

"That lands to the extent of two townships in quantity, authorized by the third section of the act of February twenty-one, eighteen hundred and fifty-five [10 Stat. at 459]L. 611, chap. 117], to be reserved *for the establishment of the University of Utah, are hereby granted to the state of Utah for university purposes, to be held and used in accordance with the provisions of this section; and any portions of said lands that may not have been selected by said territory may be selected by said state. *That in addition to the above, one hundred and ten thousand acres of land, to be selected and located as provided in the foregoing section of this act, and including all saline* lands in said state, are hereby granted to said state, for the use of said university, and two hundred thousand acres for the use of an agricultural college therein. That the proceeds of the sale of said lands, or any portion thereof, shall constitute permanent funds, to be safely invested and held by said state, and the income thereof to be used exclusively for the purposes of such university and agricultural college, respectively."

We have italicized the clause upon which the answer to the question turns. The special stress of it comes on the words "and including," and whether they carry a grant of all the saline lands, or permit merely the selection of such lands as part of the 110,000 acres.

Construing the statute as granting all of the saline lands, the state brought suit against the Montello Salt Company, herein called the salt company, in the district court of the third judicial district, alleging that the salt company was in possession of certain of the lands, specifically describing them, claiming title under certain placer mining locations, and was threatening to take up and remove valuable deposits of salt therefrom. It was prayed that the salt company be adjudged to have no right, title, or interest in the lands, and that the state be decreed their owner. An injunction pending the trial was also prayed, and general relief.

A preliminary injunction was issued. The answer of the salt company admitted that the lands were saline, and alleged that it was the equitable owner of them by *virtue of conveyance from the orig-[460 inal owners, about 1,500 in number, all of whom were qualified to enter mineral claims under the land laws of the United States, including saline lands, and that such persons in groups of eight entered upon 160 acres of the lands, discovered salt thereon, and did all that was necessary for the location of the same, including the filing of a notice of location, to be recorded in the office of the recorder within and for Tooele county, where the lands were situated. And it is alleged that thereafter, for the purpose of more economically developing the property, the locators conveyed by quit-claim deeds their interest to the company and became stockholders of it.

It alleged that on the 16th day of July, 1894, date of the passage of the enabling act, the lands were not known to be saline, but were so covered with soil and other earthly substances that their true character was concealed, and were not discovered to be saline until November, 1906; "whereas, it is alleged, in truth and fact, that under such substances and soil the said lands are covered by a deposit of salt varying from 4 to 8 feet deep;" that prior to the discovery of their character, the state had selected and received grants from the United States for the full amount of the 110,000 acres selected and located as provided in §§ 7 and 8 of the enabling act, and the grant by the United States for the

university satisfied. It is further alleged that at the time of the passage of the enabling act only acres has been classified by the Surveyor General of the United States within and for the then territory of Utah, as saline lands and that said amount was in the contemplation of Congress when it passed the act, and that the same was duly approved.

The lands, it is alleged, were subject to location under the placer laws of the United States.

A demurrer by the state to the answer was sustained, and, the salt company refus-
461]ing to proceed further, judgment *was entered for the state in accordance with the prayer of the complainant, and the injunction was made perpetual. The judgment was affirmed by the supreme court of the state.

Three interpretations of the act are presented. The state insists that all of the saline lands were granted, known and unknown. The salt company presents two views, either of which, it is contended, determines in its favor. (1) If there is a grant of saline lands in addition to the grant of 110,000 acres, it is only of lands known to be saline at the date of the act. (2) There is no grant of saline lands except as they may be selected as part of the grant of the 110,000 acres.

The state puts its reliance on the word "including," and urges that Congress used the word—(1) "in its true and proper sense, as defined by lexicographers; (2) in the sense of 'also.'"

In support of the first ground, the following definitions are given from Webster: "1. To confine within; to hold; to contain; to shut up, as, the shell of a nut *includes* the kernel; a pearl is *included* in a shell. 2. To comprehend, as a genus the species, the whole a part, an argument or reason the inference; to contain; to embrace; to relate to; to pertain to; as Great Britain *includes* England, Scotland, and Wales."

And then the argument is that Congress grants, first, two townships in a county (this was an affirmation of a prior grant to the territory), and in addition 110,000 acres of land, to be selected and located in legal subdivisions (§ 7 referred to in § 8 for the manner of selection) within the state in such manner as the legislature may provide, with the approval of the Secretary of the Interior (§ 6 referred to in § 7 for the manner of selection). It is hence argued that the 110,000 acres was a grant of an undesignated portion of the public domain, and provision for its selection was necessary and was made, but no
462]provision *was made for the selection and location of saline lands, because all were granted "irrespective of their area or 'locality.'" They are determined by their character, it is said, and "when the grant is of all, and not of a part, selection and location become superfluous terms." It is further urged that if Congress intended to make the saline lands subject only to be selected as part of the 110,000 acres, the phrase "including all saline lands" is awkwardly and ungrammatically placed, but properly and grammatically placed if an independent grant is intended, and that Congress is supposed to know the rules of grammar,—citing United States v. Goldenberg, 168 U. S. 95, 103, 42 L. ed. 394, 398, 18 Sup. Ct. Rep. 3.

The argument is further developed by pointing out that the word "all" is comprehensive and excludes the idea of a limitation of quantity or the selection of a part. If such limitation or selection had been intended, it is said, the word "any" would have been used, not "all," and it cannot be supposed that Congress again used a word inappropriate to its purpose.

"Of still greater significance," it is urged, "is the use of the conjunction 'and' in the phrase 'and including all saline lands,'" and that from its frequent use and ready understanding no ambiguity can ever arise from its employment, it being "always employed to express the *relation of addition.*"

The state further urges that the word "including" may be taken as signifying "also," and illustrations are given, some from the statutes, some from decisions, Federal and state.

In United States v. Pierce, 77 C. C. A. 425, 147 Fed. 199, a provision in a tariff act was considered which provided as follows: "Woods: Logs and round manufactured timber, including pulp woods. . . ." The court (United States circuit court of appeals, second circuit) said: "We think the word 'including' was used as the equivalent of 'also,' a sense in which it is frequently used in tariff acts." *Hiller v.[463 United States, 45 C. C. A. 229, 106 Fed. 73, was referred to. The latter case was also concerned with a tariff act. The provision passed upon was "embroideries, and all trimmings, including braids." etc. The construction given to the provision by the importer was that it covered "all trimmings, including braids" used for that purpose. The government, on the other hand, contended that it meant "all trimmings, among which are included braids," etc., and that the word "including" was not used by way of specification, but by way of addition. The court said: "It would be somewhat difficult to infer the legislative intention from the language of the paragraph without reference to the history of this part of

the cotton schedule, because in the tariff acts the word 'including' is sometimes used merely to specify particularly that which belongs to the genus, and is sometimes used to add to the general class a species which does not naturally belong to it." The court resorted for explanation to the cotton schedule, and decided in favor of the government's contention, one member of the court dissenting.

In Re Goetz, 71 App. Div. 272, 75 N. Y. Supp. 750, a testator bequeathed to his wife all of his "personal property, including furniture, plate, and household effects." The court held the bequest was of all the personal property, saying "'including' is not a word of limitation, rather is it a word of enlargement, and in ordinary signification implies that something else has been given beyond the general thing which precedes it." The state, in the case at bar, concedes that the definition is too broad, and says that what the court probably meant was that, as commonly used, the word had such meaning.

The state reinforces its interpretation of the words of § 8 by other considerations. It is urged that if Congress intended the saline lands to be a part of another grant, it is the first instance of the kind. Fourteen states are enumerated to which all of the salt springs within them respectively 464]*were granted. In twelve of the states there was a limitation of the number of springs. To Illinois the grant was of "all springs within such state;" to New Mexico the grant was of 65,000 acres of nonmineral lands, "together with all the saline lands in said territory." To eighteen states no saline lands or salt springs were given.

The enabling act of Utah, it is suggested, was the guide to the grant to New Mexico. The latter, it is said, is more explicit, but indicates the same purpose to convey to each all of the saline lands within their respective borders.

The salt company opposes the contentions of the state, and invokes against the meaning attributed to § 8 the rule of strict construction of grants by the government. The purpose of the grant is, it is urged, to constitute a fund by the sale of the lands, the income from which is to be used exclusively for a university and agricultural college, and that the result of the grant as construed by the state would be to endow them as no other educational institution is endowed. And so construed, it is said, even by the decision in this case, the grant of 110,000 acres will be increased 40,000 acres, and as the demurrer concedes the deposit of salt is from 4 to 8 feet thick, there will be the further increase of two or three million tons of salt, worth in the aggregate an almost fabulous sum. Future discoveries, it is suggested, will increase the grant still more.

Such consequences of the state's contention at once challenges its soundness, and we recall that counsel for the state asserted at the oral argument that its title attached to all lands having salt deposits, no matter what thickness of arable soil lay above the deposits, and as it is insisted that no selection of saline lands is necessary, embarrassment in the administration of the land laws and serious conflicts of title may arise. However, let us consider the words of § 8. The determining word is, of course the word "including." It may have the sense of addition, *as we have seen, and of[465 "also;" but, we have also seen, "may merely specify particularly that which belongs to the genus." Hiller v. United States, 45 C. C. A. 229, 106 Fed. 73, 74. It is the participle of the word "include," which means, according to the definition of the Century Dictionary, (1) "to confine within something; hold as in an inclosure; inclose; contain." (2) "To comprise as a part, or as something incident or pertinent; comprehend; take in; as the greater includes the less; . . . the Roman Empire included many nations." "Including," being a participle, is in the nature of an adjective and is a modifier. What, then, does it modify as used in § 8? Necessarily, we think, the preceding substantive phrase "one hundred and ten thousand acres of land," and we have the meaning of the section to be that the saline lands are to be contained in or comprise a part of the 110,000 acres of land. We see no particular awkwardness in the expression of the purpose, and it well may be contended that it needs not for its support the rule of strict construction. And such purpose is in harmony with grants of saline lands to other states. It is also sustained by the reports of the committees of the House and Senate.

In the case of Brainard v. Darling, 132 Mass. 218, it was held that a legacy of $100, "including money trusteed in a certain bank," could not be construed as meaning that the sum of $100 was in addition to the sum in bank.

In Henry v. Henry, 81 Ky. 342, a bequest of $14,000, "including certain notes," was held to mean that the notes formed a part of the $14,000, and were not in addition thereto.

In Neher v. McCook County, 11 S. D. 422, 78 N. W. 998, it was held that a certain section of the laws of the state which provided that the sheriff's fees should be $16 for summoning a jury, "including mileage," did not entitle him to mileage in addition to the $16.

466] *We have seen that the state urges that the word "and" is always employed to express the relation of addition, and it is said, with words of emphasis, that Congress cannot be supposed to have been ignorant of its meaning. The supreme court of the state also gave special significance to the use of "and," as adding something to that which preceded. The court also considered that the word "including" was used as a word of enlargement, the learned court being of opinion that such was its ordinary sense. With this we cannot concur. It is its exceptional sense, as the dictionaries and cases indicate. We may concede to "and" the additive power attributed to it. It gives in connection with "including" a quality to the grant of 110,000 acres which it would not have had,—the quality of selection from the saline lands of the state. And that such quality would not exist unless expressly conferred we do not understand is controverted. Indeed, it cannot be controverted. Under the applicable statutes and uniform policy of the government, saline lands would not have been subject to selection in satisfaction of the 110,000-acre grant, in the absence of a special provision authorizing their selection. Rev. Stat. § 2318, U. S. Comp. Stat. 1901, p. 1423; Act of January 12, 1877, 19 Stat. at L. 221, chap. 18, U. S. Comp. Stat. 1901, p. 1547; Morton v. Nebraska, 21 Wall. 660, 22 L. ed. 639, 12 Mor. Min. Rep. 451; Cole v. Markley, 2 Land Dec. 847; Re Salt Bluff Placer, 7 Land Dec. 549; Re Southwestern Min. Co. 14 Land Dec. 597; Jeremy v. Thompson, 20 Land Dec. 299; Re Geissler, 27 Land Dec. 515.

Something is attempted to be made of the fact as militating against the selection of saline lands as part of the grant of 110,000 acres that no time limit was fixed, as in grants of such lands in other states. The fact has some force, and giving it and the other contentions of the state proper weight, they cannot prevail against the considerations to which we have adverted.

It is finally contended that if the saline lands are included in the 110,000 acres, the 467]state has the right to select *all of them, and that until it declares its intention no rights can be acquired by others under the mining laws. We are not called upon to discuss the contention. It is alleged in the answer that the state has selected and received grants from the United States for the full amount of 110,000 acres, "selected and located as provided in §§ 7 and 8 of the enabling act." As the state demurred to the answer, the truth of the allegation must be considered as admitted.

Judgment reversed and the cause remanded for further proceedings in accordance with this opinion.

Mr. Justice Harlan dissents.

FIFTH AVENUE COACH COMPANY, Plff. in Err.,
v.
CITY OF NEW YORK.

(See S. C. Reporter's ed. 467–484.)

Federal courts — following decisions of state courts — ultra vires.

1. It is for the state courts alone to decide whether the display of exterior advertisements upon automobile stages is *ultra vires* of a domestic corporation operating stage routes in the streets of a city for the carriage of passengers and property for hire.

[For other cases, see Courts, 1879–1883, in Digest Sup. Ct. 1908.]

NOTE.—As to state decisions and laws as rules of decision in Federal courts—see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553; Griffin v. Overman Wheel Co. 9 C. C. A. 548; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; Clark v. Graham, 5 L. ed. U. S. 334; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; and Mitchell v. Burlington, 18 L. ed. U. S. 351.

On municipal power as to regulation of signs and billboards—see People ex rel. Wineburgh Advertising Co. v. Murphy, 21 L.R.A.(N.S.) 735.

As to what constitutes dues process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to the validity of class legislation—see notes to State v. Goodwill, 6 L.R.A. 621; and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

As to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

Constitutional law — due process of law — police power — advertising wagons in city streets.

2. A municipal ordinance prohibiting the use of advertising trucks, vans, or wagons in the city streets is a valid exercise of the police power, and does not deprive a stage coach company of its property without due process of law.

[For other cases, see Constitutional Law, 441–522, 881–890, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — advertising wagons on city streets.

3. The equal protection of the laws is not denied to a stage coach company by a municipal ordinance prohibiting the use of advertising trucks, vans, or wagons in the city streets, because "ordinary business wagons" when "engaged in the usual business or regular work of the owner, and not used merely or mainly for advertising," are expressly permitted to exhibit "business notices," nor because advertising is allowed on the stairs of the elevated railways and on elevated structures.

[For other cases, see Constitutional Law, 239–291, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — prohibiting advertising wagons in city streets.

4. Contract obligations are not unconstitutionally impaired by a municipal ordinance under which a domestic corporation operating stage routes in the city streets is forbidden to display exterior advertisements on its stages, where, at the time the advertising contracts were entered into, there existed an ordinance almost identical in terms, and the company's charter does not confer any right to use its stages for advertising purposes.

[For other cases, see Constitutional Law, 1273–1580, in Digest Sup. Ct. 1908.]

[No. 159.]

Argued April 27 and 28, 1911. Decided May 29, 1911.

IN ERROR to the Supreme Court of the State of New York in and for the County of New York to review a decree entered pursuant to the mandate of the Court of Appeals of that state, which had affirmed a judgment of the Appellate Division of the Supreme Court, First Department, affirming a decree of the Supreme Court, which dismissed the complaint in a suit to enjoin the enforcement of a municipal ordinance prohibiting advertising wagons in the city streets. Affirmed.

See same case below in appellate division, 126 App. Div. 657, 111 N. Y. Supp. 1037; in court of appeals, 194 N. Y. 19, 21 L.R.A.(N.S.) 744, 86 N. E. 824, 16 A. & E. Ann. Cas. 695.

The facts are stated in the opinion.

Mr. **William H. Page** argued the cause, and, with Mr. Gilbert H. Crawford, filed a brief for plaintiff in error:

When an intrinsically harmless, natural, and ordinary use of property is forbidden by law, the owner is deprived of his property within the meaning of the constitutional provision.

Interborough Rapid Transit Co. v. New York, 47 Misc. 221, 95 N. Y. Supp. 886; People v. Green, 85 App. Div. 400, 83 N. Y. Supp. 460; People ex rel. Manhattan Sav. Inst. v. Otis, 90 N. Y. 52; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 179, 20 L. ed. 557, 560; Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; Myer v. Adam, 63 App. Div. 544, 71 N. Y. Supp. 707; Re Grade Crossing Comrs. 6 App. Div. 334, 40 N. Y. Supp. 520; Belleville v. St. Clair County Turnp. Co. 234 Ill. 434, 17 L.R.A. (N.S.) 1071, 84 N. E. 1049.

The reasonableness of the ordinance is to be determined from the evidence contained in the record and from the findings based thereon, which sustain unqualifiedly the contention of the plaintiff in error.

Egan v. Hart, 165 U. S. 188, 189, 41 L. ed. 680, 681, 17 Sup. Ct. Rep. 300; Stanley v. Schwalby, 162 U. S. 255, 278, 40 L. ed. 960, 968, 16 Sup. Ct. Rep. 754; E. Bement & Sons v. National Harrow Co. 186 U. S. 71, 83, 46 L. ed. 1058, 1064, 22 Sup. Ct. Rep. 747; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 97, 53 L. ed. 417, 424, 29 Sup. Ct. Rep. 220.

This court is not bound by the determination of the state courts, either as to the lawfulness of the ordinance or as to its effect upon the rights of the plaintiff in error.

Yick Wo v. Hopkins, 118 U. S. 356, 366, 30 L. ed. 220, 225, 6 Sup. Ct. Rep. 1064; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18.

This court has approved and adopted certain limits upon the police power, which preclude a claim of lawfulness of the ordinance in question.

Yick Wo v. Hopkins, supra; Lawton v. Steele, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Dobbins v. Los Angeles, supra; Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Yates v. Milwaukee, 10 Wall 497, 19 L. ed. 984.

The principles stated by the Supreme Court have been followed in numerous well-considered cases in the state courts, which unite in holding that when an intrinsically harmless use of private property is prohibited by law, it must appear clearly that the prohibition accomplishes some purpose which is of benefit to the community.

Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 12 L.R.A. (N.S.) 707, 79 N. E. 836; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; People v. Armstrong, 73 Mich. 288, 2 L.R.A. 721, 16 Am. St. Rep. 578, 41 N. W. 275; People ex rel. Cartmill v. Rochester, 44 Hun, 166.

The display of advertisements made by the advertising company under contract with the plaintiff, or the lease of space by the latter to the former, is not a nuisance, and in no way injures or affects the welfare, health, physical comfort, safety convenience, or morals of passengers or of the public.

Wood, Nuisances, 3d ed. § 801, p. 1177.

The advertisements in question cannot be judicially condemned on æsthetic grounds.

Bleistein v. Donaldson Lithographing Co. 188 U. S. 239, 251, 47 L. ed. 460, 462, 23 Sup. Ct. Rep. 298; Com. v. Boston Advertising Co. 188 Mass. 348, 69 L.R.A. 817, 108 Am. St. Rep. 494, 74 N. E. 601; Passaic v. Paterson Bill Posting Adv. & Sign Painting Co. 72 N. J. L. 285, 111 Am. St. Rep. 676, 62 Atl. 267, 5 A. & E. Ann. Cas. 995; Bryan v. Chester, 212 Pa. 262, 108 Am. St. Rep. 870, 61 Atl. 894.

Mere classification is not sufficient to save an ordinance from the condemnation of the equality clause of the 14th Amendment; the classification must be based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 165, 41 L. ed. 666, 671, 17 Sup. Ct. Rep. 255.

The ordinance discriminates between two classes of passenger carriers having chartered rights to use the streets.

Soon Hing v. Crowley, 113 U. S. 709, 28 L. ed. 1147, 5 Sup. Ct. Rep. 730.

The ordinance impairs the obligations of the contract between the plaintiff and the Railway Advertising Company, and of the contract subsisting between the state of New York and the plaintiff.

Delmas v. Merchants' Mut. Ins. Co. 14 Wall. 661–668, 20 L. ed. 757–760; Chicago v. Sheldon, 9 Wall. 50, 55, 19 L. ed. 594, 597; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 493, 38 L. ed. 793, 796, 14 Sup. Ct. Rep. 968; Piqua Branch of State Bank v. Knoop, 16 How. 369, 380, 14 L. ed. 977, 981; Pearsall v. Great Northern R. Co. 161 U. S. 646, 663, 40 L. ed. 838, 844, 16 Sup. Ct. Rep. 705; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252.

Mr. **Terrence Farley** argued the cause, and, with Mr. Theodore Connolly, filed a brief for defendant in error:

This court should not entertain this appeal, for the reason that there are no Federal questions involved in it.

Sage v. Board of Liquidation, 144 U. S. 647, 36 L. ed. 577, 12 Sup. Ct. Rep. 755; Powell v. Brunswick County, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; Turner v. Wilkes County, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464; Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26; Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; Fischer v. St. Louis, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673; Ansbro v. United States, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; Millingar v. Hartupee, 6 Wall. 258, 18 L. ed. 829; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353.

The ordinance in question is a valid exercise of the legislative power of the city.

Ringelstein v. Chicago, 128 Ill. App. 483; McQuillin, Mun. Ord. § 186; Wettengel v. Denver, 20 Colo. 552, 39 Pac. 343; Com. v. McCafferty, 145 Mass. 384, 14 N. E. 451; Com. v. Plaisted, 148 Mass. 375, 2 L.R.A. 142, 12 Am. St. Rep. 566, 19 N. E. 224; Com. v. Ellis, 158 Mass. 555, 33 N. E. 651; Philadelphia v. Brabender, 201 Pa. 574, 58 L.R.A. 220, 51 Atl. 374; Rochester v. West, 164 N. Y. 510, 53 L.R.A. 548, 79 Am. St. Rep. 659, 58 N. E. 673; Gunning System v. Buffalo, 75 App. Div. 31, 77 N. Y. Supp. 987; Chicago v. Gunning System, 214 Ill. 628, 70 L.R.A. 230, 73 N. E. 1035, 2 A. & E. Ann. Cas. 897.

Mr. Justice **McKenna** delivered the opinion of the court:

Plaintiff in error, which was also plaintiff in the court below, and we shall so refer to it, brought suit against the city in the supreme court of the county of New York. It alleged the following: It is a corporation duly formed and organized under the laws of the state of New York, and engaged in the operation of automobile stages upon routes extending along Fifth avenue and other streets in the city of New York, under and in pursuance of certain acts of the legislature of the state, having acquired, under various acts, all the property rights and franchises of the Fifth Avenue Transportation Company, Limited.

The city is a municipal corporation, organized under the laws of the state, and exercises its powers through officers and departments.

The plaintiff has operated stages upon its routes, and has used the interior of them for the display of advertising signs or matter, for many years. In May, 1905, with the complete substitution of automobile stages for horse stages, which was affected in July last (1907), it began to utilize and now utilizes, the exterior of its stages for such purposes, which it is able to do by reason of the necessary difference in form of the new vehicle and in the consequent increase of space adapted to use in the display of advertising matter, and from such use it is enabled to secure a substantial income from portions of its property not susceptible of being used otherwise for the purpose of its business.

The city, through its various officials, has interfered with such advertising, and intends to interfere with the operations of plaintiff's stages, and to prevent it from maintaining advertising signs upon the ex-
477]terior thereof, *which will materially impair plaintiff's business, reduce its income, interfere with the exercise of its rights and franchises under the laws of the state, and "infringe its constitutional right to freedom in the use of its property." The damage to plaintiff will be irreparable, and no adequate compensation therefor can be obtained at law.

A permanent injunction was prayed.

The city answered, denying some allegations and admitting others, and set out a number of ordinances which precede that in controversy, and set out the latter as follows:

"No advertising trucks, vans, or wagons shall be allowed in the streets of the borough of Manhattan, under a penalty of $10 for each offense. Nothing herein contained shall prevent the putting of business notices upon ordinary business wagons, so long as such wagons are engaged in the usual business or regular work of the owner, and not used merely or mainly for advertising."

And it alleged that it was its duty to prevent "the display of the advertisements on the outside of the stages operated by complainant on Fifth avenue."

After hearing, a judgment was entered dismissing the complaint. It was affirmed successively by the appellate division and by the court of appeals.

The trial court found that plaintiff had succeeded to all of the "rights, privileges, franchises, and properties" of the Fifth Avenue Transportation Company, having the right to use automobile power instead of horses. The franchises of the transportation company were to carry passengers and property for hire; to establish, maintain, and operate stage routes for public use in the conveyance of persons and property, and to receive compensation therefor. It had other franchises not material to mention.

The court also found the following facts:

"The automobile omnibuses now operated over the routes of the plaintiff herein have two decks, on the lower of which are longitudinal seats for sixteen passengers, and *on the upper deck there are trans-[478
verse seats for eighteen passengers. There is a stairway leading from the rear platform of the lower deck to the upper deck. Said stairway has a screen extending from the top to the bottom.

"The space used for advertising purposes on the vehicles of the plaintiff herein is leased to the Railway Advertising Company, under an agreement dated May 11, 1907, from which the plaintiff herein receives the sum of $10,000 per annum, plus the sum of $200 per bus for exterior advertising. There was an agreement dated May 15, 1905, relating to interior advertising."

Advertising signs of various colors are upon the stairs of the elevated railways, in places on the elevated structures in the city of New York, and on the walls of the underground stations of the subway railroad company.

The advertising signs on plaintiff's coaches have no relation to their operation or to the physical comfort, convenience, or health of the passengers or the public, and are merely an incident to the use of the stages in the operation of the franchise belonging to it for the transportation of passengers.

The findings of fact are very descriptive as to the size and character of the signs used. There are two, 13 feet by 2 feet 7 inches; another, 2 by 6½ feet; another, 4 by 2 feet; another, 8 feet by 20 inches; another, 2 feet 4 inches square; and others, 2 feet in length. And the signs or the pictures painted on them were in pink, blue, black, bright yellow, drab, and red.

It was concluded from the facts found that the advertisements were not a nuisance; could not be judicially condemned on esthetic grounds; that the health, safety, or comfort of passengers and the public are not injured by them; that plaintiff failed to prove that their display was a necessary incident to the operation of the stages; that by its franchise it did not acquire the right to display advertisements for hire, and that such display was *ultra[479
vires, being neither incidental to nor implied by the powers conferred by plaintiff's charter or by-law. It was further concluded that the streets of New York could only be used for street purposes, and that the

display of advertising signs by plaintiff was not a street use.

The appellate division affirmed the judgment. The court said: "The complaint was properly dismissed, and the judgment would be affirmed without opinion were it not for the fact that we do not concur in the reasons assigned by the learned justice at special term for making this disposition of the case. . . . From the facts proved and the findings made, a case is not presented to a court of equity which calls for the exercise of its powers." [126 App. Div. 658, 110 N. Y. Supp. 1037.] The court further expressed the view that plaintiff had a right, under its charter, to operate its stages, but whether it could or not, as an incident to such right, display signs or advertisements, must be determined when the question arose, and not, as in the pending case, upon a supposition which had for its foundation a mere threat which might never be carried into effect. And the court intimated that it was the concern of the state, and not of the city, if plaintiff was violating is charter; and further intimated that the advertisements did not violate the ordinance.

The court of appeals, however, agreed with the trial court. It reviewed the laws which constituted the charter powers of the Fifth Avenue Transportation Company and the laws by which plaintiff succeeded to the transportation company and its powers, and decided that the franchise of plaintiff "does not expressly include the right to use the public streets mentioned therein for advertising purposes or to carry or maintain exterior advertisements on its stages, and the carrying of such advertisements is not a necessary or essential incident to its express franchise rights. Such exterior advertising is in no way related to the carrying of passengers for hire." [194 N. Y. 26, 21 L.R.A.(N.S.) 744, 86 N. E. 824, 16 A. & E. Ann. Cas. 695.] The court also decided that the city had the power to pass the ordi-
480]nance *which is in question, and that plaintiff offended against its provisions, and, after discussing at some length the powers of the city, among other things, said:

"Fifth avenue is an important and much-used street. At certain times of the day slow-moving trucks are barred therefrom on account of the congestion in such street. The plaintiff's contract with the advertising company allows the advertisements on its stages to become the conspicuous part of their exterior, and the business of advertising for the purpose of revenue is of such value to the plaintiff that the gross income therefrom exceeds 6 per cent upon its entire capital stock.

. . . . . .

"It appears that the right to display garish advertisements in conspicuous places has become a source of large revenue. If the plaintiff can cover the whole or a large part of the exterior of its stages with advertisements for hire, delivery wagons engaged by the owners in their usual business or regular work can rightfully be covered with similar advertisements. Cars and vehicles of many descriptions, although not engaged exclusively in advertising, and thus not incumbering the street exclusively for advertising purposes, may be used for a similar purpose. The extent and detail of such advertisements when left wholly within the control of those contracting therefor would make such stages, wagons, or cars a parade or show for the display of advertisements which would clearly tend to produce congestion upon the streets upon which they were driven or propelled. The exaggerated and gaudy display of advertisements by the plaintiff is for the express purpose of attracting and claiming the attention of the people upon the streets through which the stages are propelled."

The court cited Com. v. McCafferty, 145 Mass. 384, 14 N. E. 451, in which an ordinance was sustained which prohibited the placing or carrying on sidewalks, *show boards, placards, or signs for the[481 purpose of there displaying the same. It was said in this case that the tendency and effect of such signs might be to collect crowds, and thus interfere with the use of the sidewalks by the public, and lead to disorder, and that such a provision applicable to the crowded streets of a populous city was not unreasonable. The court of appeals, therefore, concluded that the ordinance of the city of New York was "not wholly arbitrary and unreasonable," and that the plaintiff "has failed to show that the maintenance of such exterior advertisements is within its express franchise rights, or that such ordinance prohibiting their maintenance on its stages is not a proper exercise of the authority vested in the city to regulate the business conducted in the streets thereof, and the trial court was therefore right in dismissing the plaintiff's complaint."

To this conclusion complainant urges (1) it has a property right to rent space on its stages for advertisements, and the doctrine of *ultra vires* has no application; (2) the ordinance, as construed by the court of appeals, deprives plaintiff in error of its property without due process of law, in contravention of the 14th Amendment to the Constitution of the United States; (3) denies to it the equal protection of the laws; (4) impairs the obligation of the contract between plaintiff and the Railway Adver-

tising Company, and that between the state of New York and plaintiff.

To sustain the first proposition plaintiff cites a number of cases which are not in point. It may be that in other jurisdictions it has been decided, construing the charters granted, that under the local laws particular uses of property may be merely incident to its ownership, and not *ultra vires*. A sufficient answer to the cases is that the law is held to be different in New York.

It is surely competent for the courts of New York to construe the laws of the state, 482]and decide what powers a *corporation derives under them, or to what uses it may employ its property necessary for the exercise of those powers. And the stages used on the streets of the city transporting passengers is the very exercise of the franchise granted to plaintiff, and is not like the instances of the cited cases, where property was not intimately used in the exercise of charter rights. The right of property contended for in its full breadth would make property intended for corporate use as absolute as property not so committed or not limited by charter conditions. And this, we think, is enough for the decision of the case. No matter what may be the general rights of corporate property, it cannot be contended that a state granting a charter may not strictly define and limit the uses of the property necessary to the exercise of the powers granted. And this is what the court of appeals has decided the laws of New York have done, and that the Fifth Avenue Transportation Company was, and the plaintiff, as the successor of its rights, is, subject to the limitations imposed by those laws. When plaintiff went beyond the limitations, it became subject to the ordinance as construed by the court of appeals. "General advertising for hire," the court said, "is by ordinance prohibited, whether carried on wagons wholly used for advertising, or in connection with the ordinary or usual business in which wagons are engaged." Plaintiff's stages are therefore brought under even a broader principle than that of its charter. The same rule is applied to that as to other wagons, and within the exercise of the police power illustrated in Com. v. McCafferty, supra. We concur with the court of appeals, for we cannot say that it was an arbitrary exercise of such power. The density of the traffic on Fifth avenue we might take judicial notice of, but it is represented to us as a fact by the court of appeals, and we find from the opinion of the trial court and the exhibits in the record that "the signs 483]advertised in various glaring *colors and appropriate legends divers articles;" for example, Duke's Mixture Smoking Tobacco, Bull Durham Smoking Tobacco, and Helmar Turkish Cigarettes. There were painted figures of animals, men in oriental costume, busts of men and women, all made conspicuous by contrasted coloring. Describing the signs, the court said: "The colors used—green, dark blue, white, light blue, yellow, drab, and various brilliant shades of red—are contrasted so as to attract attention, and are not blended so as to produce a harmonious or an artistic effect, and the resulting painting constitutes a disfigurement rather than an ornament." [58 Misc. 405, 111 N. Y. Supp. 759.] If plaintiff be right, however the advertisements may be displayed is immaterial. There can be no limitation of rights by degrees of the grotesque. If such rights exist in plaintiff, they exist in all wagon owners, and there might be such a fantastic panorama on the streets of New York that objection to it could not be said to have prompting only in an exaggerated esthetic sense. That rights may not be pushed to such extreme does not help plaintiff. Its rights are not greater because others may not exercise theirs.

This discussion of plaintiff's first contention answers in effect its other contentions. Necessarily, if plaintiff had no right under its charter to use its stages for advertising purposes, or if the ordinance of the city was a proper exercise of the police power, plaintiff was not deprived of its property without due process of law, which is the basis of its second contention.

We pass, therefore, to the third and fourth contentions. The third contention is that the ordinance denies plaintiff the equal protection of the laws; and to support the contention it is urged that "no advertising wagons are allowed in the streets, but 'ordinary business wagons' when engaged in the usual business or work of the owner, and not used merely or mainly for advertising,' are permitted to exhibit 'business notices.'" It is argued that the ordinance *"thus creates a favored subclass of[484 vehicles which are permitted to display advertisements." In view of the power of the state, and the city acting with the authority of the state, to classify the objects of legislation, we will not discuss the contention. The distinction between business wagons and those used for advertising purposes has a proper relation to the purpose of the ordinance, and is not an illegal discrimination. The same comment may be made as to the charge that the ordinance discriminates between two classes of passenger carriers having charter rights to use the streets. As an instance of this charge,

plaintiff adduces the findings of the trial court that advertising is allowed on the stairs of the elevated railways and on elevated structures. This difference, too, is within the power of classification which the city possesses.

The fourth and last contention of plaintiff is that the ordinance impairs the obligations of the contract between plaintiff and the Railway Advertising Company and the contract between it and the state of New York.

This contention was made in the trial court, as follows: "Any law or ordinance which prevents the Fifth Avenue Coach Company, the plaintiff herein, from displaying advertisements on the exterior of its vehicles, will impair the obligation of plaintiff's contract with the state."

It is doubtful if the point was properly raised in the courts below, but granting that it was, there are obvious answers to it. At the time of the contract of plaintiff with the advertising company there existed an ordinance almost identical in terms with that in controversy, and, besides, the contract was necessarily subject to the charter of plaintiff. And if we should exercise the right to construe the charter as a contract with the state we should be unable to discern in it a right in plaintiff to use its stages for advertising purposes in the manner shown by this record.

Judgment affirmed.

485]*J. N. BEAN, W. R. Bainbridge, S. W. Bent, Wallace Bent, and Corbett Bennett, Petitioners,

v.

W. A. MORRIS et al.

(See S. C. Reporter's ed. 485–488.)

Waters — prior appropriation — interstate stream.

The Federal Supreme Court will assume, in the absence of Montana legislation to the contrary, that prior appropriators of the waters of an interstate stream at a point in Wyoming could acquire rights as against junior appropriators of the waters of the same stream in Montana, enforceable in the latter state.

[For other cases, see Waters, II. c. in Digest Sup. Ct. 1908.]

[No. 122.]

Argued April 11 and 12, 1911. Decided May 29, 1911.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Montana, enjoining the diversion of the water of an interstate stream. Affirmed.

See same case below, 86 C. C. A. 519, 159 Fed. 651.

The facts are stated in the opinion.

Mr. **Thomas J. Walsh** argued the cause, and, with Messrs. George W. Pierson and Cornelius B. Nolan, filed a brief for petitioners:

With one accord the states of the arid region deny that the grantee of land from the government gets any right to the waters flowing through or along it, and assert that such waters belong to and remain in the state; that the state has the right to say, and does say, whether those waters shall be enjoyed by the riparian proprietors in accordance with the rule of the common law, or be enjoyed by those who may divert and appropriate them.

Farm Invest. Co. v. Carpenter, 9 Wyo. 110, 50 L.R.A. 747, 87 Am. St. Rep. 918, 61 Pac. 258; Wheeler v. Northern Colorado Irrig. Co. 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487; Ft. Morgan Land & Canal Co. v. South Platte Ditch Co. 18 Colo. 1, 36 Am. St. Rep. 259, 30 Pac. 1032; 1 Farnham, Waters, 135, 136a; 2 Farnham, Waters, 649–652; Coffin v. Left Hand Ditch Co. 6 Colo. 443; Long, Irrigation, 6; Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 214; Union Mill & Min. Co. v. Dangberg, 81 Fed. 94; Clough v. Wing, 2 Ariz. 371, 17 Pac. 453; Drake v. Earhart, 2 Idaho, 750, 23 Pac. 541; Stowell v. Johnson, 7 Utah, 215, 26 Pac. 290; Albuquerque, Land & Irrig. Co. v. Gutierrez, 10 N. M. 177, 61 Pac. 357; Fitzpatrick v. Montgomery, 20 Mont. 185, 63 Am. St. Rep. 622, 50 Pac. 416; 3 Farnham, Waters, 652d.

They declare that the water rights do not originate in grant from the general government by virtue of the act of 1866, but that that act merely, as has been repeatedly declared by the Supreme Court of the United States, recognized pre-existing rights.

Forbes v. Gracey, 94 U. S. 762, 24 L. ed. 313, 14 Mor. Min. Rep. 183; Jennison v. Kirk, 98 U. S. 453, 25 L. ed. 240, 4 Mor. Min. Rep. 504; Broder v. Natoma Water & Min. Co. 101 U. S. 274, 25 L. ed. 790, 5 Mor. Min. Rep. 33.

As to every stream within its dominions, a state may change the common-law rule of riparian rights, and permit the appropriation of the flowing waters for such purposes as it deems wise.

NOTE.—On the right of prior appropriation of water—see note to Isaacs v. Barber, 30 L.R.A. 665.

United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 43 L. ed. 1136, 19 Sup. Ct. Rep. 770.

If a state can do this, it must be because it owns the waters, and simply permits their use obedient to its laws.

The state owns the navigable waters within its borders, and the soil under them.

Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

The United States has no right, except a proprietary right, in the public lands within a state.

Gould v. Hudson River R. Co. 6 N. Y. 540.

The owner of land bordering on an unnavigable stream, or one owning the land on both sides of the stream, and the whole or any part of the bed of the stream, does not own the stream or the waters in it, even in those states where the common-law doctrine of riparian rights has its full application.

3 Kent, Com. 439; Washb. Easements, 4th ed. 296 (218); Gould, Waters, 204; 1 Wood, Nuisances, § 332; Gavit v. Chambers, 3 Ohio, 497; Pollock v. Cleveland Ship Bldg. Co. 56 Ohio St. 666, 47 N. E. 582; McCarter v. Hudson County Water Co. 70 N. J. Eq. 695, 14 L.R.A.(N.S.) 197, 118 Am. St. Rep. 754, 65 Atl. 489, 10 A. & E. Ann. Cas. 116.

The grantee of lands from the United States has just such rights, by virtue of his ownership, as are accorded, by the laws of the state in which the lands lie, to the owners of lands generally.

Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; Packer v. Bird, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210.

The rights of the United States in the streams flowing over public lands in Iowa and in Montana may be, as they are, essentially and radically different.

Boquillas Land & Cattle Co. v. Curtis, 213 U. S. 339, 53 L. ed. 822, 29 Sup. Ct. Rep. 493.

Subject to whatever rights the local law accords to the riparian owners, the state owns the streams within its borders, and can lawfully prevent the diversion of their waters beyond its borders, though the assent of all riparian owners is obtained.

McCarter v. Hudson County Water Co. 70 N. J. Eq. 695, 14 L.R.A.(N.S.) 197, 118 Am. St. Rep. 754, 65 Atl. 489, 10 A. & E. Ann. Cas. 116, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, 14 A. & E. Ann. Cas. 560.

The rights acquired in Wyoming were subordinate to the rights acquired in and on the Crow Indian Reservation in Montana.

Winters v. United States, 207 U. S. 564, 52 L. ed. 340, 28 Sup. Ct. Rep. 207.

Mr. **William M. Ellison** argued the cause, and, with Mr. Alexander M. McCoy, filed a brief for respondents.

Mr. Justice **Holmes** delivered the opinion of the court:

This suit was brought by the respondent Morris, to prevent the petitioners from so diverting the waters of Sage Creek in Montana as to interfere with an alleged prior right of Morris, by appropriation, to 250 inches of such waters in Wyoming. Afterwards the other respondent, Howell, was allowed to intervene *and make a simi-[486 lar claim. Sage creek is a small creek, not navigable, that joins the Stinking Water in Wyoming, the latter stream flowing into the Big Horn, which then flows back northerly into Montana again, and unites with the Yellowstone. The circuit court made a decree that Morris was entitled to 100 inches miner's measurement, of date April, 1887, and that, subject to Morris, Howell was entitled to 110 inches, of date August 1, 1890, both parties being prior in time and right to the petitioners. 146 Fed. 423. On appeal the findings of fact below were adopted and the decree of the circuit court affirmed by the circuit court of appeals. 86 C. C. A. 519, 159 Fed. 651.

It was admitted at the argument that, but for the fact that the prior appropriation was in one state, Wyoming, and the interference in another, Montana, the decree would be right, so far as the main and important question is concerned. It is true that some minor points were suggested, such as laches, abandonment, the statute of limitations, etc., but the findings of two courts have been against the petitioners upon all of these, and we see no reason for giving them further consideration. So we pass at once to the question of private water rights as between users in different states.

We know no reason to doubt, and we assume, that, subject to such rights as the lower state might be decided by this court to have, and to vested private rights, if any, protected by the Constitution, the state of Montana has full legislative power over Sage creek while it flows within that state. Kansas v. Colorado, 206 U. S. 46, 93–95, 51 L. ed. 956, 973, 974, 27 Sup. Ct. Rep. 655. Therefore, subject to the same qualifications, we assume that the concurrence of the laws of Montana with those of Wyoming is necessary to create easements, or such private rights and obligations as

are in dispute, across their common boundary line. Missouri v. Illinois, 200 U. S. 496, 521, 50 L. ed. 572, 579, 26 Sup. Ct. Rep. 268; Rickey Land & Cattle Co. v. Miller & Lux, 218 U. S. 258, 260, 54 L. ed. 1032, 1037, 487]31 Sup. Ct. Rep. 11. *But with regard to such rights as came into question in the older states, we believe that it always was assumed, in the absence of legislation to the contrary, that the states were willing to ignore boundaries, and allowed the same rights to be acquired from outside the state that could be acquired from within. Mannville Co. v. Worcester, 138 Mass. 89, 52 Am. Rep. 261; Thayer v. Brooks, 17 Ohio, 489, 49 Am. Dec. 474; Slack v. Walcott, 3 Mason, 508, 516, Fed. Cas. No. 12,932; Stillman v. White Rock Mfg. Co. 3 Woodb. & M. 538, Fed. Cas. No. 13,446; Rundle v. Delaware & R. Canal Co. 1 Wall. Jr. 275, Fed. Cas. No. 12,139, 14 How. 80, 14 L. ed. 335; Foot v. Edwards, 3 Blatchf. 310, Fed. Cas. No. 4,908. See Wooster v. Great Falls Mfg. Co. 39 Me. 246, 253; Armendiaz v. Stillman, 54 Tex. 623; State v. Lord, 16 N. H. 357; Howard v. Ingersoll, 17 Ala. 780, 793. There is even stronger reason for the same assumption here. Montana cannot be presumed to be intent on suicide, and there are as many if not more cases in which it would lose as there are in which it would gain, if it invoked a trial of strength with its neighbors. In this very instance, as has been said, the Big Horn, after it has received the waters of Sage creek, flows back into that state. But this is the least consideration. The doctrine of appropriation has prevailed in these regions probably from the first moment that they knew of any law, and has continued since they became territory of the United States. It was recognized by the statutes of the United States, while Montana and Wyoming were such territory (Rev. Stat. §§ 2339, 2340, U. S. Comp. Stat. 1901, p. 1437; act of March 3, 1877, chap. 107, 19 Stat. at L. 377, U. S. Comp. Stat. 1901, p. 1548), and is recognized by both states now. Before the state lines were drawn, of course, the principle prevailed between the lands that were destined to be thus artifically divided. Indeed, Morris had made his appropriation before either state was admitted to the Union. The only reasonable presumption is that the states, upon their incorporation, continued the system that had prevailed theretofore, and made no changes other 488]than those necessarily implied or *expressed. See Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210; Smith v. Denniff, 24 Mont. 20, 50 L.R.A. 741, 81 Am. St. Rep. 408, 60 Pac. 398.

It follows from what we have said that it is unnecessary to consider what limits there may be to the powers of an upper state, if it should seek to do all that it could. The grounds upon which such limits would stand are referred to in Rickey Land & Cattle Co. v. Miller & Lux, 218 U. S. 258, 261, 54 L. ed. 1032, 1038, 31 Sup. Ct. Rep. 11. So it is unnecessary to consider whether Morris is not protected by the Constitution; for it seems superfluous to fall back upon the citadel until some attack drives him to that retreat. Other matters adverted to in argument, so far as not disposed of by what we have said, have been dealt with sufficiently in two courts. It is enough here to say that we are satisfied with their discussion, and confine our own to the only matter that warranted a certiorari or suggested questions that might be grave.

Decree affirmed.

UNITED STATES, Plff. in Err.,
v.
O. A. JOHNSON.

(See S. C. Reporter's ed. 488–507.)

Pure food and drugs act — misbranding — curative and remedial effects.

False and misleading statements in the labels on a proprietary medicine as to its curative or remedial effects, but which do not import any statement concerning identity, are not "misbranding," within the meaning of the food and drugs act of June 30, 1906 (34 Stat. at L. 768, chap. 3915, U. S. Comp. Stat. Supp. 1909, p. 1187), § 8, which defines that term as applicable to all drugs or articles of food, the package or label of which shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular.

[No. 433.]

Argued April 13, 1911. Decided May 29, 1911.

IN ERROR to the District Court of the United States for the Western District of Missouri to review a judgment quashing an indictment for misbranding drugs in violation of the food and drugs act. Affirmed.

See same case below, 177 Fed. 313.

The facts are stated in the opinion.

NOTE.—As to what constitutes a violation of pure food regulations—see note to Brina v. United States, 105 C. C. A. 559.

Solicitor General Lehmann argued the cause, and Assistant Attorney General Winfred T. Dennison, and Messrs. George P. McCabe and Loring C. Christie, Special Assistants to the Attorney General, filed a brief for plaintiff in error:

Reference may be made to the congressional reports and the debates in Congress, in order to show what the evil was which the legislature intended to remedy.

Jennison v. Kirk, 98 U. S. 459, 25 L. ed. 243, 4 Mor. Min. Rep. 504; Church of the Holy Trinity v. United States, 143 U. S. 465, 36 L. ed. 230, 12 Sup. Ct. Rep. 511; American Net & Twine Co. v. Worthington, 141 U. S. 473, 35 L. ed. 823, 12 Sup. Ct. Rep. 55; Binns v. United States, 194 U. S. 486, 495, 48 L. ed. 1087, 1090, 24 Sup. Ct. Rep. 816; Blake v. National City Bank, 23 Wall. 307, 319, 23 L. ed. 119, 120.

Among the sources from which the identity of that evil can best be ascertained is the public agitation contemporaneous with the discussion of the bill in Congress; and the facts of this agitation, being part of the history of the times, can be examined as indicating the nature of the evils attacked.

United States v. Union P. R. Co. 91 U. S. 72, 79, 23 L. ed. 224, 228; Church of the Holy Trinity v. United States, 143 U. S. 464, 465, 36 L. ed. 229, 230, 12 Sup. Ct. Rep. 511; Smith v. Townsend, 148 U. S. 490, 37 L. ed. 533, 13 Sup. Ct. Rep. 634; Aldridge v. Williams, 3 How. 9, 24, 11 L. ed. 469, 475; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; McKee v. United States, 164 U. S. 287, 292, 41 L. ed. 437, 439, 17 Sup. Ct. Rep. 92; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 502, 38 L. ed. 793, 799, 14 Sup. Ct. Rep. 968; Preston v. Browder, 1 Wheat. 115, 121, 4 L. ed. 50, 51; Ex parte Milligan, 4 Wall. 2, 114, 18 L. ed. 281, 293; Hamilton v. Rathbone, 175 U. S. 419, 44 L. ed. 221, 20 Sup. Ct. Rep. 155; Pacific Coast S. S. Co. v. United States, 33 Ct. Cl. 56.

Contemporary construction by the officers charged by the act with its enforcement is entitled to the serious consideration of the court, if they should think the statute doubtful.

United States v. Moore, 95 U. S. 760, 763, 24 L. ed. 588, 589; Heath v. Wallace, 138 U. S. 573, 582, 34 L. ed. 1063, 1067, 11 Sup. Ct. Rep. 380; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 366, 33 L. ed. 363, 367, 10 Sup. Ct. Rep. 112; Five Per Cent Cases, 110 U. S. 471, 28 L. ed. 198, 4 Sup. Ct. Rep. 210; Edwards v. Darby, 12 Wheat. 206, 209, 6 L. ed. 603, 604; Brown v. United States, 113 U. S. 568, 570, 28 L. ed. 1079, 1080, 5 Sup. Ct. Rep. 648; Union Ins. Co. v. Hoge, 21 How. 35, 16 L. ed. 61; Smythe v. Fiske, 23 Wall. 374, 23 L. ed. 47.

Our jurisprudence does not place matters beyond legal control, merely because their correct solution may depend upon opinion.

Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Crossman v. Lurman, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234; Pike v. Honsinger, 155 N. Y. 201, 63 Am. St. Rep. 655, 49 N. E. 760; Logan v. Field, 75 Mo. App. 594; Jackson v. Burnham, 20 Colo. 532, 39 Pac. 577; Patten v. Wiggin, 51 Me. 594, 81 Am. Dec. 593; Nelson v. Harrington, 72 Wis. 591, 1 L.R.A. 719, 7 Am. St. Rep. 900, 40 N. W. 228; Edgington v. Fitzmaurice, L. R. 29 Ch. Div. 459, 55 L. J. Ch. N. S. 650, 53 L. T. N. S. 369, 33 Week. Rep. 911, 50 J. P. 52; Durland v. United States, 161 U. S. 306, 40 L. ed. 709, 16 Sup. Ct. Rep. 508; Butler v. Watkins, 13 Wall. 456, 20 L. ed. 629; Missouri Drug Co. v. Wyman, 129 Fed. 623; Rogers v. Virginia-Carolina Chemical Co. 78 C. C. A. 615, 149 Fed. 1; Ten Mile Coal & Coke Co. v. Burt, 95 C. C. A. 516, 170 Fed. 332; Kohler Mfg. Co. v. Beeshore, 8 C. C. A. 215, 17 U. S. App. 352, 59 Fed. 572; Fenwick v. Grimes, 5 Cranch, C. C. 603, Fed. Cas. No. 4,734; Hedin v. Minneapolis Medical & S. Institute, 62 Minn. 146, 35 L.R.A. 417, 54 Am. St. Rep. 628, 64 N. W. 158; Olston v. Oregon Water Power & R. Co. 52 Or. 343, 20 L.R.A.(N.S.) 915, 96 Pac. 1095, 97 Pac. 538; Walters v. Rock, 18 N. D. 45, 115 N. W. 511; McDonald v. Smith, 139 Mich. 211, 102 N. W. 668; Nowlin v. Snow, 40 Mich. 699; Totten v. Burhans, 91 Mich. 495, 51 N. W. 1119; Stoney Creek Woolen Co. v. Smalley, 111 Mich. 321, 69 N. W. 722; Johnson v. Monell, 2 Keyes, 655; Stewart v. Emerson, 52 N. H. 301; Bughman v. Central Bank, 159 Pa. 94, 28 Atl. 209; Ayres v. French, 41 Conn. 142; Dowd v. Tucker, 41 Conn. 197; Laing v. McKee, 13 Mich. 124, 87 Am. Dec. 738; Sweet v. Kimball, 166 Mass. 333, 55 Am. St. Rep. 406, 44 N. E. 243; Adams v. Gillig, 131 App. Div. 494, 115 N. Y. Supp. 999; Smith v. Smith, 153 Ala. 504, 45 So. 168; Braddy v. Elliott, 146 N. C. 578, 16 L.R.A.(N.S.) 1121, 125 Am. St. Rep. 52, 60 S. E. 507; Carr v. Craig, 138 Iowa, 526, 116 N. W. 720; City Deposit Bank v. Green, 138 Iowa, 156, 115 N. W. 893; Wolfe v. Burke, 56 N. Y. 122; Post v. United States, 70 L.R.A. 989, 67 C. C. A. 569, 135 Fed. 4.

In the steady advance of science, matters which may possibly at some time have been within the realm of opinion have, one by one, been transferred by the researches and labors of men of science from that realm into the realm of fact.

Dent v. West Virginia, 129 U. S. 114, 123, 32 L. ed. 623, 626, 9 Sup. Ct. Rep. 231.

The constitutional power of Congress to prohibit use of the instruments of interstate commerce to the injury of the public is no longer open to question.

United States v. 74 Cases of Grape Juice, 181 Fed. 629; Shawnee Milling Co. v. Temple, 179 Fed. 517; Reid v. Colorado, 187 U. S. 137, 146, 47 L. ed. 108, 113, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Buttfield v. Stranahan, 192 U. S. 470, 492, 48 L. ed. 525, 534, 24 Sup. Ct. Rep. 349; Crossman v. Lurman, 192 U. S. 189, 199, 48 L. ed. 401, 405, 24 Sup. Ct. Rep. 234; St. Louis I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 287, 52 L. ed. 1061, 1064, 28 Sup. Ct. Rep. 616; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Leisy v. Hardin, 135 U. S. 100, 108, 34 L. ed. 128, 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865.

The statute is remedial, and should not be narrowly construed.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; Taylor v. United States, 3 How. 197, 11 L. ed. 559.

Mr. James H. Harkless argued the cause, and, with Mr. Clifford Histed, filed a brief for defendant in error:

It is especially necessary, in administering an act like the pure food law (however beneficial it may be), that there should be reasonable definiteness and accuracy, not only in the statement of offenses against the act, but in conceptions of what is within the intent of Congress, and what is not within that intent. In the administration of such an act it is particularly essential that it should not be given forced or strained constructions.

United States v. 650 Cases of Tomato Catsup, 166 Fed. 775.

The statute in question is a new one, and denounces a new offense, and must be strictly construed.

Field v. United States, 69 C. C. A. 568, 137 Fed. 6; United States v. Wiltberger, 5 Wheat. 96, 5 L. ed. 42.

It never was the intention of Congress by the pure food and drug act to invade the province of a physician to give his opinion upon the result and effect of his prescriptions or his medicines.

American School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 408, 53 L. ed. 849, 29 Sup. Ct. Rep. 527.

It is undoubtedly the duty of the court to ascertain the meaning of the legislature from words used in the statute and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never designed to include in it.

Brewer v. Blougher, 14 Pet. 178, 198, 10 L. ed. 408, 417. See also Petri v. Commercial Nat. Bank, 142 U. S. 644, 35 L. ed. 1144, 12 Sup. Ct. Rep. 325; United States v. American Bell Teleph. Co. 159 U. S. 550, 40 L. ed. 256, 16 Sup. Ct. Rep. 69; McKee v. United States, 164 U. S. 287, 41 L. ed. 437, 17 Sup. Ct. Rep. 92.

However broad and comprehensive the commerce power of Congress may be, yet it has never been decided that it has vested Congress with an unbridled license in respect to all commodities which may find their way into the avenues of interstate traffic.

United States v. Delaware & H. Co. 164 Fed. 229.

Ample power is lodged in the states upon this subject.

Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 A. & E. Ann. Cas. 1066; Plumley v. Massachusetts, 155 U. S. 461, 472, 39 L. ed. 223, 227, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154.

This statute is bad, as construed by the government, in that it wholly ignores the necessity of a criminal intent.

Pettibone v. United States, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542; United States v. Carll, 105 U. S. 611, 26 L. ed. 1135, 4 Am. Crim. Rep. 246.

Messrs. James H. Harkless, Charles S. Crysler, and Clifford Histed also filed a brief for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is an indictment for delivering for shipment from Missouri to Washington, District of Columbia, packages and bottles of medicine bearing labels that stated or implied that the contents were effective in curing cancer, the defendant well knowing that such representations were false. On motion of the defendant, the district judge quashed the indictment (177 Fed. 313), and the United States brought this writ of error under the act of March 2, 1907, chap. 2564, 34 Stat. at L. 1246.

The question is whether the articles were misbranded within the meaning of § 2 of the food and drugs act of June 30, 1906, chap. 3915, 34 Stat. at L. 768, U. S. Comp. Stat. Supp. 1909, p. 1187, making the delivery of misbranded drugs for shipment to any other state or territory or the District of Columbia a punishable offense. By § 6 the term "drug" includes any substance or mixture intended to be used for the cure, mitigation, or prevention of disease. By 496]§ 8 the *term "misbranded" "shall apply to all drugs or articles of food, . . . the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the state, territory, or country in which it is manufactured or produced. . . . An article shall also be deemed to be misbranded: In case of drugs: First. If it be an imitation of, or offered for sale under the name of, another article. Second. [In case of a substitution of contents] . . . or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilid, or any derivative or preparation of any such substances contained therein."

It is a postulate, as the case comes before us, that in a certain sense the statement on the label was false, or, at least, misleading. What we have to decide is whether such misleading statements are aimed at and hit by the words of the act. It seems to us that the words used convey to an ear trained to the usages of English speech a different aim; and although the meaning of a sentence is to be felt rather than to be proved, generally, and here, the impression may be strengthened by argument, as we shall try to show.

We lay on one side as quite unfounded the argument that the words "statement which shall be misleading in any particular," as used in the statute, do not apply to drugs at all,—that the statements referred to are those "regarding such article," and that "article" means article of food, mentioned by the side of drugs at the beginning of the section. It is enough to say that the beginning of the sentence makes such a reading impossible, and that "article" expressly includes "drugs," a few lines further on in what we have quoted, not to speak of 497]the reason of the *thing. But we are of opinion that the phrase is aimed not at all possible false statements, but only at such as determine the identity of the article, possibly including its strength, quality, and purity, dealt within § 7. In support of our interpretation the first thing to be noticed is the second branch of the sentence: "Or the ingredients or substances contained therein." One may say with some confidence that in idiomatic English this half, at least, is confined to identity, and means a false statement as to what the ingredients are. Logically it might mean more, but idiomatically it does not. But if the false statement referred to is a mistatement of identity as applied to a part of its objects, idiom and logic unite in giving it the same limit when applied to the other branch, the article, whether simple or one that the ingredients compose. Again, it is to be noticed that the cases of misbranding, specifically mentioned, and following the general words that we have construed, are all cases analogous to the statement of identity, and not at all to inflated or false commendation of wares. The first is a false statement as to the country where the article is manufactured or produced,—a matter quite unnecessary to specify if the preceding words had a universal scope, yet added as not being within them. The next case is that of imitation and taking the name of another article, of which the same may be said, and so of the next, a substitution of contents. The last is breach of an affirmative requirement to disclose the proportion of alcohol and certain other noxious ingredients in the package,—again a matter of plain past history concerning the nature and amount of the poisons employed, not an estimate or prophecy concerning their effect. In further confirmation, it should be noticed that although the indictment alleges a wilful fraud, the shipment is punished by the statute if the article is misbranded, and that the article may be misbranded without any conscious fraud at all. It was natural enough to throw this risk on *shippers[498 with regard to the identity of their wares, but a very different and unlikely step to make them answerable for mistaken praise. It should be noticed still further that by § 4, the determination whether an article is misbranded is left to the Bureau of Chemistry of the Department of Agriculture, which is most natural if the question concerns ingredients and kind, but hardly so as to medical effects.

To avoid misunderstanding, we should add that, for the purposes of this case, at least, we assume that a label might be of such a nature as to import a statement concerning identity, within the statute, although in form only a commendation of the supposed drug. It may be that a label in such form would exclude certain substances so plainly to all common understanding as to amount to an implied statement of what the contents of the package were not; and it may be that such a negation might fall

within the prohibitions of the act. It may be (we express no opinion upon that matter) that if the present indictment had alleged that the contents of the bottles were water, the label so distinctly implied that they were other than water, as to be a false statement of fact concerning their nature and kind. But such a statement as to contents, undescribed and unknown, is shown to be false only in its commendatory and prophetic aspect, and as such is not within the act.

In view of what we have said by way of simple interpretation we think it unnecessary to go into considerations of wider scope. We shall say nothing as to the limits of constitutional power, and but a word as to what Congress was likely to attempt. It was much more likely to regulate commerce in food and drugs with reference to plain matter of fact, so that food and drugs should be what they professed to be, when the kind was stated, than to distort the uses of its constitutional power to establishing criteria in regions where opinions are far apart. See American School v. 499]*McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33. As we have said above, the reference of the question of misbranding to the Bureau of Chemistry for determination confirms what would have been our expectation and what is our understanding of the words immediately in point.

Judgment affirmed.

Mr. Justice Hughes, dissenting:

I am unable to concur in the judgment in this case, for the following reasons:

The defendant was charged with delivering for shipment in interstate commerce certain packages and bottles of drugs alleged to have been misbranded in violation of the food and drugs act of June 30, 1906, chapter 3915, 34 Stat. at L. 768, U. S. Comp. Stat. Supp. 1909, p. 1187.

The articles were labeled respectively "Cancerine tablets," "Antiseptic tablets," "Blood purifier," "Special No. 4," "Cancerine No. 17," and "Cancerine No. 1,"—the whole constituting what was termed in substance "Dr. Johnson's Mild Combination Treatment for Cancer." There were several counts in the indictment with respect to the different articles. The labels contained the words, "Guaranteed under the Pure Food and Drugs Act, June 30, 1906;" and some of the further statements were as follows:

"Blood Purifier. This is an effective tonic and alternative. It enters the circulation at once, utterly destroying and removing impurities from the blood and entire system. Acts on the bowels, kidneys, and skin, eliminating poisons from the system, and when taken in connection with the Mild Combination Treatment, gives splendid results in the treatment of cancer and other malignant diseases. I always advise that the Blood Purifier be continued some little time after the cancer has been killed and removed and the sore healed.

*"Special No. 4. . . . It has a[500 strong stimulative and absorptive power; will remove swelling, arrest development, restore circulation, and remove pain. Is indicated in all cases of malignancy where there is a tendency of the disease to spread, and where there is considerable hardness surrounding the sore. Applied thoroughly to a lump or to an enlarged gland will cause it to soften, become smaller, and be absorbed.

"Cancerine No. 1. . . . Tendency is to convert the sore from an unhealthy to a healthy condition and promote healing. Also it destroys and removes dead and unhealthy tissue."

In each case the indictment alleged that the article was "wholly worthless," as the defendant well knew.

In quashing the indictment, the district court construed the statute. The substance of the decision is found in the following words of the opinion: "Having regard to the intendment of the whole act, which is to protect the public health against adulterated, poisonous, and deleterious food, drugs, etc., the labeling or branding of the bottle or container, as to the quantity or composition of 'the ingredients or substances contained therein, which shall be false or misleading,' by no possible construction can be extended to an inquiry as to whether or not the prescription be efficacious or worthless to effect the remedy claimed for it." [177 Fed. 317.] And the question on this writ of error is whether or not this construction is correct. United States v. Keitel, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123.

What, then, is the true meaning of the statute?

Section 8 provides:

"Sec. 8. That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any *particular; and to any food or[501 drug product which is falsely branded as to the state, territory, or country in which it is manufactured or produced."

The words "such article" in this section, as is shown by the immediate context, refer to "drugs" as well as to "food."

"Drugs" are thus defined in § 6:

"Sec. 6. That the term 'drug,' as used in this act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, *and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals.*"

Articles, then, intended to be used for curative purposes, such as those described in the indictment, are within the statute, though they are not recognized in the United States Pharmacopœia or the National Formulary. And the offense of misbranding is committed if the package or label of such an article bears any statement regarding it "which shall be false or misleading in any particular."

But it is said that these words refer only to false statements which fix the identity of the article. According to the construction placed upon the statute by the court below in quashing the indictment, if one puts upon the market, in interstate commerce, tablets of inert matter or a liquid wholly worthless for any curative purpose, as he well knows, with the label "Cancer Cure" or "Remedy for Epilepsy," he is not guilty of an offense, for, in the sense attributed by that construction to the words of the statute, he has not made a statement regarding the article which is false or misleading in any particular.

I fail to find a sufficient warrant for this limitation, and, on the contrary, it seems to me to be opposed to the intent of Congress, and to deprive the act of a very salutary effect.

502] *It is strongly stated that the clause in § 8—"or the ingredients or substances contained therein"—has reference to identity, and that this controls the interpretation of the entire provision. This, in my judgment, is to ascribe an altogether undue weight to the wording of the clause and to overlook the context. The clause, it will be observed, is disjunctive. If Congress had intended to restrict the offense to misstatements as to identity, it could easily have said so. But it did not say so. To a draftsman with such a purpose, the language used would not naturally occur. Indeed, as will presently be shown, Congress refused, with the question up, so to limit the statute.

Let us look at the context. In the very next sentence, the section provides (referring to drugs) that an article shall "*also*" be deemed to be misbranded if it be "an imitation of, or offered for sale under the name of, another article;" or in case of substitution of contents, or of failure to disclose the quantity or proportion of certain specified ingredients, if present, such as alcohol, morphine, opium, cocaine, etc.

It is a matter of common knowledge that the "substances" or "mixtures of substances" which are embraced in the act, although not recognized by the United States Pharmacopœia or National Formulary, are sold under trade names without any disclosure of constituents save to the extent necessary to meet the specific requirements of the statute. Are the provisions of the section to which we have referred, introduced by the word "*also*," and the one relating to the place of manufacture, the only provisions as to descriptive statements which are intended to apply to these medicinal preparations? Was it supposed that, with respect to this large class of compositions, nothing being said as to ingredients except as specifically required, there could be, within the meaning of the act, no false or misleading statement in *any par-[503 ticular? If false and misleading statements regarding such articles were put upon their labels, was it not the intent of Congress to reach them? And was it not for this very purpose that the general language of § 8 was used?

The legislative history of the section would seem to negative the contention that Congress intended to limit the provision to statements as to identity. The provision in question as to misbranding, as it stood in the original bill in the Senate (then § 9), was as follows:

"If the package containing it, or its label, shall bear any statement regarding the ingredients or the subtances contained therein, which statement shall be false or misleading in any particular."

The question arose upon this language whether or not it should be taken as limited strictly to statements with respect to identity. It was insisted that the words had a broader range, and the effort was made to procure an amendment which should be so specific as to afford no basis for the conclusion that anything but false statements as to identity or constitutents was intended. An amendment was then adopted in the Senate, making the provision read:

"Any statement as to the *constituent* ingredients, or the substances contained therein, which statements shall be false or misleading in any particular."

With this amendment the bill was passed by the Senate and went to the House. There the provision was changed by striking out the word "constituent," and inserting the word "regarding," so that it should read:

"Any statement regarding the ingredients or substances contained in such article,

which statement shall be false or misleading in any particular."

Finally, it appears, that in conference the bill was amended by inserting the word "*design, or device,*" and also the words "*such article, or;*" and thus the section be-
504]came *a part of the law in its present form—containing the words:

"Any statement, design, or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular."

"It is difficult to support that, the question distinctly raised, Congress would have rejected the provision of the Senate bill, and broadened the language in the manner stated, if it had been intended to confine the prohibition to false statements as to identity. Reading the act with the sole purpose of giving effect to the intent of Congress. I cannot escape the conclusion that it was designed to cover false and misleading statements of fact on the packages or labels of articles intended for curative purposes, although the statements relate to curative properties.

It is, of course, true, that when Congress used the words "false or misleading statement," it referred to a well defined category in the law, and must be taken to have intended statements of *fact*, and not mere expressions of opinion.

The argument is that the curative properties of articles purveyed as medicinal preparations are matters of opinion, and the contrariety of views among medical practitioners, and the conflict between the schools of medicine, are impressively described. But, granting the wide domain of opinion, and allowing the broadest range to the conflict of medical views, there still remains a field in which statements as to curative properties are downright falsehoods and in no sense expressions of judgment. This field I believe this statute covers.

The construction which the district court has placed upon this statute is that it cannot be extended to any case where the substance labeled as a cure, with a description of curative properties, is "wholly worthless" and is known by the defendant to be such. That is the charge of the indictment.

505] *The question, then, is whether, if an article is shipped in interstate commerce, bearing on its label a representation that it is a cure for a given disease, when, on a showing of the facts, there would be a unanimous agreement that it was absolutely worthless and an out-and-out cheat, the act of Congress can be said to apply to it. To my mind the answer appears clear. One or two hypothetical illustrations have been given above. Others may readily be suggested. The records of actual prosecutions, to which I am about to refer, show the operation the statute has had, and I know of no reason why this should be denied to it in the future.

Our attention has been called to the construction which was immediately placed upon the enactment by the officers charged with its enforcement in the Department of Justice and the Department of Agriculture. It is true that the statute is a recent one, and, of course, the question is one for judicial decision. But it is not amiss to note that the natural meaning or the words used in the statute, reflected in the refusal of Congress to adopt a narrower provision, was the meaning promptly attributed to it in the proceedings that were taken to enforce the law. And this appears to have been acquiesced in by the defendants in many prosecutions in which the defendants pleaded guilty. We have been referred to the records of the Department of Agriculture, showing nearly thirty cases in which either goods had been seized and no defense made, or pleas of guilty had been entered. Among these are found such cases as the following:

"No. 29. Hancock's Liquid Sulphur, falsely represented, among other things, to be 'nature's greatest germicide. . . . The great cure for . . . diphtheria.' Investigation begun November 22, 1907. Plea of guilty."

"No. 180. Gowan's Pneumonia Cure, falsely represented, among other things, that it 'supplies an easily *absorbed[506 food for the lungs that quickly effects a permanent cure.' Investigation begun November 22, 1907. Criminal information. Plea of guilty."

"No. 181. 'Eyelin,' falsely represented, among other things, that it 'repairs and rejuvenates the eye and sight.' Investigation begun February 13, 1908. Plea of guilty."

"No. 261. 'Sure Thing Tonic,' falsely represented, among other things, to be 'sure thing tonic. . . . Restores nerve energy. Renews vital force.' Investigation begun June 3, 1909. Pleaded guilty."

"No. 424. 'Tuckahoe Lithia Water,' falsely represented, among other things, to be 'a sure solvent for calculi, either of the kidneys or liver, especially indicated in all diseases due to urie diathesis, such as gout, rheumatism, gravel stone, incipient diabetes, Bright's Disease, inflamed bladder, eczema, stomach, nervous, and malarial disorders.' Investigation begun July 9, 1908. Plea of guilty."

"No. 427. 'Cancerine,' falsely represented, among other things, to be 'a remarkably curative extract, which, if faithfully adhered to, will entirely eradicate cancerous poison from the system. . . . A specific cure for cancer in all its forms.' Investigation

begun about April 12, 1909. Criminal information. Plea of guilty."

I find nothing in the language of the statute which requires the conclusion that these persons who have confessed their guilt in making false and misleading statements on their labels should be privileged to conduct their interstate traffic in their so-called medicines, admittedly worthless, because Congress did not intend to reach them.

Nor does it seem to me that any serious question arises in this case as to the power of Congress. I take it to be conceded that misbranding may cover statements as to strength, quality, and purity. But so long as the statement is not as to matter of 507]opinion, but consists of a false *representation of fact,—in labeling the article as a cure when it is nothing of the sort from any point of view, but wholly worthless,—there would appear to be no basis for a constitutional distinction. It is none the less descriptive— and falsely descriptive—of the article. Why should not worthless stuff, purveyed under false labels as cures, be made contraband of interstate commerce, as well as lottery tickets? Lottery Case (Champion v. Ames) 188 U. S. 331, 47 L. ed. 497, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561.

I entirely agree that in any case brought under the act for misbranding,—by a false or misleading statement as to curative properties of an article,—it would be the duty of the court to direct an acquittal when it appeared that the statement concerned a matter of opinion. Conviction would stand only where it had been shown that, apart from any question of opinion, the so-called remedy was absolutely worthless, and hence the label demonstrably false; but in such case it seems to me to be fully authorized by the statute.

Accordingly, I reach the conclusion that the court below erred in the construction that it gave the statute, and hence in quashing the indictment, and that the judgment should be reversed.

I am authorized to say that Mr. Justice **Harlan** and Mr. Justice **Day** concur in this dissent.

508]*LEIBEL PINCUSOV GLUCKSMAN, Appt.

v.

WILLIAM HENKEL, United States Marshal for the Southern District of New York, et al.

(See S. C. Reporter's ed. 508–514.)

Foreign extradition — complaint.

1. Good faith to the demanding foreign government requires the surrender of the accused in extradition proceedings if there is presented, even in somewhat untechnical form, such reasonable ground to suppose him guilty of crime as to make it proper that he should be tried.

[For other cases, see Extradition, IV. a, in Digest Sup. Ct. 1908.]

Foreign extradition — review — identity.

2. A finding that the identity of the prisoner with the person whose extradition to a foreign country is sought is made out cannot be said to be erroneous where, in addition to a photograph under seal of the foreign magistrate, which represents the prisoner, there are other facts tending to establish such identity.

[For other cases, see Extradition, IV. c, in Digest Sup. Ct. 1908.]

Foreign extradition — variance.

3. A variance in proceedings for the extradition to a foreign country of a person charged with forgery and uttering forged paper, in that the complaint speaks of bills of exchange, while the evidence shows the forged instruments to have been promissory notes, is not fatal, where the instruments are sufficiently identified.

[For other cases, see Extradition, IV. a, in Digest Sup. Ct. 1908.]

Foreign extradition — variance — rule of decision.

4. The effect of a variance between the complaint and the evidence in proceedings for the extradition of a person to a foreign country is to be decided on general principles, irrespective of the law of the state where the proceedings are had.

[For other cases, see Extradition, IV. a, in Digest Sup. Ct. 1908.]

Foreign extradition — complaint — verification.

5. A complaint sworn to upon information and belief is sufficient in proceedings for the extradition of a person to a foreign country, where it is supported by the testimony of witnesses who are stated to have deposed, and who therefore must be presumed to have been sworn.

[For other cases, see Extradition, IV. a, in Digest Sup. Ct. 1908.]

[No. 944.]

Argued April 6 and 7, 1911. Decided May 29, 1911.

Note.—On the practice and procedure in extradition cases—see notes to Kentucky v. Dennison, 16 L. ed. U. S. 717; Cook v. Hart, 36 L. ed. U. S. 934; and Iasigi v. Van de Carr, 41 L. ed. U. S. 1046.

As to what papers are necessary to obtain surrender of fugitive from another state—see note to Ex parte Hart, 28 L.R.A. 801.

Sufficiency, in extradition proceedings, of complaint or information based upon information and belief.

A complaint in which the charges are made solely on information or belief is in-

APPEAL from the Circuit Court of the United States for the Southern District of New York to review a decree dismissing writs of habeas corpus and certiorari to test the validity of extradition proceedings. Affirmed.

The facts are stated in the opinion.

Mr. **Charles Dushkind** argued the cause and filed a brief for appellant:

While a writ of habeas corpus cannot perform the functions of a writ or error, the court will nevertheless go behind the commitment to ascertain whether there was any legal evidence to give the commissioner jurisdiction; since in the absence of some legal proof the commissioner has no jurisdiction.

Terlinden v. Ames, 184 U. S. 277, 46 L. ed. 541, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424.

The laws of the state where the fugitive is found, and not the acts of Congress, are to govern in such cases.

Wright v. Henkel, 190 U. S. 61, 47 L. ed. 955, 23 Sup. Ct. Rep. 781, 12 Am. Crim. Rep. 386; Pettit v. Walshe, 194 U. S. 205, 48 L. ed. 938, 24 Sup. Ct. Rep. 657.

While the courts will not review the magistrate's findings on the question as to the amount of evidence, they hold that the magistrate has no jurisdiction, and cannot act, unless there is some competent legal proof to establish a probable cause.

People ex rel. Bungart v. Wells, 57 App. Div. 140, 68 N. Y. Supp. 59; Church, Habeas Corpus, p. 319; Ex parte Jenkins, 2 Wall.

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sufficient as the basis of extradition proceedings, where no attempt is made to set forth the sources of information or the grounds of affiant's belief. Ex parte Lane, 6 Fed. 34; Rice v. Ames, 180 U. S. 371, 45 L. ed. 577, 21 Sup. Ct. Rep. 406, 12 Am. Crim. Rep. 356.

A complaint in extradition proceedings, made upon information and belief, and not from a personal knowledge of the affiant, has been held to be wholly insufficient. Ex parte Rowland, 35 Tex. Crim. Rep. 108, 31 S. W. 651; People ex rel. Cornett v. Warden, 60 Misc. 525, 112 N. Y. Supp. 492.

Nor is the complaint saved by the fact that the affiant described himself as a government detective of the requisitioning government, duly authorized by the Attorney General to act as the agent of the government to prosecute extradition proceedings. Rice v. Ames, supra.

The statement that affiant "has reason to believe and does believe" that the prisoner embezzled and fraudulently converted to his own use the property mentioned is insufficient. Ex parte Spears, 88 Cal. 640, 22 Am. St. Rep. 341, 26 Pac. 608.

The verification of an information will not be regarded as such an affidavit as is required by U. S. Rev. Stat. § 5278, U. S. Comp. Stat. 1901, p. 3597, in extradition proceedings, when it is verified by a prosecuting attorney, who swears that he believes the contents thereof to be true, but not that they are true. Ex parte Hart, 28 L.R.A. 801, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. 249.

An affidavit which states that the affiant "believes and has good reason to believe from evidence and information now in his possession" is insufficient in extradition proceedings; the evidence and information should have been incorporated in the complaint. Ex parte Smith, 3 McLean, 121, Fed. Cas. No. 12,968.

"We do not wish, however, to be understood," said Mr. Justice Brown, speaking for the court in Rice v. Ames, 180 U. S. 371, 45 L. ed. 577, 21 Sup. Ct. Rep. 406, 12 Am. Crim. Rep. 356, "as holding that, in extradition proceedings, the complaint must be sworn to by persons having actual knowledge of the offense charged. This would defeat the whole object of the treaty, as we are bound to assume that no foreign government possesses greater power than our own to order its citizens to go to another country to institute legal proceedings. This is obviously impossible. The ordinary course is to send an officer or agent of the government for that purpose, and U. S. Rev. Stat. § 5271, makes special provision that 'in every case of complaint and of a hearing upon the return of the warrant of arrest, any depositions, warrants, or other papers offered in evidence shall be admitted and received for the purpose of such hearing, if they shall be properly and legally authenticated so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the tribunals of the foreign country from which the accused party shall have escaped; and copies of any such depositions, warrants, or other papers shall, if authenticated according to the law of such foreign country, be in like manner received as evidence,' of which authentication the certificate of the diplomatic or consular officer of the United States shall be sufficient. This obviates the necessity which might otherwise exist, of confronting the accused with the witnesses against him. Now, it would obviously be inconsistent to hold that depositions which are admissible upon the hearing should not also be admitted for the purpose of vesting jurisdiction in the commissioner to issue the warrant. Indeed, the words of the statute, 'in every case of complaint,' seem to contemplate this very use of them. If the officer of the foreign government has no personal knowledge of the facts, he may with entire propriety make the complaint upon information and belief, stating the sources of his information and the grounds of his belief, and annexing to the complaint a properly certified copy of any indictment or equivalent proceeding which may have been found in the foreign country, or a copy of

Jr. 521, Fed. Cas. No. 7,259; Re Henry, 13 Misc. 734, 35 N. Y. Supp. 210; People ex rel. Perkins v. Moss, 187 N. Y. 410, 11 L.R.A.(N.S.) 528, 80 N. E. 383, 10 A. & E. Ann. Cas. 309; Ex parte Swartwout, 4 Cranch, 75, 2 L. ed. 554.

Each piece of documentary evidence offered by the agents of the foreign government in support of the charge of criminality should be accompanied by a certificate of the principal diplomatic consular officer of the United States, resident in the foreign country from which the fugitive shall have escaped, stating clearly that it is properly and legally authenticated, so as to entitle it to be received in evidence in support of the same criminal charge, by the tribunals of such foreign country.

Re Henrich, 5 Blatchf. 414, Fed. Cas. No. 6,369; Re McPhun, 24 Blatchf. 254, 30 Fed. 60.

It is particularly essential that the complainants in extradition cases shall describe the crime with some degree of accuracy, in order that the accused may avail himself of the benefit of the well-established rule of law that he cannot be tried for any other offense than that charged in the extradition proceedings.

United States v. Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222; Ex parte Hibbs, 26 Fed. 431.

The complaint is insufficient and defective, and should be dismissed.

Rice v. Ames, 180 U. S. 371, 45 L. ed. 577, 21 Sup. Ct. Rep. 406, 12 Am. Crim. Rep. 356; Ex parte Lane, 6 Fed. 38; Ex parte McCabe, 12 L.R.A. 589, 46 Fed. 369; Re Heilbonn, 1 Park. Crim. Rep. 436; Re Farez, 7 Blatchf. 345, Fed. Cas. No. 4,645.

Re Henrich, 5 Blatchf. 414, Fed. Cas. No. 6,369; Re Roth, 15 Fed. 507; Wharton, Confl. L. § 848; Spear, Extradition, p. 250; 7 Am. & Eng. Enc. Law, p. 623 and note.

Mr. **Frederic R. Coudert** argued the cause, and, with Mr. Charles A. Conlon, filed a brief for appellees:

All that is required, under the treaty, to secure the provisional arrest of a person charged with the commission of a crime, is that a complaint shall be made under oath before a properly authorized officer.

Ex parte Sternaman, 77 Fed. 595; Grin v. Shine, 187 U. S. 181, 47 L. ed. 130, 23 Sup. Ct. Rep. 98, 12 Am. Crim. Rep. 366.

All that is required before the commissioner is to show that a crime has been committed, and that there is reasonable ground to believe that the accused is the person who committed it.

Re Herres, 33 Fed. 167; Grin v. Shine, 187 U. S. 181, 47 L. ed. 130, 23 Sup. Ct. Rep. 98, 12 Am. Crim. Rep. 366; Ex parte Sternaman, 77 Fed. 595.

The claim that the appellant must be discharged because the complaint charges the accused with having forged and uttered forged bills of exchange, whereas the proof shows that he had forged and uttered forged notes, is altogether untenable in an extradition case.

Pierce v. Creecy, 210 U. S. 401, 52 L. ed. 1120, 28 Sup. Ct. Rep. 714; Whitten v. Tomlinson, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297; Ex parte Reggel, 114 U. S. 650, 29 L. ed. 252, 5 Sup. Ct. Rep. 1148, 5 Am. Crim. Rep. 218; Roberts v. Reilly, 116 U. S. 96, 97, 29 L. ed. 549, 6 Sup. Ct. Rep. 241; Ex parte Sternaman, 77 Fed. 595; Grin v. Shine, 187 U. S. 181, 47 L. ed. 130, 23 Sup. Ct. Rep. 98, 12 Am. Crim. Rep. 366.

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the depositions of witnesses having actual knowledge of the facts, taken under the treaty and act of Congress. This will afford ample authority to the commissioner for issuing the warrant."

Hence, any irregularity in making a complaint in extradition proceedings, on information and belief, without attaching thereto the record and depositions of the foreign court which are the basis of the proceeding, is cured by the production of the same before the commissioner. Yordi v. Nolte, 215 U. S. 227, 54 L. ed. 170, 30 Sup. Ct. Rep. 90, affirming 166 Fed. 921.

A complaint by a foreign consul in his official capacity, he not pretending to any personal knowledge of the matters set forth in the complaint, is sufficient if it contains all the necessary and proper averments to enable the party accused to understand what offenses he is charged with having committed. Re Farez, 7 Blatchf. 345, Fed. Cas. No. 4,645.

The complaint of a foreign consul general, made upon information and belief, stating that the sources of his information were telegrams from the proper authorities, and certain foreign depositions not before the court, is sufficient to justify the court in refusing to discharge on habeas corpus a person held under an extradition warant. Ex parte Van Hoven, 4 Dill. 415, Fed. Cas. No. 16,859.

The statement in Ex parte Sternaman, 77 Fed. 595, affirmed in 26 C. C. A. 214, 51 U. S. App. 312, 80 Fed. 883, that in some cases the complaint in extradition proceedings might be made upon information and belief, should be understood with the qualification that the sources of information and grounds of belief should be set forth.

See also notes to Salter v. State, 25 L.R.A.(N.S.) 60, and People ex rel. Livingston v. Wyatt, 10 L.R.A.(N.S.) 159, on complaint or information based on information and belief as the basis for the issuance of a warrant, or for an examination preliminary thereto.

Mr. Justice Holmes delivered the opinion of the court:

This is a proceeding by habeas corpus and certiorari to test the validity of a commitment of the appellant, Glucksman, for extradition to Russia. The circuit court dismissed the writs and remanded the prisoner, who thereupon appealed to this court. The complaint three times charges the forgery of the signature of one Tugendriach to bills of exchange for 100 roubles, and following each such charge alleges the fraudulent utterance of bills for the same sum to merchants named Bierenzweig, Traidenraich, and Selinsky, and obtaining goods for them of that value. This last is alleged to constitute the crime of uttering forged paper, although it is not expressly alleged that the bills fraudulently uttered were forged, as pretty plainly is meant. The ground of the appeal is that there is no sufficient evidence to warrant extradition on the charge.

512] *It is common in extradition cases to attempt to bring to bear all the factitious niceties of a criminal trial at common law. But it is a waste of time. For while, of course, a man is not to be sent from the country merely upon demand or surmise, yet if there is presented, even in somewhat untechnical form according to our ideas, such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender. Grin v. Shine, 187 U. S. 181, 184, 47 L. ed. 130, 133, 23 Sup. Ct. Rep. 98, 12 Am. Crim. Rep. 366. See Pierce v. Creecy, 210 U. S. 387, 405, 52 L. ed. 1113, 1122, 28 Sup. Ct. Rep. 714. We are bound by the existence of an extradition treaty to assume that the trial will be fair. The evidence in this case seems to us sufficient to require us to affirm the judgment of the circuit court.

According to the translation of the Russian documents accompanying the demand, Birenzweig, a merchant, "deposed" on July 7, 1910, that the Lodz merchant, Leiba Glikeman, in the previous June, indorsed to him in payment for goods a note for 100 roubles, purporting to be drawn by a Tugendreich, who resides in Ozorkov; that a few days later he learned that Glikeman had left those parts, and that he was confirmed by Tugendreich in his suspicion that the note was spurious. Fraidenreich, a merchant, deposed to like effect, giving the name of the purported drawer of the note as Mosche-Leiba Tugendreich. And so did Zelinsky. Birenzweig and Fraidenreich produced their notes. Moschek-Leib Jakubov-Maerov Tugendreich deposed that he was a merchant in Ozorkov, that he never drew any notes in Glikeman's favor, that the signatures on the notes produced by Birenzweig and Fraidenreich represented a kind of imitation of his signature, and that the text of his notes was written by Glikeman (with whom he had had dealings). There is no rational doubt that the evidence tends to show that Leiba Glikeman, a leather merchant of Lodz, forged notes of the above-named Tugendreich, *and disappeared before July 7,[513 1910. The prisoner by his own admission was a leather merchant and came from Lodz, arriving in New York on or about August 3, 1910. When first arrested he said that he had enemies on the other side who were bringing these charges against him, and, as we think it appears, tried to bribe the officers to let him go. He also said that the spelling of his name Gluksman was a typographical error that his name was Lewek Glicksman. The Russian magistrate sends a description of Leiba-Levek Pinkusov Glikeman, which is worthless, as such descriptions generally are, but adds certainly to the correspondence of the name of the person referred to in the proceedings in Russia, with that of the prisoner, and after the description the magistrate adds: "A photograph of Glikeman is hereto attached," with his seal on the card, and the photograph represents the prisoner. It is objected that there is no deposition that the photograph represents the party accused, and it may be that in other circumstances we should require further proof. But the magistrate, in certifying as if of his own knowledge, presumably had some reason for doing so, and taking the convergence of the other facts mentioned toward the prisoner as the party accused, we cannot say that the commissioner was wrong in finding the identity made out.

One or two subordinate matters need but a bare mention. The complaint speaks of bills of exchange; the evidence shows the forged instruments to have been promissory notes. The instruments are identified sufficiently and for this purpose no more is needed. Neither Wright v. Henkel, 190 U. S. 40, 47 L. ed. 948, 23 Sup. Ct. Rep. 781, 12 Am. Crim. Rep. 386, nor Pettit v. Walshe, 194 U. S. 205, 48 L. ed. 938, 24 Sup. Ct. Rep. 657, indicates that because the law of New York in this case may determine whether the prisoner is charged with an extraditable crime, it is to determine the effect of such variance between evidence and complaint. That is a matter to be decided on general principles, irrespective *of the law of the state. The[514 complaint is sworn to upon information and belief, but it is supported by the testimony of witnesses who are stated to have deposed, and whom, therefore, we must presume to have been sworn. That is enough.

Rice v. Ames, 180 U. S. 371, 375, 45 L. ed. 577, 581, 21 Sup. Ct. Rep. 406, 12 Am. Crim. Rep. 356.

Judgment affirmed.

ALBERT S. APSEY, Receiver of the First National Bank of Chelsea, Plff. in Err.,
v.
GEORGE E. KIMBALL.† (No. 132.)

ALBERT S. APSEY, Receiver of the First National Bank of Chelsea, Plff. in Err.,
v.
ANNA C. WHITTEMORE. (No. 133.)

(See S. C. Reporter's ed. 514–524.)

National banks — liability of shareholders — termination of relation.

Shareholders in a national bank which has extended its corporate existence, conformably to the act of July 12, 1882 (22 Stat. at L. 162, chap. 290, U. S. Comp. Stat. 1901, p. 3457), ceased to be such upon the expiration of the original term of the bank's corporate life, and therefore could not thereafter be chargeable with personal liability for its debts, where they took the steps required of nonassenting stockholders in § 5 of that act by giving notice of a desire to withdraw, and by appointing an appraiser to obtain a valuation of their shares.

[For other cases, see Banks, IV. d, in Digest Sup. Ct. 1908.]

[Nos. 132 and 133.]

Argued April 20, 1911. Decided May 29, 1911.

IN ERROR to the United States Circuit Court of Appeals for the First Circuit to review a judgment which reversed a judgment of the Circuit Court for the District of Massachusetts in favor of the receiver of a national bank in an action to enforce the personal liability of a shareholder. Affirmed. Also

IN ERROR to the Superior Court of the State of Massachusetts for the County of Suffolk to review a judgment, entered pursuant to a decision of the Supreme Court of that state, in favor of defendant in an action by the receiver of a national bank to enforce the personal liability of a shareholder. Affirmed.

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†Death of George E. Kimball, the defendant in error herein, suggested, and appearance of Sidney A. Wilbur, executor of the estate of George E. Kimball, deceased, as the party defendant in error herein, filed and entered December 19, 1910.

NOTE.—As to who are liable as shareholders in national bank—see notes to Beal v. Essex Sav. Bank, 15 C. C. A. 131, and Earle v. Carson, 46 C. C. A. 503.

On the enforcement of statutory liability of shareholders in national banks—see note to Williamson v. American Bank, 52 C. C. A. 6.

See same case below, No. 132, 90 C. C. A. 634, 164 Fed. 830; No. 133, 199 Mass. 65, 85 N. E. 91.

The facts are stated in the opinion.

Mr. **George L. Wilson** argued the cause and filed a brief for plaintiff in error:

The section in question imposes upon shareholders a contractual liability, just the same as if they had individually entered into the contract in express terms; and that liability has been imposed not for the safety or security of the bank as a going concern, but of its creditors in case it should fail to pay its debts. They are the persons benefited, and to be benefited, by the section in question, and only very rarely and in exceptional cases have stockholders—meaning record stockholders on the books of the bank—been able to escape the enforcement of the contractual liability so imposed upon them for the safety of creditors.

Richmond v. Irons, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; Stuart v. Hayden, 169 U. S. 2, 8, 42 L. ed. 639, 641, 18 Sup. Ct. Rep. 274; Whitney v. Butler, 118 U. S. 655, 30 L. ed. 266, 7 Sup. Ct. Rep. 61; Earle v. Carson, 188 U. S. 42, 47 L. ed. 373, 23 Sup. Ct. Rep. 254; Scott v. Deweese, 181 U. S. 202, 45 L. ed. 822, 21 Sup. Ct. Rep. 585; Minor v. Mechanics' Bank, 1 Pet. 46, 7 L. ed. 47; Lantry v. Wallace, 182 U. S. 536, 45 L. ed. 1218, 21 Sup Ct. Rep. 878.

The records of the bank at the time of insolvency determine the question who are, and who are not, shareholders of the association liable to the assessment under this section.

Pauly v. State Loan & T. Co. 165 U. S 606, 41 L. ed. 844, 17 Sup. Ct. Rep. 465; Richmond v. Irons, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; Germania Nat. Bank v. Case, 99 U. S. 628, 25 L. ed. 448; Anderson v. Philadelphia Warehouse Co. 111 U. S. 479, 28 L. ed. 478, 4 Sup. Ct. Rep. 525; Matteson v. Dent, 176 U. S. 521, 530, 44 L. ed 575, 20 Sup. Ct. Rep. 419.

The liability under U. S. Rev. Stat. § 5151, U. S. Comp. Stat. 1901, p. 3465, is not in favor of the bank, but of its creditors, and does not arise until the bank becomes insolvent.

Wickham v. Hull, 102 Iowa, 469, 71 N. W. 352; Irons v. Manufacturers' Nat. Bank, 21 Fed. 197; Scott v. Deweese, 181 U. S. 202, 212, 213, 45 L. ed. 822, 827, 828, 21 Sup. Ct. Rep. 585.

Mr. **Wilbur H. Powers** argued the cause, and, with Messrs. Henry H. Folsom and Walter Powers, filed a brief for defendants in error:

There is no estoppel in this case.

Whitney v. Butler, 118 U. S. 655, 30 L. ed. 266, 7 Sup. Ct. Rep. 61; Earle v. Carson, 188 U. S. 42, 47 L. ed. 373, 23 Sup. Ct. Rep. 254.

In order that one who is not a shareholder should be liable as a shareholder, he must have done some act ratifying, approving, or acquiescing in the bank's action in having him on the books as a shareholder, or receive some benefit such as would arise from the ownership of such stock.

Stephens v. Follett, 43 Fed. 842; Keyser v. Hitz, 133 U. S. 139, 149, 33 L. ed. 534, 537, 10 Sup. Ct. Rep. 290.

One who may profit by the gains of an enterprise should bear its losses; and the statute imposing a liability on shareholders in a national bank rests on this principle.

Beal v. Essex Sav. Bank, 15 C. C. A. 128, 33 U. S. App. 101, 67 Fed. 816.

A transfer of bank stock to a person without his knowledge or consent does not make him a shareholder.

Keyser v. Hitz, supra.

So, a transfer fraudulently or collusively made to avoid paying an assessment will be disregarded, and the real owner, not the book owner, held liable.

Rankin v. Fidelity Ins. Trust & S. D. Co. 189 U. S. 242, 246, 47 L. ed. 792, 794, 23 Sup. Ct. Rep. 553.

The real owner of shares is held responsible, although the shares are not registered in his name. The law looks through subterfuges and apparent ownership, and fastens the liability upon the persons to whom the shares actually belong.

Ohio Valley Nat. Bank v. Hulitt, 204 U. S. 162, 168, 51 L. ed. 423, 427, 27 Sup. Ct. Rep. 179.

Mr. Justice **Day** delivered the opinion of the court:

These cases are practically alike. No. 132 is a writ of error to the United States circuit court of appeals of the first circuit; No. 133 is a writ of error to the superior court of Massachusetts. The suits were originally brought by Albert S. Apsey, receiver of the First National Bank of Chelsea, Massachusetts, against George E. Kimball and Anna G. Whittemore, respectively, under § 5151 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3465), making the shareholders of a national banking association individually responsible in a sum equal to the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares.

In each of the cases the courts whose judgments are here for review reached the conclusion that the shareholder sued was not liable to the receiver on account of such statutory obligation. In the case from Massachusetts, while the final judgment was entered in the superior court of that state, the decision was in the supreme judicial court of Massachusetts, and is reported in 199 Mass. 65, 85 N. E. 91.

As originally organized, national banks had a corporate existence of twenty years. By the act of July 12, 1882, 22 Stat. at L. chap. 290, p. 162, U. S. Comp. Stat. 1901, p. 3457, such banks were authorized to continue their corporate existence for another twenty years. As pointed out in § 2 of the act, such extension must be authorized by consent in writing of shareholders owning not less than two thirds of the capital stock of the association. Before granting a certificate of approval of such extension, the Comptroller of the Currency is required to cause a special examination of the bank to be made, and *if, after such exami-[516 nation, or otherwise, it appears to him that the association is in a satisfactory condition, he is required to grant his certificate of approval, or, if it appear that the condition of the association is not satisfactory, he shall withhold the same.

Section 5, which is the important one in this case, provides:

"That when any national banking association has amended its articles of association, as provided in this act, and the Comptroller has granted his certificate of approval, any shareholder not assenting to such amendment may give notice in writing to the directors within thirty days from the date of the certificate of approval, of his desire to withdraw from said association, in which case he shall be entitled to receive from said banking association the value of the shares so held by him, to be ascertained by an appraisal made by a committee of three persons, one to be selected by such shareholder, one by the directors, and the third by the first two; and in case the value so fixed shall not be satisfactory to any such shareholder, he may appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and if said reappraisal shall exceed the value fixed by said committee, the bank shall pay the expenses of said reappraisal, and otherwise the appellant shall pay said expenses; and the value so ascertained and determined shall be deemed to be a debt due, and be forthwith paid, to said shareholder from said bank; and the shares so surrendered and appraised shall, after due notice, be sold at public sale, within thirty days after the final appraisal provided in this section."

Except as to the number of shares held

by the shareholders sued in the two cases, and the times at which the same were acquired, the facts in both cases are essentially the same. Case No. 132 was tried upon an agreed statement of facts, as follows:

517] *"The First National Bank of Chelsea was, prior to August 16, 1906, a banking association duly organized and existing under the provisions of the national banking act and amendments, with a capital of $300,000 divided into 3,000 shares of the par value of $100 each; that on said August 16, 1906, the said bank closed its doors and suspended business; that on August 25, 1906, the plaintiff was duly appointed by the Comptroller of the Currency, receiver of said bank; that on September 25, 1906, the Comptroller of the Currency ordered an assessment of $100 per share on each share of stock in said bank, payable by the stockholders, according to their respective holdings, on or before October 25, 1906, and ordered the plaintiff to collect and recover the same by proper proceedings; that the defendant received from said receiver a copy of said order of assessment and a separate notice and demand for payment, all of which were in the following form:

"The defendant, on November 18, 1901, became the owner of twenty (20) shares of the capital stock of said bank, and on said date received two certificates, each for ten (10) shares; on November 20, 1901, he became the owner of fifteen (15) shares and received a certificate therefor; and on August 31, 1904, he became the owner of five (5) shares, and received a certificate therefor. Said four certificates were each and all in the following form, *mutatis mutandis*, and their numbers were respectively 1235, 1236, 1237, 1238.

"Massachusetts.

"The First National Bank of Chelsea.

"No. 1235. 10 Shares.

"This certifies that George E. Kimball of Boston, Mass., is the proprietor of ten (10) shares of the capital stock of the First National Bank of Chelsea, transferable only on the books of the bank in person or by attorney, on the surrender of this certifi-
518] cate. 'No transfer of the stock of *this association shall be made without the consent of the board of directors by any stockholder who shall be liable to the association either as principal debtor or otherwise.'

"Chelsea, Nov. 18, 1901.

S. B. Hinckley, President.

"Walter Whittlesey, Cashier.

"Shares $100 each."

"The defendant held said certificates from the respective dates of their issuance, as above specified, down to and after the date of the suspension of the bank, and he had them in his possession and produced them at the trial.

"The twenty-year period of succession of said bank under the provisions of the national bank act expired on September 5, 1904, and on or before said date proper proceedings were taken under the act of July 12, 1882 (one of the amendments to the national bank act), to amend the articles of association so as to extend the period of succession for a period of twenty years from said September 5, 1904, and said articles were so amended.

"The defendant did not assent to said amendment, but, acting in pursuance of the provisions of § 5 of said act of July 12, 1882, and within the time therein named, he gave to the bank directors due notice of his desire to withdraw from the association, and afterwards appointed one William R. Dresser as one member of the appraisal committee under said § 5, and gave due notice of such appointment to the directors of the bank, and said directors appointed Sylvester B. Hinckley as a second member of said committee of appraisal, but these two never appointed the third member, and no appraisal was ever made. The said Sylvester B. Hinckley was at said time a director of said bank, its president, and a large stockholder therein.

"The defendant, after waiting some months subsequent to the appointment of said Dresser and Hinckley, during which time he made all reasonable efforts in good faith to *have said third member ap-[519 pointed, but without result, in September, 1905, retained an attorney, who at once communicated with said Hinckley, urging him to join in the making of such appointment and the said Hinckley, or the bank, also retained counsel, and the two counsel conducted a correspondence on the question of such appointment, which correspondence, however, failed to result in such appointment.

"On January 1, 1905, at the time of declaring its regular semiannual dividend, the bank declared a regular dividend of three (3) per cent to the defendant on said forty (40) shares and sent him a dividend check therefor, which the defendant promptly returned, declaring that he was not a stockholder in the bank, and declining to accept or to use the check. Further regular dividends were declared to him by the bank on July 1, 1905, January 1, 1906, and July 1, 1906, the latter being the last dividend declared by the bank prior to the suspension.

"None of the said last mentioned dividends were sent to or received by the defendant. The defendant was also credited

on the bank's ledger with said forty (40) shares. The bank never refused the defendant or withheld from him any of the rights or privileges of a stockholder, but the defendant never used or asserted any of said rights or privileges of a stockholder after September 5, 1904. The following extract from the bank's by-laws was introduced in evidence:

" 'Section 15. The stock of this bank shall be assignable only on the books of this bank, subject to the restrictions and provisions of the act; and a transfer book shall be kept in which all assignments and transfer of stock of this association shall transfer of stock of this association shall be made without the consent of the board of directors by any stockholder who shall be liable to the association, either as principal debtor or otherwise; and certificates of stock shall contain upon them notice of 520]this provision. *Transfers of stock shall not be suspended preparatory to a declaration of dividends, and except in cases of agreement to the contrary expressed in the assignments, dividends shall be paid to the stockholder in whose name the stock shall stand on the day on which the dividends are declared.

" 'Section 16. Certificates of stock, signed by the president and cashier, may be issued to stockholders, and the certificate shall state upon the face thereof that the stock is transferable only upon the books of the bank; and when stock is transferred, the certificates thereof shall be returned to the bank and canceled and new certificates issued.' "

The question, then, is: Did the shareholders, defendants in error, cease to be such, or were they still shareholders when the bank failed, and liable to assessment for the benefit of creditors? It is the contention of the plaintiff in error that they did not cease to be shareholders until, under § 5 of the act, an appraisal of the value of the stock had been made and the certificates of stock duly surrendered. Upon the other hand, the defendants in error contend that, upon complying with the steps required of them, in giving notice, appointing an appraiser, and using diligence to have an appraisal, they ceased to be shareholders, and were no longer liable to pay the assessment made.

The First National Bank of Chelsea was originally incorporated, under the statute, for a period of twenty years, and while that was its span of corporate life, the defendants in error became shareholders therein, received certificates of shares, and were duly registered as shareholders. As twenty years was the life of the corporation, the shareholders had not bound themselves to remain such after the expiration of that definite period of time. As the statute originally stood, the venture would necessarily terminate at the end of that time.

Congress recognized that it might be proper to continue *the organization, that[521 at least a part of the shareholders might desire to do so, and therefore the act of July 12, 1882, provided for the extension of the corporate existence of the bank. It was also recognized that a part of the shareholders might wish to retire from the venture, and it was therefore provided that two thirds of the shareholders must acquiesce to continue the bank's existence, and must certify such desire to the Comptroller of the Currency, who must approve of the extension of the corporate existence.

It is provided in § 5, above quoted, that each nonconsenting shareholder shall give notice in writing to the directors of the association, within thirty days of the date of the certificate of approval by the Comptroller, of his desire to withdraw from the association; and further, that he thereupon shall be entitled to receive from the association the value of the shares held by him, such value to be ascertained by an appraisal by a committee of three, one to be selected by the shareholder, one by the directors of the association, and the third by the first two thus selected, the value ascertained and determined is to be deemed a debt of the bank and forthwith paid, and the surrendered shares to be sold after due notice, at public sale, after thirty days from the final appraisement provided for in the section.

The agreed facts show that the shareholders here involved strictly complied with the statute in giving the required notice, and in the selection of their appraiser. The bank also selected its appraiser, and the facts show that the shareholders urged action, employed counsel, and endeavored to bring about the appraisal. Apparently the delay was caused by the bank's representative; at least, this was the possible inference suggested by the supreme judicial court of Massachusetts. 199 Mass. 68, 85 N. E. 91.

We agree with the courts below that the defendants *ceased to be shareholders[522 after thus complying with the statute. Section 5151 of the statute makes shareholders liable to the assessment. The statute makes specific provision for the manner in which the shareholder may sever his connection with the corporation. These necessary steps were taken, as the agreed facts show. The shareholders had a right to end their connection with the association at the termination of the period of original incorporation, or, if they so desired, they might

go on with the assoeiation in its renewed life.

Section 5 provides for the manner of manifesting such determination to terminate their relations with the eorporation at the expiration of its original life. True, other things were to be done to aseertain the amounts to be paid the retiring shareholders; that they were not done in these cases is no fault of the retiring shareholders. We eannot agree with the contention of the plaintiff in error, that they ceased to be shareholders only when the appraisal had been made, and the eertifieate of shares surrendered.

It is said that the sharcholders, when the bank's representative did not act in the matter of the appraisal, might have brought suit to compel further proeeedings, or to eaneel their stock on the books of the company. Again we answer—that they did all that the statute required them to do.

But, it is urged, in not getting their names off the books, whatever might be their relations with the bank, these shareholders eontinued to be registered shareholders, and, as such, liable to creditors. Cases are cited which hold that where one permits his name to be registered on the books of the bank as a shareholder, or where he fails to obtain a transfer of the shares to another name, although he has in fact parted with his stock, such shareholder remains liable to the creditors. (See Germania Nat. Bank v. Case, 99 U. S. 628, 25 L. ed. 448; Matteson v. Dent, 176 U. S. 521, 44 L. ed. 571, 20 Sup. Ct. Rep. 419).

523] *But those are not cases where shareholders have done all that the law required in order to end their relation to the bank and to get their names off the books.

Where the shareholder has performed every duty whieh the law imposes upon him in order to seeure a transfer of the stoek, the fact that it is not transferred on the register of the bank does not continue his liability as sueh shareholder. Whitney v. Butler, 118 U. S. 655, 30 L. ed. 266, 7 Sup. Ct. Rep. 61; Earle v. Carson, 188 U. S. 42, 47 L. ed. 373, 23 Sup. Ct. Rep. 254. The facts of the cases at bar bring them within this principle. These shareholders had done all that the law required of them. Any further aetion to evidence the ehanged relation of the shareholders to the bank, upon its books, was not a matter within the control of the shareholders.

It is argued that the eonstruction we have given the statute may amount to a reduction of the eapital stock, to the detriment of ereditors. The corporation in which these shares were held expired in twenty years. The creditors after that time had no right to hold these shareholders in faee of the law, of which all must take notiee, permitting the retirement of nonassenting shareholders. If this results in the diminution of outstanding shares of the bank assessable for creditors, it was the very thing made possible by the amended statute. New shareholders are to be brought in by the sale of the stock, as provided in § 5. It is true that these defendants retained their certificates, but they were not obliged to surrender them except upon payment for their shares.

It is said, had the corporation made a large gain, instead of failing after the action of these sharcholders, in giving notiee and naming their appraiser, they might have withdrawn their notice, and obtained the benefit of such increase, but this depends upon the construction of the statute. As we view it, when the shareholders made their election to retire at the end of the first twenty-year period of eorporate organization, and took the steps required *in § 5, by giving notice and appoint-[524 ing an appraiser to obtain a valuation of and payment for their shares of stock, they thereby ceased to be shareholders beyond the original twenty-year term of the life of the corporation, and they eould neither share its profits, nor be eompelled to bear its burdens.

The views here expressed require the affirmance of the judgments in both eases.

Affirmed.

CHARLES E. APPLEBY, as Surviving Trustee of the Ogden Land Company, Plff. in Err.,

v.

CITY OF BUFFALO.

(See S. C. Reporter's ed. 524-533.)

Error to state court — Federal question — raising by assignment of errors.

1. The assignments of error in the Federal Supreme Court eannot cure the failure of the record in the state court to show that a question was there raised and deeided of the eharacter described in U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, governing writs of error from the Federal Supreme Court to a state eourt.

[For other cases, see Appeal and Error, 1311-1318, in Digest Sup. Ct. 1908.]

Note.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state eourts can be brought up for review in the Su-

Constitutional law — due process of law — eminent domain — nominal damages.

2. An award of only nominal damages in proceedings to acquire by eminent domain the fee to lands under the waters of a navigable stream does not take property for public use without compensation, and hence without due process of law, where substantially all the land abutting upon the stream on either side had already been conveyed away by the owner of the bed, and the proceedings were had under a statute providing adequate machinery for the ascertainment of compensation upon notice and hearing, and the record discloses no ruling of law preventing just compensation to the owner for the property taken.

[For other cases, see Constitutional Law, 490–499, in Digest Sup. Ct. 1908.]

[No. 162.]

Argued April 26 and 27, 1911. Decided May 29, 1911.

IN ERROR to the Supreme Court of the State of New York in and for the County of Erie, in that state, to review a judgment entered pursuant to the mandate of the Court of Appeals, which had reversed a judgment of the Appellate Division of the Supreme Court, Fourth Department, reversing a judgment of the Supreme Court, confirming an award in condemnation proceedings. Affirmed.

See same case below, in appellate division, 116 App. Div. 555, 101 N. Y. Supp. 966; in court of appeals, 189 N. Y. 163, 81 N. E. 954.

The facts are stated in the opinion.

Messrs. **O. O. Cottle** and **Edmund P. Cottle** argued the cause and filed a brief for plaintiff in error.

Mr. **Clark H. Hammond** argued the cause, and, with Mr. George E. Pierce, filed a brief for defendant in error.

Mr. Justice **Day** delivered the opinion of the court:

This case originated in a proceeding begun by the city of Buffalo to appropriate the lands of the plaintiff in error under the waters of the Buffalo river, between the Buffalo Creek Indian Reservation line, at or near the crossing of Hamburg street, and the easterly city line of the city of Buffalo. These lands are said to lie under the waters for about 7 miles in the circuitous winding of the river, and to embrace about 141 acres.

Application was made to the supreme court of the state of New York, at Buffalo, for the appointment of commissioners to ascertain the compensation to be made the owner for the lands described. The plaintiff in error appeared, and three commissioners were appointed to ascertain the just compensation to be awarded to the owner. The commissioners were duly sworn, viewed the premises, and heard a considerable amount of testimony, both for the city and the plaintiff in error, and made a report awarding compensation for the lands taken in the sum of 6 cents. The plaintiff in error excepted to the award, but the same was confirmed in the supreme court of New York. Plaintiff in error moved to set aside the order confirming the report, which was done, and thereupon a new order of confirmation was entered, setting out the proceedings in greater detail.

From the order of the supreme court confirming the *report of the commission-[526] ers appeal was taken by the plaintiff in error to the appellate division of the supreme court of New York, and that court held that the only question presented by the appeal was the adequacy of the award, and reached the conclusion that the evidence showed conclusively that the property was valuable; that while the exact value was difficult to determine, the evidence established that it was more than nominal. 116 App. Div. 555, 101 N. Y. Supp. 966.

The appellate division reversed the order of the supreme court, and adjudged that new commissioners should be appointed, at special term, to determine the compensation to be paid the owners of the premises in question.

The appellate division granted leave to the city to appeal to the court of appeals of the state of New York, and certified to that court four questions for review, as follows:

"1. Is Charles E. Appleby, as surviving

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preme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

As to when Federal question is raised in time to sustain the appellate jurisdiction of the Federal Supreme Court over state courts—see note to Chicago, I. & L. R. Co. v. McGuire, 49 L. ed. U. S. 414.

As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

trustee of the Ogden Land Company, under the facts in this proceeding, entitled to an award of more than 6 cents damages, on the city of Buffalo acquiring the fee to the lands under the waters of the Buffalo river in eminent domain proceedings, taken pursuant to its revised city charter, for the purposes of a public highway?

"2. Were the appraisal commissioners authorized and empowered, under the facts in this proceeding, to fix the actual damages of Charles E. Appleby, as surviving trustee of the Ogden Land Company, on the city of Buffalo acquiring the fee to the lands under the waters of the Buffalo river, at 6 cents, and to award said sum as and for the just compensation to be made to said Charles E. Appleby, as surviving trustee of the Ogden Land Company?

"3. Does the city of Buffalo in this proceeding show a necessity for acquiring the fee of said lands?

527] *"4. Did any of the exceptions call for a reversal of the order confirming the appraisal commissioners' report?"

The court of appeals overruled a motion to dismiss the appeal. (This ruling is reported in 189 N. Y. 537, 82 N. E. 1124. It answered the four questions propounded by the appellate division in an opinion reported in 189 N. Y. 163, 81 N. E. 954, the questions being answered as follows: "The first question should be answered in the negative. The second question should be answered in the affirmative. The third question is immaterial and not answered. The fourth question should be answered in the negative."

The court of appeals held, among other things, that the Buffalo river had been made a public highway by law; that for a large part of the distance through the city of Buffalo it is navigable to large boats from the lakes, and is a stream of much commercial importance. It held that the proceedings were under due authority of law as enacted in the charter of the city of Buffalo. In answering the questions, the court of appeals said: "We have no great difficulty in answering these questions to the effect that the commissioners were authorized upon the evidence presented to them, if they saw fit so to do, to award only nominal damages for the land sought to be acquired by the city. In reaching this conclusion we have assumed, as did the city in the institution of the proceedings, that the respondent was vested with the fee of the river bed. Upon the other hand, there does not appear to be any dispute that either by him or by the company whose rights he represents, substantially all of the land abutting upon the river upon either side formerly owned by the company has been conveyed away. This is a matter of importance, as bearing upon the value of the bed of the stream, because if the bed and fee to the abutting lands were owned by the same party, it very well might be that the possible connected use of the two *would be an element of much impor-[528 tance in passing upon the value of the bed.

"Many witnesses were sworn before the commissioners in regard to the value of this bed and the amount of the damages which should be awarded for taking it. Their evidence presented a well-defined question of fact, the testimony ranging all of the way from a valuation at nominal figures to one of very substantial amount. In addition to hearing the testimony of these witnesses the commissioners were under obligations to, and we must assume did, view the premises to be taken. Various theories were doubtless presented to them, as they have been to us, leading to the view that the land was of substantial value. These theories are more or less speculative.

"We think that the commissioners were so justified by the evidence in making the award which they did make that we cannot say, as a matter of law, that there was no evidence to sustain their conclusions."

The court of appeals further held that should the first and second questions be regarded as questions of fact, not to be considered by it, and the third question be treated as immaterial, there would be left for consideration only the fourth question, and there being no exceptions calling for a reversal of the order confirming the commissioners' report, the order of the appellate division would have to be reversed.

The case is now brought here for a review of the judgment of the court of appeals, for this is the effect of the proceeding in error, although, under the practice in New York, the judgment of the court of appeals is remitted to the supreme court of New York, and the writ of error runs to that court.

The case has been elaborately argued, orally and in the voluminous brief of the plaintiff in error, and many alleged errors of procedure in rulings upon construction of state statutes, and questions of practice in the state courts *are pointed[529 out. Indeed, the case has been argued, apparently, upon the theory that this court has the power, embraced in a general right to review, to correct errors in trials and procedure in the state courts.

This court has had frequent occasion to say that its right to review the judgment of the highest court of a state is specifically limited by the provisions of § 709 of the Revised Statutes of the United States (U. S.

Comp. Stat. 1901, p. 575). This right of review in cases such as the one at bar depends upon an alleged denial of some right, privilege, or immunity specially set up and claimed under the Constitution or authority of the United States, which it is alleged has been denied by the judgment of the state court. In such cases it is thoroughly well settled that the record of the state court must disclose that the right so set up and claimed was expressly denied, or that such was the necessary effect, in law, of the judgment. Sayward v. Denny, 158 U. S. 180, 183, 39 L. ed. 941, 942, 15 Sup. Ct. Rep. 777; Harding v. Illinois, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 97, 53 L. ed. 417, 424, 29 Sup. Ct. Rep. 220.

In the case at bar an elaborate assignment of error for the purpose of bringing the case to this court is found in the record, in which many rulings are referred to, which, it is alleged, resulted in deprivation of rights of Federal creation. But it is well settled that the assignments of error made for the purpose of bringing the case to this court cannot be looked to for the purpose of originating a right of review here. This must necessarily follow from the provisions of § 709, which permit a review in this court of rulings concerning claims of Federal right which were set up and denied in the state court. Neither the petition for writ of error in the state court after judgment, nor the assignments of error in this court, can supply deficiencies in the record of the state court, if such exist. Harding v. Illinois, supra, and previous cases in this court therein cited.

The jurisdiction of the court of appeals 530]of New York *was invoked because of the questions propounded by the appellate division. A reading of those questions shows that no right under the Federal Constitution was asserted or suggested.

We look in vain in the record to find any claim of Federal right prior to the judgment in the court of appeals, unless it is to be found in the third exception to the report of the commissioners.

"Third. The said report is also contrary to and in violation of the Constitution of the United States, which provides that private property shall not be taken for public use without just compensation, and the sum awarded by said report is less than just compensation."

If it be taken that the exceptions in this respect amount to a claim of violation of the due-process-of-law clause of the Constitution, which protects against the taking of private property without compensation, and that the effect of the judgment of the court of appeals is to deny this claim, we proceed to inquire, do the proceedings show a want of due process in the result reached and affirmed by the court of appeals in its judgment answering the questions propounded by the appellate division?

That the 14th Amendment of the Federal Constitution forbids a state to deprive any person of property without due process of law, and to take private property for public use without compensation amounts to such deprivation, is recognized and affirmed in a case wherein the subject was given much consideration. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581. After a review of the authorities this court said:

"Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he *be admitted to defend, can-[531 not convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

And furthermore:

"In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state, or under its direction, for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

In summing up the matter, the court said:

"We are permitted only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation.

"We say 'in absolute disregard of the company's right to just compensation,' because we do not wish to be understood as holding that every order or ruling of the state court in a case like this may be reviewed here, notwithstanding our jurisdiction, for some purposes, is beyond question. Many matters may occur in the progress of such cases that do not necessarily involve, in any substantial sense, the Federal right alleged to have been denied; and in respect of such matters, that which is done or omitted to be done by the state court may constitute only error in the administration

of the law under which the proceedings were instituted.

. . . . . .

"In harmony with those views, we may say in the present case that the state court, having jurisdiction of the subject-matter and of the parties, and being under a duty to guard and protect the constitutional right here asserted, the final judg-
532]ment ought not to be held to be in *violation of the due process of law enjoined by the 14th Amendment, unless by its rulings upon questions of law the company was prevented from obtaining substantially any compensation. See also Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894."

The question of what amounts to due process of law in cases of this character came again before this court in the case of A. Backus Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445. In summing up the essentials of due process of law in condemnation cases this court said: "All that is essential is that, in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation; and when this has been provided there is that due process of law which is required by the Federal Constitution."

The only assignment of error which is here open for review does not show that the court below, by any ruling of law, deprived the owner of the right of compensation for his property. The alleged denial of Federal right rests upon the assertion that the damages were nominal, while the property taken was of greater value. But, as this court has heretofore held, if the state has provided adequate machinery for the ascertainment of compensation, upon notice and hearing, and the record discloses no ruling of law which prevented compensation to the owner for the property taken, there is no lack of due process.

The proceedings in the present case were under a statute which the highest court of the state has held adequate to require condemnation, and against which no constitutional objection was urged. The same court has found that the Buffalo river was a public highway, and a navigable stream; that there was testimony before the commissioners that the land company, of which the plaintiff in error is trustee, had formerly owned land adjacent to the river, which had been sold off, and that the only remaining title was in the lands covered by the river.
533] *The record discloses that the testimony ranged all the way from nominal valuation to one of considerable amount. The court of appeals held that, in view of these facts, the testimony of the witnesses, and view of the premises had by the commissioners, that it could not say, as a matter of law, that there was no evidence to sustain the commissioners' conclusions.

The record thus discloses that the plaintiff in error has had a hearing as to the value of his property before a board of commissioners acting under authority of law, which order was affirmed in a reviewing court; that he was again heard in the Appellate Division, where that order was reversed, and was finally heard in the Court of Appeals, where the finding of the Appellate Division was in turn reversed. And the record fails to show any ruling of law, to which an exception was properly reserved on the ground of denial of Federal rights, which prevented the plaintiff in error from obtaining just compensation for his property.

Judgment affirmed.

JOSEPH N. CARPENTER et al., Petitioners,
v.
DAVID J. WINN.

(See S. C. Reporter's ed. 533–546.)

Discovery — production of books and papers in action at law.

A court of law is not empowered to compel one party to an action to produce books and papers in advance of trial for

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Note.—Production of books and papers, under U. S. Rev. Stat. § 724, U. S. Comp. Stat. 1901, p. 583, in action at law, before trial, for inspection by adverse party.

The decision in Carpenter v. Winn, that U. S. Rev. Stat. § 724, does not empower courts to compel the production of books and papers in an action at law for the inspection of the adverse party before trial, settles a question upon which the lower Federal courts have long disagreed.

In addition to the cases cited in the principal case in support of its decision may be mentioned Paine v. Warren, 33 Fed. 357; and United States v. National Lead Co. 75 Fed. 94.

Entertaining the contrary opinion are Lucker v. Phœnix Assur. Co. 67 Fed. 18; United States v. Youngs, 10 Ben 264, Fed. Cas. No. 16,783; Gray v. Schneider, 119 Fed. 474; Exchange Nat. Bank v. Washita Cattle Co. 61 Fed. 190; Gregory v. Chicago, M. & St. P. R. Co. 3 McCrary, 374, 10 Fed. 529; Ridgely v. Richard, 130 Fed. 387; Bronson v. Kensey, 3 McLean, 180, Fed. Cas. No. 1,927; Central Bank v. Tayloe, 2 Cranch, C. C. 427, Fed. Cas. No. 2,548; Caspary v. Carter, 84 Fed. 416; American Banana Co. v. United Fruit Co. 153 Fed. 943; Motley, G. & Co. v. Detroit Steel & Spring Co. 174 Fed. 734; Rosenberger v. Shubert, 182 Fed. 411.

his adversary's examination and inspection, by the provisions of U. S. Rev. Stat. § 724. U. S. Comp. Stat. 1901, p. 583, that "in the trial" of actions at law the Federal courts may, on motion and notice, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery.

[For other cases, see Discovery and Inspection. II., in Digest Sup. Ct. 1908.]

[No. 135.]

Argued April 20, 21 1911. Decided May 29, 1911.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of New York, entered by default because of defendants' refusal to produce books and papers in advance of trial. Reversed.

See same case below, 91 C. C. A. 301, 165 Fed. 636.

Statement by Mr. Justice Lurton:

In an action wherein David J. Winn was plaintiff and Joseph N. Carpenter and others defendants, the plaintiff, Winn, obtained an order from the court, requiring the defendants to produce certain books and papers said to contain evidence material to make out the plaintiff's case. The order required the defendants to produce "all of their books, papers, writings, account books, day books, blotters, journals, registers, cash books, check books, contracts contract slips and memoranda, made or received by them, their agents, and employees, which contain any memoranda or any business transactions" relating to the plaintiff during the years 1905 and 1906, and particularly pertaining to a certain brokerage transaction in cotton. The order required such production before the trial, and that the plaintiff and his attorneys should be allowed, at the office of the defendants, within a time named, access to such books and papers, with leave to "examine and investigate the same, and to make copies and extracts from such books, documents, and writings." The order concluded thus: "In the event the defendants fail to comply with this order, judgment against them shall be entered by default."

The defendants, conceiving that the court had no authority to require the production of their business books and correspondence before the trial of the cause, for the investigation of the plaintiff, declined to obey the order. Thereupon judgment by default was entered and a jury impaneled to assess the plaintiff's damages, which being done, there was judgment for the plaintiff for the amount so assessed. This judgment was affirmed by the circuit court of appeals, and the case has come here upon a writ of certiorari.

Mr. **John R. Abney** argued the cause and filed a brief for petitioners:

U. S. Rev. Stat. § 724, U. S. Comp. Stat. 1901, p. 583, does not confer the power to require a party to produce books before trial.

Triplett v. Bank of Washington, 3 Cranch, C. C. 646, Fed. Cas. No. 14,178; Iasigi v. Brown, 1 Curt. C. C. 401, Fed. Cas. No. 6,993; Merchants' Nat. Bank v. State Nat. Bank, 3 Cliff. 201, Fed. Cas. No. 9,448; Colgate v. Compagnie Francaise du Telegraphe, 23 Blatchf. 86, 23 Fed. 82; Guyot v. Hilton, 32 Fed. 744; United States v. National Lead Co. 75 Fed. 95; Kirkpatrick v. Pope Mfg. Co. 61 Fed. 47; Cassatt v. Mitchell Coal & Coke Co. 10 L.R.A.(N.S.) 99, 81 C. C. A. 80, 150 Fed. 44; Pennsylvania R. Co. v. International Coal Min. Co. 84 C. C. A. 421, 156 Fed. 765.

The petitioners have a right to keep their books and papers a secret, under the common law and the Constitution, and § 724 should be construed strictly, like an attachment statute.

Entick v. Carrington, 19 How. St. Tr. 1029; Boyd v. United States, 116 U. S. 616, 626, 29 L. ed. 746, 749, 6 Sup. Ct. Rep. 524.

Congress having provided for discovery, there is no other authority. The statute of New York and the practice in that state cannot affect the question.

Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; Amy v. Watertown, 130 U. S. 301, 32 L. ed. 946, 9 Sup. Ct. Rep. 530; Pierce v. Union P. R. Co. 47 Fed. 709; Hanks Dental Asso. v. International Tooth Crown Co. 194 U. S. 303, 48 L. ed. 989, 24 Sup. Ct. Rep. 700; Shumaker v. Security Life & Annuity Co. 86 C. C. A. 302, 159 Fed. 112.

Mr. **John W. Boothby** argued the cause, and, with Mr. Ernest E. Baldwin, filed a brief for respondent:

The method by which discovery of books and papers could be compelled "by the ordinary rules of proceeding in chancery" was by bill of discovery; and by that method, discovery of such books and papers could be, and had to be, compelled before the trial of an action at law.

Story, Eq. Jur. § 1485; 2 Dan. Ch. Pl. & Pr. 1556.

The vast weight of authority in the United States courts as to the power of the

court to grant an inspection under § 724, U. S. Comp. Stat. 1901, p. 583, before the trial, is in favor of such power.

Central Bank v. Tayloe, 2 Cranch, C. C. 427, Fed. Cas. No. 2,548; Jacques v. Collins, 2 Blatchf. 23, Fed. Cas. No. 7,167; United States v. Youngs, 10 Ben. 264, Fed. Cas. No. 16,783; United States v. Hutton, 10 Ben. 268, Fed. Cas. No. 15,433; Victor G. Bloede Co. v. Joseph Bancroft & Sons Co. 98 Fed. 175; Gray v. Schneider, 119 Fed. 474; Cameron Lumber Co. v. Droney, 132 Fed. 304; Lucker v. Phœnix Assur. Co. 67 Fed. 18; Exchange Nat. Bank v. Washita Cattle Co. 61 Fed. 190; Gregory v. Chicago, M. & St. P. R. Co. 3 McCrary, 374, 10 Fed. 529; Newcomb v. Burbank, 159 Fed. 568; Schaffer v. International Power Co. 157 Fed. 896.

It is the spirit and purpose of the statute which are to be regarded in its interpretation; and if these find fair expression in the statute, it should be construed so as to carry out the legislative intent, even though such construction is contrary to the literal meaning of some of the provisions of the statute. A reasonable construction should be adopted where there is a doubt or uncertainty as to the intention of the lawmakers.

People ex rel. Wood v. Lacombe, 99 N. Y. 45, 1 N. E. 599.

Mr. Justice **Lurton**, after making the foregoing statement of the case, delivered the opinion of the court:

The question is whether, under § 724 of the revised Statutes (U. S. Comp. Stat. 1901, p. 583), a court of law may compel one party to an action to produce, in advance of the trial, books and papers for examination and inspection of his adversary.

Section 724 is substantially the 15th section of the judiciary act of 1789 [1 Stat. at L. 82, chap. 20, U. S. Comp. Stat. 1901, p. 583]. It reads as follows:

"In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default."

The purpose of the provision is to provide a substitute for a bill of discovery in aid of a legal action. It may be invoked only when the document sought "contains evidence pertinent to the issue," and "in cases and under circumstances when they might be compelled to produce the same by the ordinary rules of proceeding in chancery." The penalty for failing to comply with such an order is *exceedingly[538 stringent,—that of a nonsuit or a judgment by default.

For more than a century trial courts have disagreed as to whether, under this enactment, the procedure is limited to a requirement that the books, documents, and writings be produced at the trial, or, in the discretion of the court, before the trial, for such investigation and examination as the party obtaining the order might desire

The contention upon the one side is that "in the trial" does not mean "at the trial," or "during the trial," but at any time after issue joined.

The doubt about the meaning of the provision is engendered by the use of the words "in the trial." It is, of course, urged that if the Congress had intended to limit the right to such production, it would have said "at the trial," or, "on the trial." But it is said with equal force that if the purpose was to compel such production before the trial and after issue joined, Congress would have substituted the words, "in an action at law," instead of using words seemingly more restrictive.

But, taking the words as written, what must we infer Congress to have meant by empowering the court to compel production "in the trial?"

Some of the considerations which collectively lead us to conclude that the words "in the trial" mean "on or at the trial" are these:

a. The significance of the word "trial." Does that word embrace anything more than is commonly understood when we speak of the "trial" of an action at law? Or does it include, as contended here, every step in a cause between issue joined and that judicial examination and decision of the issues in an action at law, which we always refer to as the trial?

Blackstone defines "trial" to be the examination of the matters of fact in issue. 3 Bl. Com. 350. This definition is adopted by Bouvier. In Miller v. Tobin, 9 Sawy. 401, 411, 18 Fed. 609, 616, *Judge[539 Deady applied this meaning to the removal act, saying: "'Trial' is a common-law term, and is commonly used to donate that step in an action by which issues or questions of fact are decided." But the word has often a broader significance, as referring to that final examination and decision of matter of law as well as fact, for which every ante-

cedent step is a preparation, which we commonly denominate "the trial." Many cases are cited for this definition in 28 Am. & Eng. Enc. Law, p. 636. But this does not help out those who would broaden the meaning so as to justify an order to produce before such judicial examination of both matters of fact and law which constitute that final step which is called "the trial."

b. "In the trial" implies a restricted use of the procedure as compared to a bill of discovery.

Under the ordinary rules of procedure in chancery to obtain a discovery of evidence material to the maintenance or defense of an action at law, such evidence must, in the very nature of things, result in production before the "trial" at law. Such procedure is still open if it is desired to have the evidence produced before the trial. A court of equity does not lose its jurisdiction to entertain a bill for the discovery of evidence or to enjoin the trial at law until obtained, because the powers of the courts of law have been enlarged so as to make the equitable remedy unnecessary in some circumstances. See the very instructive discussion of the question by Judge Wallace in Colgate v. Campaignie Française du Telegraphe, 23 Blatchf. 86, 23 Fed. 82.

In Guyot v. Hilton, 32 Fed. 743, an application under § 724 to require the plaintiff to produce for the inspection of the defendants the business books of the plaintiff's firm for certain years "in order to enable them to prepare for trial" was denied, Judge Lacombe saying that the proper practice to obtain such relief was by a bill in equity for discovery.

The statute may therefore be well re-[540]garded as affording *a short and quick way of obtaining documentary evidence for use "in the trial" of an action at law, leaving the parties to a bill of discovery if they desire the production before the trial for the purpose of preparing for it.

c. Another consideration leading to the same conclusion is found in the fact that a bill of discovery cannot be used merely for the purpose of enabling the plaintiff in such a bill to pry into the case of his adversary to learn its strength or weakness. A discovery sought upon suspicion, surmise, or vague guesses is called a "fishing bill," and will be dismissed. Story, Eq. Pl. §§ 320 to 325. Such a bill must seek only evidence which is material to the support of the complainant's own case, and prying into the nature of his adversary's case will not be tolerated. The principle is stated by a great authority upon equity thus: "Nor has a party a right to any discovery except of facts and deeds and writings necessary to his own title under which he claims; for he is not at liberty to pry into the title of the adverse party." 2 Story, Eq. Jur. § 1490; Kettlewell v. Barstow, L. R. 7 Ch. 689, 694, 41 L. J. Ch. N. S. 7, 18, 27 L. T. N. S. 258, 20 Week. Rep. 917. In Ingilby v. Shafto, 33 Beav. 31, 9 Jur. N. S. 1141, 32 L. J. Ch. N. S. 807, 8 L. T. N. S. 785, it was held:

The province of discovery in equity is not to compel a defendant, who is a plaintiff in a suit at law, to disclose in what manner he intends to make out his case at law. The plaintiff in equity is entitled only to the discovery of such matters in the knowledge or possession of the defendant in equity, as will enable him to make out his own case at law; and exceptions to an answer omitting to respond to inquiries touching the mode in which the defendant purposed to make out his case at law, and as to documents "relating to matters in the bill mention," were overruled.

This "fundamental rule," as it is called by Judge Story in his work upon Equity Pleading, § 317, in view of the express limitation of the section "to cases and under circumstances" when discovery might be obtained in equity, *implies that pro-[541 duction of an adversary's documents should not be required before trial, that one party may examine and inspect in search of evidence which he may or may not use in the trial.

d. Another consideration arises from the very stringent penalty which is to result if the judge shall conclude that the documents desired have not been produced. The party against whom such an order is sought has the undoubted right to make every objection which he could make were he a defendant in equity to a bill seeking discovery of the same evidence; for the right to compel production is no broader under the statute than under a discovery proceeding in equity. This would include the right to insist that the case, the circumstances, and the purpose to be advanced, were not such as to justify the order. He must also be heard, if he desires, upon the pertinency of the evidence which is being sought, and the right to insist that he be not required to disclose that which pertains only to his side of the case, but only that which is material to make out the case of the party seeking the order.

When, where, and how are these important questions to be heard and decided? If heard by the court in advance of the trial, it will often be necessary that it shall possess itself of that kind of knowledge of the case which can be had only on the trial where the evidence is to be produced. This in many cases will practically require two

trials: one before the jury is impaneled, another after. Opportunities for a miscarriage of justice, as well as inconvenience to the trial judge, may be reduced to a minimum by making an order to produce at the trial, or there show cause why he should not. Bas v. Steele, 3 Wash. C. C. 381, Fed. Cas. No. 1,088; Dunham v. Riley, 4 Wash. C. C. 126, Fed. Cas. No. 4,155.

In Bas v. Steele the order was to produce at the trial. Nothing is said in the opinion of Mr. Justice Washington about production before the trial, but the construction of 542]*the act by the learned justice furnishes practical reason for construing the statute as we have indicated. Construing the section, he said:

"It is not difficult to give a construction to the section of the act of Congress. When either party wants papers, he must give notice; and he has in view one of these objects: 1st. That if the papers called for are not produced, he may be enabled to argue against the party not producing them to the jury; 2d. This object may be to obtain evidence from the contents of the papers called for; and 3d. To move the court for a nonsuit, or for a judgment by default, as the case may be. But in either case, the party must entitle himself to the benefits of the section, by showing that the party was in possession of the papers called for; and he must also give evidence of the contents of the papers; for it will not do for him only to say what those contents are. The court will require reasonable proof of the possession and of the pertinency of the papers. If the object of the party is to avail himself of the provisions of the section, so as to move for a nonsuit, or for judgment by default, he must put the party on his guard, and let him know the consequences of a refusal; and the party receiving such notice will come prepared to meet it. In any such case, when the party is called on to produce papers, he may make oath that he has them not, and thus extricate himself from difficulty. This is the case in chancery, where the plaintiff charges the defendant with having papers to which he has a right, and the defendant relieves himself by his oath; and this may be met by contrary proof of two witnesses. In every case, the party claiming the papers must give evidence of the relevancy of the papers, and of the opposite party having possession of them. Whenever a judgment by default or a nonsuit is intended to be claimed, the notice to produce papers must give the party information that it is intended to move for a nonsuit or a judgment by default, as the case 543]may be; *and this must hereafter be considered as the rule of the court, under this section of the act of Congress."

In Dunham v. Riley the order was to produce on the trial. Reasons for making the rule nisi instead of absolute are given by Mr. Justice Washington, who said:

"But the court," in Bas v. Steele, "did not decide whether such order must be absolute in the first instance. We think it need not be so; but that upon the rule to show cause, it may be made nisi; leaving the court at liberty to enforce the rule, unless the plaintiff can show, at the trial, good cause for not producing them. If the rule be made absolute at the time when it is argued, the court might have to go prematurely into an inquiry into the case, in order to decide whether the order should be absolute or not."

The statute has never been construed by this court, and the practice and decisions of the inferior courts have no such uniformity as to exert any controlling influence. There are perhaps as many cases upon one side as upon the other. We shall therefore refer to but a few of them.

The third circuit court of appeals construes the statute as requiring production only on the trial. Cassatt v. Mitchell Coal & Coke Co. 10 L.R.A.(N.S.) 99, 81 C. C. A. 80, 150 Fed. 32, 44; Pennsylvania R. Co. v. International Coal Min. Co. 84 C. C. A. 421, 156 Fed. 765, 769.

The circuit court of appeals for the second circuit reached an opposite conclusion in the case now before us.

Since Jacques v. Collins, 2 Blatchf. 23, Fed. Cas. No. 7,167, decided in 1846, the United States courts for the New York districts have generally followed the broad interpretation of Judge Betts,—an interpretation which was plainly influenced by the practice in the courts of the state of New York under a state statute dealing with the matter. It is significant that in Jacques v. Collins there was no opposition to the rule to produce before trial, and no consideration given to the practice under the statute in courts of the United States.

*In Victor G. Bloede Co. v. Joseph[544 Bancroft & Sons Co. 98 Fed. 175, though since overruled by the circuit court of appeals for the third circuit, there is to be found a review of most of the cases bearing upon the subject.

The conclusion which we reach as to the meaning of the statute finds support in many reported cases, which, although no more numerous than those upon the other side, are entitled, as we conceive, to the greater weight as precedents. The very early practice under what was then known as the 15th section of the judiciary act of 1789, as shown by Geyger v. Geyger, 2 Dall.

332, 1 L. ed. 403, Fed. Cas. No. 5,375; Hylton v. Brown, 1 Wash. C. C. 298, Fed. Cas. No. 6,981; Triplett v. Bank of Washington, 3 Cranch, C. C. 646, Fed. Cas. No. 14,178, and Dunham v. Riley, 4 Wash. C. C. 126, Fed. Cas. No. 4,155, was to direct the production of books and documents at the trial. The very first reported opinion under the section, the Geyger Case cited above, was by Mr. Justice Patterson, one of the subcommittee of the judiciary committee of the Senate which framed the act. The order in that case was one requiring production on the trial of the action. Hylton v. Brown, 1 Wash. C. C. 298, Fed. Cas. No. 6,981; Bas v. Steele, 3 Wash. C. C. 381, Fed. Cas. No. 1,088, and Dunham v. Riley, 4 Wash. C. C. 126, Fed. Cas. No. 4,155, were cases in which Mr. Justice Washington presided. Some of the observations of the justice in Bas v. Steele and Dunham v. Riley have already found a place in this opinion. Two other of the early practice cases worthy of notice are Triplett v. Bank of Washington, 3 Cranch, C. C. 646, Fed. Cas. No. 14,178, and Waller v. Stewart, 4 Cranch, C. C. 532, Fed. Cas. No. 17,109.

In 1853 the interpretation of this section of the judiciary act came before Mr. Justice Curtis, and his view of the question is found in Iasigi v. Brown, 1 Curt. C. C. 401, Fed. Cas. No. 6,993. There was a motion, based upon affidavits, to compel the production and delivery to the clerk of the court of certain documents alleged to contain evidence material to the issues in a pending action. The opinion was upon this motion. The justice said:

"By the common law, a notice to produce 545]a paper *merely enables the party to give parol evidence of its contents, if it be not produced. Its nonproduction has no other legal consequence. This act of Congress has attached to the nonproduction of a paper order to be produced at the trial, the penalty of a nonsuit or default. This is the whole extent of the law. It does not enable parties to compel the production of papers before trial, but only at the trial, by making such a case and obtaining such an order as the act contemplates. The applicant must show that the paper exists, and is in the control of the other party; that it is pertinent to the issue, and that the case is such that a court of equity would compel its discovery.

"The application for such an order may be made, on notice, before trial. There is a manifest convenience in allowing this. But, at the same time, I think the court should not decide finally on the materiality of the paper, except during the trial; because it would occupy time unnecessarily, and it might be very difficult to decide beforehand whether a paper was pertinent to the issue, and whether it was so connected with the case that a court of equity would compel its production. These points could ordinarily be decided without difficulty during a trial, after the nature of the case and the posture and bearings of the evidence are seen.

"If the notice is made before the trial, the correct practice seems to me to be, after the moving party has made a prima facie case, to enter an order nisi, leaving it for the other party to show cause at the trial. He must then come prepared to produce the paper, if he fails to show cause."

In Merchants' Nat. Bank v. State Nat. Bank, 3 Cliff. 201, Fed. Cas. No. 9,448, Mr. Justice Clifford summarized procedure under the section. Among other things he said:

"Those conditions are that the motion must be in a case at law, and on due notice to the opposite party, and it *must[546 appear that the books or writings are in the possession or power of the other party, and that they contain evidence pertinent to the issue, and that the case and circumstances are such that the party might be compelled to produce the same, as therein provided. No doubt is entertained that the motion may be made, in a pending action at law, before the day of the trial; but the requirement of the order must perhaps be that the books and writings be produced at the trial of the action. Such an order may be absolute or nisi, as the circumstances may justify or require. Production before the trial is not, perhaps, contemplated by the words of the provision, nor is it in general necessary, as the penalty, in case of failure to comply with the order, is not arrest and imprisonment until the party comply, as for a contempt, but a judgment of nonsuit or default, as the plaintiff or defendant is the offending party. Where the motion is accompanied by satisfactory proof that the case is one in all respects within the conditions of the provision, and it is also satisfactorily shown that there is just ground to apprehend that the books and writings may be destroyed or transferred to another, or removed out of the jurisdiction before the day of the trial, the order should be made without delay, and be absolute."

For the reasons we have stated, and upon the authorities we have cited, the judgments of both courts must be reversed.

Mr. Justice Hughes dissents.

547]*ARTHUR BRISCOE, Appt.,
v.
CUNO H. RUDOLPH et al., †Commissioners of the District of Columbia, and the District of Columbia.

(See S. C. Reporter's ed. 547–554.)

Appeal — from District of Columbia courts — assignment of errors.

1. The specification of errors in appellant's brief on appeal from the court of appeals of the District of Columbia does not satisfy the requirements of U. S. Rev. Stat. §§ 997, 1012, U. S. Comp. Stat. 1901, pp. 712, 716, and Supreme Court rule 35, that an assignment of errors be filed with the transcript of record.

[For other cases, see Appeal and Error, 3577–3594, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — public improvements — assessment of benefits.

2. Private property is not taken for public use without compensation under the act of February 10, 1899 (30 Stat. at L. 834, chap. 150), which provides that one half the amount awarded as damages in the street extension proceeding authorized by that act is to be assessed against the lands within a designated area as benefits, considering the benefits received by each lot within such area, where there is nothing to show that the actual assessments thereunder are in substantial excess of the benefits.

[For other cases, see Constitutional Law, 559–581; Public Improvements, 27–33, in Digest Sup. Ct. 1908.]

Judgment — collateral attack — confirming assessment of special benefits.

3. A judgment of the supreme court of the District of Columbia confirming a special assessment for benefits resulting from a street extension cannot be attacked collaterally because that court, upon an objection challenging the assessment as excessive, did not call the second jury provided for by D. C. Rev. Stat. § 263, since this was, at most, an error which can only be available in appropriate proceedings in error.

[For other cases, see Judgment, 396–414, in Digest Sup. Ct. 1908.]

[No. 141.]

Argued April 25, 1911. Decided May 29, 1911.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, dismissing a bill to set aside an assessment of benefits in a street extension proceeding. Affirmed.

See same case below, 32 App. D. C. 167.

The facts are stated in the opinion.

Mr. **Samuel Maddox** argued the cause, and, with Mr. H. Prescott Gatley, filed a brief for appellant:

A writ of error will not be dismissed for want of jurisdiction, because of the failure to annex thereto or return therewith an assignment of errors, pursuant to the requirements of U. S. Rev. Stat. § 997, U. S. Comp. Stat. 1901, p. 712.

School Dist. v. Hall, 106 U. S. 428, 27 L. ed. 237, 1 Sup. Ct. Rep. 417; Gumbel v. Pitkin, 113 U. S. 547, 28 L. ed. 1129, 5 Sup. Ct. Rep. 616; United States v. Pena, 175 U. S. 502, 44 L. ed. 252, 20 Sup. Ct. Rep. 165.

The assignment of errors in this brief discloses plain error, which obviously demands correction.

Columbia Heights Realty Co. v. Rudolph, 217 U. S. 547, 54 L. ed. 877, 30 Sup. Ct. Rep. 581, 19 A. & E. Ann. Cas. 854.

The cost of a local improvement can be assessed upon particular property, only to the extent that it is specially and peculiarly benefited; any substantial excess is a taking of private property for public use without compensation.

Willard v. Presbury, 14 Wall. 676, 20 L. ed. 719; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; Illinois C. R. Co. v. Decatur, 147 U. S. 190, 37 L. ed. 132, 13 Sup. Ct. Rep. 293; Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; Mattingly v. District of Columbia, 97 U. S. 687, 24 L. ed. 1098; Parsons v. District of Columbia, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; French v. Barber Asphalt Pav-

†Substituted as parties defendant upon suggestion of the retirement from office of Henry B. F. Macfarland, Henry L. West, and J. J. Morrow, as commissioners of the District of Columbia.

Note.—On the appellate jurisdiction of the Federal Supreme Court over the District of Columbia courts—see note to United States ex rel. Taylor v. Taft, 51 L. ed. U. S. 269.

On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to Wedding v. Meyler, 66 L.R.A. 833.

On the rule of damages in eminent domain—see note to Bauman v. Ross, 42 L. ed. U. S. 271.

On decision against constitutional rights as a nullity, subject to collateral attack—see note to Hovey v. Elliott, 39 L.R.A. 449.

ing Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Wight v. Davidson, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; Cooley, Taxn. 3d ed. 1154, 1224, 1255, 1260; 2 Dill. Mun. Corp. 4th ed. 936; Brandenburg v. District of Columbia, 205 U. S. 135, 51 L. ed. 743, 27 Sup. Ct. Rep. 440; Columbia Heights Realty Co. v. Rudolph, 217 U. S. 547, 54 L. ed. 877, 30 Sup. Ct. Rep. 581, 19 A. & E. Ann. Cas. 854.

Mr. **Edward H. Thomas** argued the cause and filed a brief for appellees:

The appeal should be dismissed for want of assignments of error.

Rowe v. Phelps, 152 U. S. 87, 88, 38 L. ed. 365, 14 Sup. Ct. Rep. 632; Columbia Heights Realty Co. v. Rudolph, 217 U. S. 547, 551, 54 L. ed. 877, 879, 30 Sup. Ct. Rep. 581, 19 A. & E. Ann. Cas. 854.

The judgment of the District court confirming this assessment is not a nullity, because that court had general jurisdiction of the subject.

United States use of Hine v. Morse, 218 U. S. 493, 505, 54 L. ed. 1123, 1127, 31 Sup. Ct. Rep. 37; Ex parte Watkins, 3 Pet. 193, 203, 7 L. ed. 650, 653; Ex parte Parks, 93 U. S. 18, 20, 23 L. ed. 787, 788; Secombe v. Milwaukee & St. P. R. Co. 23 Wall. 108, 119, 23 L. ed. 67, 69; Re Cuddy, 131 U. S. 280, 284, 33 L. ed. 154, 156, 9 Sup. Ct. Rep. 703.

The act to extend Rhode Island avenue is constitutional.

Wight v. Davidson, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; Martin v. District of Columbia, 205 U. S. 135, 140, 51 L. ed. 743, 744, 27 Sup. Ct. Rep. 440; Columbia Heights Realty Co. v. Rudolph, 217 U. S. 547, 552, 54 L. ed. 877, 879, 30 Sup. Ct. Rep. 581, 19 A. & E. Ann. Cas. 854; Webster v. Fargo, 181 U. S. 394, 395, 45 L. ed. 912, 914, 21 Sup. Ct. Rep. 623; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Parsons v. District of Columbia, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Mattingly v. District of Columbia, 97 U. S. 687, 24 L. ed. 1098; Shoemaker v. United States, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Macfarland v. Umhau, 34 App. D. C. 109.

Mr. Justice **Lurton** delivered the opinion of the court:

This is a bill filed by a lot owner whose property was subjected to a special assessment for benefits resulting from the extension of Rhode Island avenue in the city of Washington. The object of the bill is to vacate the assessment and enjoin the sale about to be made by the commissioners for the District.

The case was heard upon the bill, answer, and an agreed statement of facts, and was dismissed without prejudice to proceed in the case in which the assessment had been made for cancelation, if so advised.

The proceeding under which the special assessment in question was instituted in March, 1899, was in pursuance of authority conferred by an act of Congress of February 10, 1899, entitled, "An Act to Extend Rhode Island Avenue." 30 Stat. at L. p. 834, chap. 150. That act provided that one half of the amount awarded as damages should be assessed against the lands within an area described, as benefits, considering the benefits received by each lot within the area. Such assessments were declared a lien on the lots severally assessed, and were to be collected as special improvement taxes in five equal instalments, with interest at 4 per cent until paid. The lot owners were not formally notified, but notice was given by publication to all property owners, as required by the statute. Following the act, a jury of seven was appointed, who viewed the property and assessed damages and benefits; the lot owned *by this appellant being assessed for[459 benefits in the sum of $1,000. A rule was then made requiring all persons whose lots had been so assessed to appear and show cause why the verdict of the jury of seven should not be confirmed. The appellant appeared and filed a number of objections, which may be shortly stated as follows:

a. That the act of Congress is unconstitutional, as not providing for notice, and as an arbitrary assessment of one half of the damage upon lots in a designated area.

b. That the assessment against the appellant was excessive, unjust, and an unequal apportionment of benefits.

c. Want of notice and opportunity to appear and be heard by the court or the said jury of seven, and want of notice as to any of the proceedings until cited to show cause why the verdict of the jury should not be confirmed.

These objections were overruled and the verdict and assessment confirmed. This final judgment was on June 27, 1900. Like objections by other lot owners assessed for benefits were filed and overruled at the same time.

From this action of the supreme court of the District an appeal was prayed, but never prosecuted. More than two years

thereafter the commissioners advertised the lot, and proceeded to sell the same to enforce payment of the whole amount of the assessment. Thereupon this bill was filed

There is no assignment of errors, as required by §§ 997 and 1012, Rev. Stat. (U. S. Comp. Stat. 1901, pp. 712, 716), and by the 35th rule of this court. These statutes and the rule apply to appeals from the courts of the District of Columbia, as we pointed out in the case of Columbia Heights Realty Co. v. Rudolph, 217 U. S. 547, 54 L. ed. 877, 30 Sup. Ct. Rep. 581, 19 A. & E. Ann. Cas. 854. An assignment in the brief of appellant seems to have been regarded by many members of the District bar as sufficient. That erroneous practice has been followed here, and three errors have been 550]assigned, though in *substance there are but two. One is that the act of February 10, 1899, for the extension of Rhode Island avenue, is unconstitutional. The other is, that the judgment confirming the assessment made by a jury of seven over the objection of the appellant is void, and conferred no authority to enforce by sale the assessment so made.

This appeal was taken prior to the warning contained in the Columbia Heights Realty Company Case. For this reason, we shall avail ourselves of the provision in the 21st rule of this court, by which we reserve the right to "notice a plain error," not because we assume the errors assigned in the brief to be "plain," but that questions of such gravity may not be passed without notice, in view of the practice heretofore prevailing in the courts of the District of Columbia.

The objection to the constitutionality of the act of February 10, 1899, as stated in appellant's brief, is, "that it authorizes an assessment of appellant's property to meet the cost of public improvements, in substantial excess of the special benefits conferred by the improvements, and to the extent of such excess confiscates appellant's property to public use without compensation."

If by this it is meant to say that the act upon its face authorizes an assessment for benefits in excess of actual benefits conferred, the objection is not tenable. There is nothing upon the face of the act to indicate that one half of the damage awarded to those owners whose property is taken for the extension of the street is an amount in substantial excess of the special benefits realized by owners of property in the special improvement district created by the act. If, on the other hand, it is meant that, as matter of fact, the assessment against owners assumed to be benefited is so excessive as compared to actual benefits as to amount to a taking of such excess for public purpose without compensation, then there is no evidence in the *record[551 bearing upon the subject. The question of the excessiveness of a special assessment for benefits resulting from a public street improvement is one of fact. English v. Arizona, 214 U. S. 359, 53 L. ed. 1030, 29 Sup. Ct. Rep. 658.

That Congress, under its wide legislative power over the District of Columbia, may create a special improvement district, and charge a part or all of the cost upon the property in that improvement district, can hardly be doubted. It would be but an exercise of the power of taxation for a public purpose in an area carved out for the purpose. In Webster v. Fargo, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623, it was held that a state might create such special taxing districts, and charge the whole or part of the cost of a local improvement upon the property in the district, either according to valuation, superficial area, or frontage. That it is within the power of Congress to create such a special improvement district, and charge the cost of an improvement therein according to the benefits received by property within such district, has been more than once affirmed. Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; Wight v. Davidson, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; Martin v. District of Columbia, 205 U. S. 135, 51 L. ed. 743, 27 Sup. Ct. Rep. 440; Columbia Heights Realty Co. v. Rudolph, 217 U. S. 547, 54 L. ed. 877, 30 Sup. Ct. Rep. 581, 19 A. & E. Ann. Cas. 854.

When, as under the act for the extension of Rhode Island avenue, only one half of the cost is to be charged upon lot owners within the improvement district, and that upon each lot owner in proportion to the benefit his property has received, the question of whether one such owner has been assessed beyond his proportion is one of fact, and does not touch the validity of the improvement act. This appellant was an owner within the special improvement district. That he was benefited to the extent of $1,000 has been determined by the confirmed verdict of the jury, which was charged with the duty of proportionately distributing that part of the damages which Congress required to be paid by owners within the improvement district.

*The other matter to be noticed is[552 the contention that the sale to enforce the lien of the assesment is under an absolutely void judgment of the supreme court of the District of Columbia. The claim is that when the appellant appeared under a citation to show cause why the verdict of the

jury of seven should not be confirmed, and filed objections to the verdict, that it was the duty of the court to have ordered a jury of twelve for a re-examination of the matter. The section under which this contention is made prescribes the method to be pursued for the assessment of damages to landowners when land is taken or damaged for public roads. If an owner object to the laying out or extension of the road or street, and the damages are not agreed upon, a jury of seven is to be impaneled, who are to go upon the premises and assess the damages, and this assessment is to be reduced to writing and signed by the jury, attested by the marshal, returned into court, and "recorded."

Section 263 of the Revised Statutes, relating to the District of Columbia, provides that "if the authorities or any owner of the land are dissatisfied with the verdict," etc., the marshal shall be ordered to summon a second jury of twelve, who are to give the parties notice and meet on the premises, "and proceed as before directed in regard to the first jury."

The exceptions filed by the appellant, and others included in same verdict, have elsewhere been stated. These were overruled and the assessment confirmed as made, and certified for collection. An appeal was prayed and granted, but not prosecuted, because of a stipulation that it should "abide by the decision of the Supreme Court of the United States in the pending case of Wight v. Davidson," since decided and reported in 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616. That decision was adverse upon every question common to the two cases. After the decision and after the time had elapsed for any error proceed-553]ing, the commissioners of the *District proceeded to advertise a sale of the lots so specially assessed for the collection of the amount. Thereupon this bill was filed and the sale has ever since stood enjoined.

Wight v. Davidson did not present one question which is presented here, namely, that it was the duty of the nisi prius court, upon the presentation of the objection which challenged the assessment upon this owner's property by the first jury as excessive, to have at once directed the calling of a second jury, under § 263, Revised Statutes, relating to the District of Columbia. It is not necessary to consider the effect of the stipulation to abide by the result of the appeal in that case, as foreclosing the question stated, inasmuch as we are clearly of opinion that the failure of the supreme court of the district to order a second jury was at most an error which can only be available in appropriate error proceedings. It is, however, in this connection just to say that the record in the case fails to show that the court was asked for such second jury. The duty, if it existed without such motion, arose from the fact that the exceptions challenging the amount of the assessments constituted a statement that the owner, within the meaning of § 263, "was dissatisfied with the verdict thus rendered," and therefore entitled without more to another jury. But the court was possessed of jurisdiction over the parties and over the subject-matter. If the owner assessed did not in some way take steps to set aside the first verdict, its confirmation would necessarily be final. If he was denied a second jury when entitled to it, the court would fall into error; but the order confirming the assessment would not be void. There is no possible ground for upholding the present collateral attack if the order was voidable only.

The court was in the exercise of a special statutory jurisdiction, but all the facts necessary to the exercise of that jurisdiction appear to have existed, and such a judgment *is no more subject to col-[554 lateral impeachment than if the court had been exercising its general jurisdiction. Secombe v. Milwaukee & St. P. R. Co. 23 Wall. 108, 23 L. ed. 67; Fauntleroy v. Lum, 210 U. S. 230, 234, 52 L. ed. 1039, 1041, 28 Sup. Ct. Rep. 641; United States use of Hine v. Morse, 218 U. S. 493, 54 L. ed. 1123, 31 Sup. Ct. Rep. 37.

We find no error in the decree dismissing the bill for which we should reverse, and the decree is therefore affirmed.

DAVID W. LEWIS, Plff. in Err.,
v.
L. FLEET LUCKETT and Margaret Estelle Jones.

(See S. C. Reporter's ed. 554-558.)

Wills — probate proceedings — publication against unknown heirs.

Probate proceedings in the District of Columbia in which a verdict sustaining the will has been rendered by a jury after a trial of the issues framed under a caveat will not be set aside at the instance of the caveator, who participated in the proceedings, because there was no publication, under the act of June 30, 1902 (32 Stat. at L. 526, chap. 1329), against unknown heirs or next of kin, until after the verdict, where there was no suggestion made at any time that there were any such persons in existence.

[Probate proceedings, see Wills, I., in Digest Sup. Ct. 1908.]

[No. 142.]

Submitted April 25, 1911. Decided May 29, 1911.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, admitting a will to probate. Affirmed.

See same case below, 32 App. D. C. 188.

The facts are stated in the opinion.

Messrs. **John C. Gittings** and **J. M. Chamberlin** submitted the cause for plaintiff in error. Mr. Robert E. Mattingly was on the brief:

The probate court is a court of limited and statutory jurisdiction only.

Dugan v. Northcutt, 7 App. D. C. 351; Cook v. Speare, 13 App. D. C. 447; Richardson v. Daggett, 24 App. D. C. 440.

And where jurisdiction is conferred upon a court by statute, the requirements of the statute must be strictly complied with.

Shelby v. Bacon, 10 How. 64, 13 L. ed. 329.

And if a court of statutory jurisdiction exceeds its authority or powers by not proceeding in the manner prescribed, its proceedings are void, and not merely voidable.

Sigourney v. Sibley, 21 Pick. 101, 32 Am. Dec. 248; Hendrick v. Cleaveland, 2 Vt. 329; Barrett v. Crane, 16 Vt. 246; Tracy v. Roberts, 88 Me. 310, 51 Am. St. Rep. 394, 34 Atl. 68; Clarke v. Perry, 5 Cal. 58, 63 Am. Dec. 82; People's Sav. Bank v. Wilcox, 15 R. I. 258, 2 Am. St. Rep. 894, 3 Atl. 211; Smith v. Howard, 86 Me. 203, 41 Am. St. Rep. 537, 29 Atl. 1008; Root v. McFerrin, 37 Miss. 17, 75 Am. Dec. 49.

If the court had no jurisdiction of the subject-matter, that objection is not waived by appearing to the action.

1 Black, Judgm. 2d ed. §§ 217, 222, 225; Works, Jurisdiction, 118; Zecharie v. Bowers, 1 Smedes & M. 584, 40 Am. Dec. 111; Winslow v. Troy, 97 Me. 130, 53 Atl. 1008; Bohannon v. Tarbin, 25 Ky. L. Rep. 515, 76 S. W. 48; 8 Enc. Pl. & Pr. p. 173.

Messrs. **Lorenzo A. Bailey** and **James A. Toomey** submitted the cause for defendants in error:

The probate court had general jurisdiction of the subject-matter in this cause.

Re Dahlgren, 30 App. D. C. 596.

"Plenary jurisdiction" means full, entire, complete, absolute, unabridged jurisdiction.

Webster's Dict.; 31 Cyc. Law & Proc. p. 890; Black's Law Dict.

The mere fact that, subsequent to the verdict upon the issues raised by the caveat, notice by publication was given to unknown heirs at law and next of kin, is no evidence that any such heirs or next of kin existed; nor should their existence be presumed.

Hollingsworth v. Barbour, 4 Pet. 466, 477, 7 L. ed. 922, 926.

*Mr. Justice **Lurton** delivered the[555 opinion of the court:

An instrument purporting to be the last will and testament of Mary Hoskins Lewis was offered for probate by L. F. Luckett, who was named executor therein. The petition asking probate averred that the only beneficiary under the will was the defendant in error Margaret Estelle Jones, and that the decedent left "no heir at law or next of kin so far as petitioner knew, with the exception of David W. Lewis," her husband. Lewis was made a defendant and cited. He appeared, filed a caveat, and denied that the will was the will of the decedent. Miss Jones appeared and filed her petition asking that the will be admitted to probate. She averred that Mrs. Lewis had left neither heir nor next of kin, save her husband, but asked that publication be made for unknown heirs. Both petitions asked that issues be framed for trial by a jury. Issues were accordingly settled and a day named by order of the court for trial.

The jury, on February 3, 1908, found the issues in favor of the proponents of the will, the trial having been had so far as appears without objection by anyone, and without any suggestion that there were heirs or next of kin in existence who should be brought before the court. Thus the matter stood until February 24th, when the court ordered publication for unknown heirs and next of kin of the said Mary Hoskins Lewis, "and for all others concerned," to appear on April 3d and show cause why the application for probate of the will should not be granted. Publication was duly made.

Pending such publication, Lewis moved the court to vacate the order framing issues, and all subsequent proceedings, because there had been no publication for unknown heirs or next of kin of the decedent when the issues were framed or tried. On April 8th, this motion was denied, *and on[556 April 15th the will was ordered to be recorded as the last will and testament of Mary Hoskins Lewis.

From that judgment David W. Lewis appealed to the court of appeals for the District of Columbia, which affirmed the action of the court below. From this judgment of affirmance, this writ of error has been sued out.

The only question relied upon for reversal is that the probate court had no jurisdiction to admit the will of Mrs. Lewis to probate, because the issues under the caveat

filed by the plaintiff in error, and the trial of those issues by a jury, was prior to the publication for unknown heirs and next of kin of the decedent.

The procedure for the probate of wills is to be found in §§ 130 to 141, inclusive, of the Code of the District of Columbia [31 Stat. at L. 1211–1213, chap. 854]. Section 130 deals with notice when there is no caveat, upon presentation of a petition asking probate, and requires a citation to issue to all persons who would be interested in the state if no will had been executed, and that if such persons are "returned as not to be found," then there shall be a publication for such persons. No such return was made in this case. No persons were cited or could be cited, except David W. Lewis, who was duly cited as the only known person interested in case there was no will.

Section 140 deals with the trial of issues when a caveat is filed. That section provides that "if, as to any party in interest, the notification shall be returned 'not to be found,' the court shall assign a new day for such trial and shall order publication." In the present case there was no return of notice, "not to be found," as to any person supposed to be interested.

But § 130 was amended by the act of June 30, 1902, by a provision in these words:

"In all cases where it is made to appear to the satisfaction of the court that all or any of the next of kin or heirs at law of the deceased are unknown, such unknown next 557]*of kin or heirs at law may be proceeded against and described in the publication of notice hereinbefore provided for as 'the unknown next of kin,' or 'the unknown heirs at law,' as the case may be, of the deceased, and by such publication of such notice under such designation such unknown next of kin and heirs at law shall be as effectually bound and concluded as if known and their names were specifically set forth in said order of publication." [32 Stat. at L. 526, chap. 1329.]

Assuming that publication for unknown heirs and next of kin is authorized, whether a caveat has been filed or not, it is evident that there is no failure of jurisdiction because such publication was not made, unless there was something in the record showing that there were persons actually or probably in existence who were heirs at law or next of kin whose names were unknown. The language of the opening line of the amendment is: "In all cases where it is made to appear to the satisfaction of the court that all or any of the next of kin or heirs at law of the deceased are unknown, such unknown," etc., "may be proceeded against," etc.

Now, what was the case here? The petition of the propounder of the will, the executor named therein, averred that upon his information and belief there were no heirs at law or next of kin, except David W. Lewis. Margaret Estelle Jones, the sole beneficiary under the will, made a like averment in her petition, joining in the prayer for probate and for the framing of issues to be tried by jury. David W. Lewis, the husband of the decedent, and interested only in case there was no will, made no averment that there were any persons other than himself interested in preventing probate. He asked the court to frame issues for a jury trial. He obtained such an order himself. He also obtained an order setting a day, months ahead, for the trial of such issues. The trial came on. He made no suggestion that there were any unknown heirs at law or next of kin, and asked no order of publication for them. *The trial of the issues was fatal to[558 him. The court, before ordering the will to be recorded upon the verdict, took the precaution to order publication for any unknown heirs or next of kin, and for all other persons concerned, to appear and show cause, by a day named, why this will should not be probated. Then, and only then, did the plaintiff in error wake up. But only to ask that the court vacate the order settling the issues and the verdict of the jury thereon, because this publication had not been made before any step had been taken. Neither then nor at any other time did he ever suggest that there were anywhere upon the surface of the earth any person who was an heir at law or next of kin. There was under such circumstances no reason for publishing for people about whose existence there was no shadow of evidence. The fact that the court, out of precaution, held up the final probate until publication might be made, does not raise a presumption that there were any such persons. Hollingsworth v. Barbour, 4 Pet. 466, 477, 7 L. ed. 922, 926.

Under the facts of this case there was no occasion to make publication for unknown heirs at law or next of kin, and no error in denying the application to vacate the verdict, or in ordering the will to probate.

Affirmed.

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*W. H. COYLE, Plff. in Err., [559

v.

THOMAS P. SMITH, Secretary of State of the State of Oklahoma, et al.

(See S. C. Reporter's ed. 559–580.)

States — admission — power of Congress.

1. The power of Congress under U. S.

Const. art. 4, § 3, to admit new states into the Union, extends only to their admission on an equal footing with their sister states.
[For other cases, see States, XI., in Digest Sup. Ct. 1908.]

States — admission — power of Congress.

2. The constitutional duty of guaranteeing each state in the Union a republican form of government gives Congress no power to impose restrictions in admitting a new state into the Union which deprive it of equality with the other states.
[For other cases, see States, XI., in Digest Sup. Ct. 1908.]

States — admission — equality with other states — conditions of enabling act.

3. A condition in the enabling act of June 16, 1906 (34 Stat. at L. chap. 3335 p. 267), for the admission of Oklahoma into the Union on an equal footing with the original states, that the capital of the state shall temporarily be at the city of Guthrie, and shall not be changed therefrom previous to 1913, although accepted by an irrevocable ordinance, ceased to be a valid limitation upon the power of the state after its admission, and cannot override any subsequent repugnant state legislation.
[For other cases, see States, XI., in Digest Sup. Ct. 1908.]

[No. 941.]

Argued April 5 and 6, 1911. Decided May 29, 1911.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment upholding a statute for the removal of the state capital from Guthrie to Oklahoma City. Affirmed.

See same case below (Okla.) 113 Pac. 944.

The facts are stated in the opinion.

Messrs. **Frank Dale, C. G. Hornor,** and **John H. Burford** argued the cause, and, with Messrs. A. G. C. Bierer, Frank B. Burford, and Benjamin F. Hegler, filed a brief for plaintiff in error:

Congress, when it determined that the form of government which Oklahoma offered was republican in form, decided that the government formed by the instruments submitted did not strip the state of any of its essential attributes of sovereignty; Congress by that determination decided every contention of appellees in this case against them; and Congress being vested by the Constitution with the sole power of deciding upon those questions, its decision was final and beyond the power of any court to question.

Luther v. Borden, 7 How. 1–42, 12 L. ed. 581–599; Martin v. Mott, 12 Wheat. 19–31, 6 L. ed. 537–541; Wilkes v. Dinsman, 7 How. 89–131, 12 L. ed. 618–637; Ex parte Vallandigham, 1 Wall. 243–254, 17 L. ed. 589–594; Oklahoma City v. Shields, 22 Okla. 300, 100 Pac. 559; Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 98, 47 L. ed. 724, 23 Sup. Ct. Rep. 611; Dorsheimer v. United States (Johnson v. United States) 7 Wall. 166, 19 L. ed. 187; Providence Rubber Co. v. Goodyear, 9 Wall. 788, 798, 19 L. ed. 566, 569; Looe Shee v. North, 95 C. C. A. 646, 170 Fed. 570; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23.

When a Constitution has been adopted by the people of a territory preparatory to admission into statehood, and Congress prescribes certain changes and additions to be adopted by the legislature as part of the Constitution, and such changes and additions are declared to be fundamental conditions of the admission of the state, and the legislature accepts such changes, admissions, and conditions, and the state is thus admitted, they become thereby a part of the Constitution and binding as such, although not submitted to the people for their approval.

Brittle v. People, 2 Neb. 198.

It is true that Congress has, in the enabling act, said to the people of Oklahoma, "Accept the conditions which we offer, and you shall be admitted upon an equality with the other states," but this equality must not be construed to mean that, upon its admission, Oklahoma shall in all respects possess the same kind of a government, with the same kind of powers, which obtains in other states, or in the original thirteen states. This is not what is meant by the term "equality."

Spooner v. McConnell, 1 McLean, 337, Fed. Cas. No. 13,245.

Contemporary interpretation of the Constitution, practised and acquiesced in for years, conclusively fixes its construction.

Stuart v. Laird, 1 Cranch, 299, 2 L. ed. 115; Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97; West River Bridge Co. v. Dix, 6 How. 507, 12 L. ed. 535; Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279; The Laura (Pollock v. Bridgeport S. B. Co.) 114 U. S. 411, 22 L. ed. 147, 5 Sup. Ct. Rep. 881.

The right of the people of the state to be an independent sovereignty carries with it the right to make compacts or agreements with relation to the exercise of this sovereignty.

Hogg v. Zanesville Canal & Mfg. Co. 5 Ohio, 416.

At the time Congress passed the law in question, this was a territory. Congress had

the unquestioned right at that time to deal with the matter involved.

Church of Jesus Christ of L. D. S. v. United States, 136 U. S. 1, 34 L. ed. 478, 10 Sup. Ct. Rep. 792.

So far as we have been able to discover, there is not a case in the books which denies to a state the right to waive its sovereignty in respect to matters here under consideration.

Spooner v. McConnell, 1 McLean, 337, Fed. Cas. No. 13,245; Bennett v. Boggs, Baldw. 60, Fed. Cas. No. 1319; Vaughan v. Williams, 3 McLean, 530, Fed. Cas. No. 16,903; Minnesota v. Bachelder, 1 Wall. 109, 114, 17 L. ed. 551, 552; Virginia v. West Virginia, 11 Wall. 39, 20 L. ed. 67; Duke v. Cahawba Nav. Co. 10 Ala. 82, 44 Am. Dec. 472; White v. Hart, 13 Wall. 646, 20 L. ed. 685; Marsh v. Burroughs, 1 Woods, 463, Fed. Cas. No. 9,112; Romine v. State, 7 Wash. 215, 34 Pac. 924; Brittle v. People, 2 Neb. 198; Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547; Hawkins v. Barney, 5 Pet. 457, 8 L. ed. 190; Kentucky Union Co. v. Kentucky, 219 U. S. 140, ante, 137, 31 Sup. Ct. Rep. 171; Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399.

If it be necessary to point out any authority in Congress to propose these conditions, it is found in the broad power given by the Constitution to admit new states.

Ex parte Yarbrough, 110 U. S. 658, 28 L. ed. 276, 4 Sup. Ct. Rep. 152.

Compacts made between the states and the general government are, in their nature, contracts between sovereign powers, and as such cannot be abrogated or impaired except by the common consent of the parties making such compacts.

Bennett v. Boggs, Baldw. 60, Fed. Cas. No. 1,319; Albee v. May, 2 Paine, 74, Fed. Cas. No. 134; Hancock v. Walsh, 3 Woods, 351, Fed. Cas. No. 6,012; Gray v. Davis, 1 Woods, 420, Fed. Cas. No. 5,715; United States v. Partello, 48 Fed. 670; The Kansas Indians (Blue Jacket v. Johnson County) 5 Wall. 737, 18 L. ed. 667; Beecher v. Wetherby, 95 U. S. 517–522, 24 L. ed. 440, 441; Cooper v. Roberts, 18 How. 173, 15 L. ed. 338.

We find by numerous authorities that a state has, by its delegates to its constitutional convention, or otherwise, waived its jurisdiction to punish for crimes committed within its boundaries, and surely the punishment for crime is one of the highest duties and attributes of sovereignty possessed by a state or nation, and this attribute of sovereignty is possessed in it fullest extent by the original states of the Union. It is a legislative as well as a constitutional power which inheres in sovereignty, and certainly of equal dignity with the power to locate a state capital,—in fact, much greater.

Now, when a state surrenders some of its power in this respect, does this make the state unequal in the sense contended for, and is it beyond the power of the state to make a compact by which it agrees to such surrender? Let the courts answer this question.

United States v. Partello, 48 Fed. 673.

The binding force of the capital clause cannot be wiped out without ignoring Boyd v. Nebraska, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375.

The principle for which we are contending is in accord with the principles of international law laid down by eminent writers on that subject.

Vattel, Nations, pp. 3, 193, 196, 229; Baker, International Law, pp. 24–27, 43, 94; Wheaton, International Law, p. 377; Maxcy, International Law, pp. 26, 27; 1 Digest International Law, p. 19; 1 Grotius, chap. 3, §§ 16, 18.

Mr. Charles G. West, Attorney General of Oklahoma, argued the cause and filed a brief for defendants in error:

Everything in the enabling act which was within the sphere of congressional legislation was binding upon the people of Oklahoma, as all the rest of the United States,—not because of any ordinance, or not because of any acceptance or rejection at the polls, or not because of the admission of the state into the Union, but simply because the Congress had the authority in the premises.

Pollard v. Hagan, 3 How. 212, 11 L. ed. 565.

Congress cannot, proceeding from its own authority, enact the law of the state of Oklahoma, except the Federal law in that state, which is likewise in force in all other states.

Permoli v. New Orleans, 3 How. 589, 11 L. ed. 739; Menard v. Aspasia, 5 Pet. 505, 8 L. ed. 207.

Federal laws dealing with local affairs are suspended by statehood.

New Orleans v. De Armas, 9 Pet. 224, 9 L. ed. 109; Menard v. Aspasia, 5 Pet. 505, 8 L. ed. 207; Choteau v. Marguerite, 12 Pet. 507, 9 L. ed. 1174.

State governmental matters are not controlled by contracts, *i. e.*, outside agencies.

Butler v. Pennsylvania, 10 How. 402, 13 L. ed. 472; Crenshaw v. United States, 134 U. S. 99, 33 L. ed. 825, 10 Sup. Ct. Rep. 431; Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435.

Messrs. **B. F. Burwell** and **Joseph W. Bailey** also argued the cause, and, with Messrs. C. B. Stewart and W. A. Ledbetter, filed a brief for defendants in error:

A state when admitted into the Union comes in upon an equal footing with the others, and cannot contract away with the Federal government or with individuals its rights of sovereignty, nor can it contract away any of its political or police powers.

Permoli v. New Orleans, 3 How. 589, 11 L. ed. 739; Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; Strader v. Graham, 10 How. 82, 13 L. ed. 337; Case v. Loftus, 5 L.R.A. 684, 14 Sawy. 213, 39 Fed. 730; Hinman v. Warren, 6 Or. 408; 2 Tucker, Const. p. 614, § 301; Escanba & L. M. Transp. Co. v. Chicago, 107 U. S. 678–691, 27 L. ed. 442–447, 2 Sup. Ct. Rep. 185; Ward v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076; Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; Williams v. Hert, 110 Fed. 166.

In accepting the terms and condition of the enabling act, the delegates composing the convention agreed to be bound by them as suggestions or instructions to guide them in the formation of a Constitution and state government, and in the performance of the other duties imposed upon them. Permoli v. New Orleans, 3 How. 589, 11 L. ed. 739.

Every provision of an enabling act which is not continued in force by some provision of the state Constitution becomes obsolete and is abrogated and repealed on the admission of the state.

State ex rel. Atty. Gen. v. Cunningham, 81 Wis. 511, 15 L.R.A. 567, 51 N. W. 724; Permoli v. New Orleans, 3 How. 589, 11 L. ed. 739; Strader v. Graham, 10 How. 82, 13 L. ed. 337; Williams v. Hert, 110 Fed. 167.

During the territorial condition all legislative power was derived from Congress. Municipal authority of every kind descended from Congress to the people of the territory, and was exercised by the territorial legislature or local city authorities in such manner as the law provided. Upon the admission of the state, however, an entirely new condition arose. All legislative authority was derived from the people, and given expression and form in the Constitution and laws of the state.

Frantz v. Autry, 18 Okla. 561, 91 Pac. 202; Benner v. Porter, 9 How. 242, 13 L. ed. 122.

The removal of the capital or county seat of a state or county does not involve the impairment of any contract under the Constitution. It involves the exercise of a political power inherent in state government, which cannot be contracted away to the general government.

Edwards v. Lesueur, 132 Mo. 410, 31 L.R.A. 815, 33 S. W. 1130; Armstrong v. Dearborn County, 4 Blackf. 208; Newton v. Mahoning County, 26 Ohio St. 618; Slack v. Jacob, 8 W. Va. 612; Alley v. Denson, 8 Tex. 297; Walker v. Tarrant County, 20 Tex. 16.

The locating and removal of the capital of a state, like the locating and removal of a county seat, is the exercise of the political power of the state, over which the courts can exercise no judicial control.

Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128.

Mr. Justice **Lurton** delivered the opinion of the court:

This is a writ of error to the supreme court of Oklahoma to review the judgment of that court upholding a legislative act of the state, providing for the removal of its capital from Guthrie to Oklahoma City, and making an appropriation from the funds of the state for the purpose of carrying out the act by the erection of the necessary state buildings. Acts of Oklahoma, December 29, 1910.

*The opinion of the supreme court[563] of Oklahoma may be found in 113 Pac. 944.

By an act passed December 7, 1910, the state gave to its supreme court "original jurisdiction" to entertain any proceeding brought in that court by resident taxpayers of the state to have determined "the legality of the removal or location, or attempt to remove or locate, the state capital" and certain other state institutions. This act was passed in advance of the removal act here involved, and for the express purpose of providing a speedy method for the determination of constitutional objections which might be urged against the proposed relocation of the seat of the state government. The removal act followed, and this proceeding was at once started in the supreme court of the state by the plaintiff in error, who claimed not only to be a citizen and taxpayer of the state, but also owner of large property interests in Guthrie, which would be adversely affected by the removal of the seat of government, as proposed by the act in question. The validity of the law locating the capital at Oklahoma City was attacked for many reasons which involved only the interpretation and application of the Constitution of the state. These were all decided adversely to the petitioner. We shall pass them by as matters of state law, not subject to the reviewing power of this court under a writ of error to a state court.

The question reviewable under this writ

of error, if any there be, arises under the claim set up by the petitioner, and decided against him, that the Oklahoma act of December 29, 1910, providing for the immediate location of the capital of the state at Oklahoma City, was void as repugnant to the enabling act of Congress of June 16, 1906, under which the state was admitted to the Union. 34 Stat. at L. chap. 3335, p. 267. The act referred to is entitled, "An Act to Enable the People of Oklahoma and of the Indian Territory to Form a Constitu-564]tion and State *Government and Be Admitted into the Union on an Equal Footing with the Original States," etc. The same act provides for the admission of Arizona and New Mexico. The first twenty-two sections relate only to Oklahoma. The 2d section is lengthy and deals with the organization of a constitutional convention, and concludes in these words: "The capital of said state shall temporarily be at the city of Guthrie. . . . and shall not be changed therefrom previous to Anno Domini nineteen hundred and thirteen; but said capital shall, after said year, be located by the electors of said state at an election to be provided for by the legislature; provided, however, that the legislature of said state, except as shall be necessary for the convenient transaction of the public business of said state at said capital, shall not appropriate any public moneys of the state for the erection of buildings for capital purposes during said period."

Other sections of the act require that the Constitution of the proposed new state shall include many specific provisions concerning the framework of the government, and some which impose limitations upon the state as regards the Indians therein, and their reservations, in respect of traffic in liquor among the Indians or upon their reservations. The 22d and last section, applicable to Oklahoma, reads thus: "That the constitutional convention provided for herein shall by ordinance irrevocably accept the terms and conditions of this act."

The Constitution as framed contains nothing as to the location of the state capital; but the convention which framed it adopted a separate ordinance in these words:

"Sec. 497. Enabling act accepted by ordinance irrevocable. Be it ordained by the constitutional convention for the proposed state of Oklahoma, that said constitutional convention do, by this ordinance irrevocable, accept the terms and conditions of an act of the Congress of the United States en-565]titled, 'An Act to Enable the People *of Oklahoma and the Indian Territory to Form a Constitution and State Government, and be Admitted into the Union on an Equal Footing with the Original States; and to Enable the People of New Mexico and Arizona to Form a Constitutional and State Government, and Be Admitted into the Union on an Equal Footing with the Original States,' approved June the sixteenth, Anno Domini, nineteen hundred and six."

This was submitted along with the Constitution as a separate matter, and was ratified as was the Constitution proper.

The efficacy of this ordinance as a law of the state conflicting with the removal act of 1910 was, of course, a state question. The only question for review by us is whether the provision of the enabling act was a valid limitation upon the power of the state after its admission, which overrides any subsequent state legislation repugnant thereto.

The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen states could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question, then, comes to this: Can a state be placed upon a plane of inequality with its sister states in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission? The argument is, that while Congress may not deprive a state of any power which it *possesses*, it may, as a condition to the admission of a new state, constitutionally restrict its authority, to the extent, at least, of suspending its powers for a definite time in respect to the location of its seat of government. This contention is predicated upon the constitutional power of admitting new states to this Union, and the constitutional *duty of guaranteeing[566 to "every state in this Union a republican form of government." The position of counsel for the plaintiff in error is substantially this: That the power of Congress to admit new states, and to determine whether or not its fundamental law is republican in form, are political powers, and as such, uncontrollable by the courts. That Congress may, in the exercise of such power, impose terms and conditions upon the admission of the proposed new state, which, if accepted, will be obligatory, although they operate to deprive the state of powers which it would otherwise possess, and, therefore, not admitted upon "an equal footing with the original states."

The power of Congress in respect to the admission of new states is found in the 3d section of the 4th article of the Constitution. That provision is that, "new states may be admitted by the Congress into this

Union." The only expressed restriction upon this power is that no new state shall be formed within the jurisdiction of any other state, nor by the junction of two or more states, or parts of states, without the consent of such states, as well as of the Congress.

But what is this power? It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a "power to admit states."

The definition of "a state" is found in the powers possessed by the original states which adopted the Constitution,—a definition emphasized by the terms employed in all subsequent acts of Congress admitting new states into the Union. The first two states admitted into the Union were the states of Vermont and Kentucky, one as of March 4, 1791, and the other as of June 1, 1792. No terms or conditions were exacted from either. Each act declares that the state is admitted "as a new and *entire member* of the United States of America." 567] 1 Stat. at L. 191, 189, chaps. 7, 4. *Emphatic and significant as is the phrase admitted as "an entire member," even stronger was the declaration upon the admission in 1796 of Tennessee [1 Stat. at L. 491, chap. 47] as the third new state, it being declared to be "one of the United States of America," "on an equal footing with the original states in all respects whatsoever,"—phraseology which has ever since been substantially followed in admission acts, concluding with the Oklahoma act, which declares that Oklahoma shall be admitted "on an equal footing with the original states."

The power is to admit "new states into *this* Union."

"This Union" was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new states, enlarged or restricted by the conditions imposed upon new states by its own legislation admitting them into the Union; and, second, that such new states might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission.

The argument that Congress derives from the duty of "guaranteeing to each state in this Union a republican form of government," power to impose restrictions upon a new state which deprive it of equality with other members of the Union, has no merit. It may imply the duty of such new state to provide itself with such state government, and impose upon Congress the duty of seeing that *such form is not changed [568 to one anti-republican,—Minor v. Happersett, 21 Wall. 162, 174, 22 L. ed. 627, 630,—but it obviously does not confer power to admit a new state which shall be any less a state than those which compose the Union.

We come now to the question as to whether there is anything in the decisions of this court which sanctions the claim that Congress may, by the imposition of conditions in an enabling act, deprive a new state of any of those attributes essential to its equality in dignity and power with other states. In considering the decisions of this court bearing upon the question, we must distinguish, first, between provisions which are fulfilled by the admission of the state; second, between compacts or affirmative legislation intended to operate *in futuro*, which are within the scope of the conceded powers of Congress over the subject; and third, compacts or affirmative legislation which operates to restrict the powers of such new state in respect of matters which would otherwise be exclusively within the sphere of state power.

As to requirements in such enabling acts as relate only to the contents of the Constitution for the proposed new state, little need to be said. The constitutional provision concerning the admission of new states is not a mandate, but a power to be exercised with discretion. From this alone it would follow that Congress may require, under penalty of denying admission, that the organic law of a new state at the time of admission shall be such as to meet its approval. A Constitution thus supervised by Congress would, after all, be a Constitution of a state, and as such subject to alteration and amendment by the state after admission. Its force would be that of a state Constitution, and not that of an act of Congress.

The case of Permoli v. New Orleans, 3 How. 589, 609, 11 L. ed. 739, 748, is in point. By the act of February 20, 1811 [2 Stat. at L. 641, chap. 21], the people of the territory of Orleans were empowered to form a Constitution and state government. The 3d *section of that act prescribed [569

among other things, that it should "contain the fundamental principles of civil and religious liberty." The act of 1812, admitting the state, provided, that "all other the conditions and terms contained in the 3d section . . . shall be considered, deemed, and taken, fundamental conditions and terms, upon which the said state is incorporated in the Union." [2 Stat. at L. 703, chap. 50.] It was claimed that a certain municipal ordinance was in violation of religious liberty, and therefore void, as repugnant to the act under which the state had been admitted to the Union. Dealing with those terms of the enabling and admitting acts in respect to the contents of the Constitution to be adopted by the people of the territory seeking admission as a state, this court, speaking by Mr. Justice Catron, said:

"All Congress intended was to declare in advance to the people of the territory, the fundamental principles their Constitution should contain; this was every way proper under the circumstances; the instrument having been duly formed, and presented, it was for the national legislature to judge whether it contained the proper principles, and to accept it if it did, or reject it if it did not. Having accepted the Constitution and admitted the state 'on an equal footing with the original states in all respects whatever,' in express terms, by the act of 1812, Congress was concluded from assuming that the instructions contained in the act of 1811 had not been complied with. No fundamental principles could be added by way of amendment, as this would have been making part of the state Constitution; if Congress could make it in part, it might, in the form of amendment, make it entire. The conditions and terms referred to in the act of 1812 could only relate to the stipulations contained in the second proviso of the act of 1811, involving rights of property and navigation; and in our opinion were not otherwise intended."

570] *The reference by Justice Catron to the terms and conditions in act of 1812 is to a provision in the act of 1811 (2 Stat. at L. p. 641, 642, chap. 21), quite common in enabling acts, by which the new state disclaimed title to the public lands, and stipulated that such lands should remain subject to the sole disposition of the United States, and for their exemption from taxation, and that its navigable waters should forever remain open and free, etc. Such stipulations, as we shall see, being within the sphere of congressional power, can derive no force from the consent of the state. Like stipulations, as well as others in respect to the control of the United States of the large Indian reservations and Indian population of the new state, are found in the Oklahoma enabling acts. Whatever force such provisions have after the admission of the state may be attributed to the power of Congress over the subjects, derived from other provisions of the Constitution, rather than from any consent by or compact with the state.

So far as this court has found occasion to advert to the effect of enabling acts as affirmative legislation affecting the power of new states after admission, there is to be found no sanction for the contention that any state may be deprived of any of the power constitutionally possessed by other states, as states, by reason of the terms in which the acts admitting them to the Union have been framed.

The case of Pollard v. Hagan, 3 How. 212, 11 L. ed. 565, is a most instructing and controlling case. It involved the title to the submerged lands between the shores of navigable waters within the state of Alabama. The plaintiff claimed under a patent from the United States, and the defendant under a grant from the state. The plaintiff relied upon two propositions which are relevant to the question here. One was that, in the act under which Alabama was admitted to the Union [3 Stat. at L. 489, chap. 47], there was a stipulation that the people of Alabama forever disclaimed all right or title to the waste or unappropriated lands lying *within the state, and[571 that they should remain at the sole disposal of the United States; and a second, that all of the navigable waters within the state should forever remain public highways and free to the citizens of that state and of the United States, without any tax, duty, or impost imposed by the state. These provisions were relied upon as a "compact" by which the United States became possessed of all such submerged lands between the shores of navigable rivers within the state.

The points decided were:

First, following Martin v. Waddell, 16 Pet. 410, 10 L. ed. 1012, that prior to the adoption of the Constitution, the people of each of the original states "hold the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the Constitution."

Second. That Alabama had succeeded to all the sovereignty and jurisdiction of all the territory within her limits, to the same extent that Georgia possessed it before she ceded that territory to the United States.

Third. That to Alabama belong the navigable waters, and soils under them.

The court held that the stipulation in the act under which Alabama was admitted to

the Union, that the people of the proposed states "forever disclaim all rights and title to the waste or unappropriated lands lying within the said territory, and that the same shall be and remain at the sole and entire disposition of the United States," cannot operate as a contract between the parties, but is binding as law. As to this the court said:

"Full power is given to Congress 'to make all needful rules and regulations respecting the territory or other property of the United States.' This authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation.

572] *"And all constitutional laws are binding on the people in the new states and the old ones whether they consent to be bound by them or not. Every constitutional act of Congress is passed by the will of the people of the United States, expressed through their representatives, on the subject-matter of the enactment; and when so passed it becomes the supreme law of the land, and operates by its own force on the subject-matter, in whatever state or territory it may happen to be. The proposition, therefore, that such a law cannot operate upon the subject-matter of its enactment, without the express consent of the people of the new state, where it may happen to be, contains its own refutation, and requires no farther examination. The propositions submitted to the people of the Alabama territory, for their acceptance or rejection, by the act of Congress authorizing them to form a Constitution and state government for themselves, so far as they related to the public lands within that territory amounted to nothing more nor less than rules and regulations respecting the sales and disposition of the public lands. The supposed compact relied on by the counsel for the plaintiffs conferred no authority, therefore, on Congress to pass the act granting to the plaintiffs the land in controversy."

Fourth. As to the stipulation in the same admission act that all navigable waters within the state should forever remain open and free, the court, after deciding that to the original states belonged the absolute right to the navigable waters within the states and the soil under them for the public use, "subject only to the rights since surrendered by the Constitution," said:

"Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine is to deny that Alabama has *been admitted into the Union on an[573 equal footing with the original states, the Constitution, laws, and compact to the contrary notwithstanding."

The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.

This deduction finds support in Permoli v. New Orleans, 3 How. 589, 11 L. ed. 739, from which we have heretofore used an excerpt; and in Strader v. Graham, 10 How. 82, 13 L. ed. 337; Withers v. Buckley, 20 How. 84, 93, 15 L. ed. 816, 820; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 688, 27 L. ed. 442, 446, 2 Sup. Ct. Rep. 185; Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151, 160, 29 L. ed. 845, 848, 6 Sup. Ct. Rep. 670; Huse v. Glover, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313; Sands v. Manistee River Improv. Co. 123 U. S. 288, 296, 31 L. ed. 149, 151, 8 Sup. Ct. Rep. 113; Ward v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076; Bolin v. Nebraska, 176 U. S. 83, 87, 44 L. ed. 382, 383, 20 Sup. Ct. Rep. 287.

That the power of Congress to regulate commerce among the states involves the control of the navigable waters of the United States over which such commerce is conducted is undeniable; but it is equally well settled that the control of the state over its internal commerce involves the right to control and regulate navigable streams within the state until Congress acts on the subject. This has been the uniform holding of this court since Wilson v. Black Bird Creek Marsh Co. 2 Pet. 245, 7 L. ed. 412; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 683, 27 L. ed. 442, 445, 2 Sup. Ct. Rep. 185.

Many of the cases cited above presented the question as to whether state regulation of its own navigable waters, valid as an exercise of its power as a state until Congress should regulate the subject, was invalid because that "plenary power" had been cut down, not by a regulation *of the[574 general subject by Congress, but as a result of a supposed compact, condition, or restriction accepted by the state as a condition upon which it was admitted into the Union.

It may well happen that Congress should

embrace in an enactment introducing a new state into the Union legislation intended as a regulation of commerce among the states, or with Indian tribes situated within the limits of such new state, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and therefore would not operate to restrict the state's legislative power in respect of any matter which was not plainly within the regulating power of Congress. Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 9, 31 L. ed. 629, 632, 8 Sup. Ct. Rep. 811; Pollard v. Hagan, supra.

No such question is presented here. The legislation in the Oklahoma enabling act relating to the location of the capital of the state, if construed as forbidding a removal by the state after its admission as a state, is referable to no power granted to Congress over the subject, and if it is to be upheld at all, it must be implied from the power to admit new states. If power to impose such a restriction upon the general and undelegated power of a state be conceded as implied from the power to admit a new state, where is the line to be drawn against restrictions imposed upon new states. The insistence finds no support in the decisions of this court. In Withers v. Buckley, 20 How. 84, 92, 15 L. ed. 816, 819, where it was contended that certain legislation of the state of Mississippi, interfering with the free navigation of one of the navigable streams of the state, con-575]flicted *with one of the stipulations in the act under which the state had been admitted to the Union, Congress not having otherwise legislated upon the subject, it was said:

"In considering this act of Congress of March 1st, 1817 [3 Stat. at L. 348, chap. 23], it is unnecessary to institute any examination or criticism as to its legitimate meaning, or operation, or binding authority, farther than to affirm that it could have no effect to restrict the new state in any of its necessary attributes as an independent sovereign government, nor to inhibit or diminish its perfect equality with the other members of the Confederacy with which it was to be associated. These conclusions follow from the very nature and objects of the Confederacy, from the language of the Constitution adopted by the states, and from the rule of interpretation pronounced by this court in the case of Pollard v. Hagan, 3 How. p. 223, 11 L. ed. 570."

In Escanaba & L. M. Transp. Co. v. Chicago, cited above, it was contended that the control of the state of Illinois over its internal waters had been restricted by the ordinance of 1787, and by the reference to that ordinance in the act of Congress admitting the state. [3 Stat. at L. 428, chap. 67.] Concerning this insistence, this court, speaking by Mr. Justice Field, said:

"Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a state of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is 'on an equal footing with the original states in all respects whatever.' 3 Stat. at L. 536. Equality of constitutional right and power is the condition of all the states of the Union, old and new. *Illinois, therefore, as was well ob-[576 served by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Black Bird creek, and Pennsylvania over the Schuylkill river. Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; Permoli v. New Orleans, 3 How. 589, 11 L. ed. 739; Strader v. Graham, 10 How. 82, 13 L. ed. 337."

In Ward v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076, the necessary equality of the new state with the original states is asserted and maintained against the claim that the police power of the state of Wyoming over its wild game had been restricted by an Indian treaty made prior to the admission of the state of Wyoming.

In Bolln v. Nebraska, 176 U. S. 83, 87, 44 L. ed. 382, 383, 20 Sup. Ct. Rep. 287, it appeared that the act under which Nebraska had been admitted [14 Stat. at L. 391, chap. 36] had, among other things, required the convention organized to form a Constitution for the proposed state to adopt for the people of that state the Constitution of the United States. This was done. It was claimed as a result that the power of the state to authorize the prosecution of a felony by information had been restricted, because the United States could, under one of the amendments to the Constitution, prosecute only by indictment. In respect to this claim the court said:

"But conceding all that can be claimed in this connection, and that the state of Nebraska did enter the Union under the condition of the enabling act, and that it adopted the Constitution of the United States as its fundamental law, all that was meant by these words was that the state acknowledged, as every other state has done, the supremacy of the Federal Constitution. The 1st section of the act of 1867, admitting the state into the Union, declared: That 'it is hereby admitted into the Union upon an equal footing with the original states in all respects whatsoever.' It is impossible to suppose that, by such indefinite language as was used in the enabling act, Congress intended to differen-[577] tiate Nebraska from her sister *states, even if it had the power to do so, and attempt to impose more onerous conditions upon her than upon them, or that in cases arising in Nebraska a different construction should be given to her Constitution from that given to the Constitutions of other states. But this court has held in many cases that, whatever be the limitations upon the power of a territorial government, they cease to have any operative force except as voluntarily adopted after such territory has become a state of the Union. Upon the admission of a state it becomes entitled to and possesses all the rights of dominion and sovereignty which belonged to the original states, and, in the language of the act of 1867, admitting the state of Nebraska, it stands 'upon an equal footing with the original states in all respects whatsoever.'"

We are unable to find in any of the decisions of this court cited by counsel for the plaintiff in error anything which contravenes the view we have expressed. Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547, involved the question as to whether a compact between two states, assented to by Congress, by which private land titles in Kentucky, derived from Virginia before the separation of Kentucky from Virginia, "should remain valid and secure under the laws of the proposed state of Kentucky, and should be determined by the laws now existing in this (Virginia) state." By subsequent legislation of the state of Kentucky these titles were adversely affected. This court held that this legislation impaired the obligation of a valid contract within that clause of the Constitution forbidding such impairment. Neither does Virginia v. West Virginia, 11 Wall. 39, 20 L. ed. 67, have any bearing here. The question there was one of a compact between the two states, assented to by Congress, concerning the boundary between them. Both the cases last referred to concerned compacts between states, authorized by the Constitution when assented to by Congress. They were therefore compacts and agreements *sanc-[578] tioned by the Constitution, while the one here sought to be enforced is one having no sanction in that instrument.

Beecher v. Wetherby, 95 U. S. 517, 24 L. ed. 440, involved the validity of the grant of every sixteenth section in each township for school purposes. The grant was made by the act providing for the organization of a state government for the territory of Wisconsin, and purported to be upon condition that the proposed state should never interfere with the primary disposal of the public lands of the United States, nor subject them to taxation. The grant was held to operate as a grant taking effect so soon as the necessary surveys were made. The conditions assented to by the state were obviously such as obtained no force from the assent of the state, since they might have been exacted as an exertion of the proper power of Congress to make rules and regulations as to the disposition of the public lands. Minnesota v. Batchelder, 1 Wall. 109, 17 L. ed. 551, is another case which involved nothing more than an exertion by Congress of its power to regulate the disposition of the public lands.

The case of the Kansas Indians (Blue Jacket v. Johnson County) 5 Wall. 737, 18 L. ed. 667, involved the power of the state of Kansas to tax lands held by the individual Indians in that state under patents from the United States. The act providing for the admission of Kansas into the Union provided that nothing contained in the Constitution of the state should be construed to "impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians." [12 Stat. at L. 127, chap. 20.] It was held that so long as the tribal organization of such Indians was recognized as still existing, such lands were not subject to taxation by the state. The result might be well upheld either as an exertion of the power of Congress over Indian tribes, with whom the United States had treaty relations, or as a contract by which the state had agreed to forego taxation of Indian lands,—a contract quite *within the power of a state[579] to make, whether made with the United States for the benefit of its Indian wards, or with a private corporation for the supposed advantages resulting. Certainly the case has no bearing upon a compact by which the general legislative power of the state is to be impaired with reference to a matter pertaining purely to the internal

policy of the state. See Stearns v. Minnesota, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73.

No good can result from a consideration of the other cases cited by plaintiff in error. None of them bear any more closely upon the question here involved than those referred to. If anything was needed to complete the argument against the assertion that Oklahoma has not been admitted to the Union upon an equality of power, dignity, and sovereignty with Massachusetts or Virginia, it is afforded by the express provision of the act of admission, by which it is declared that when the people of the proposed new state have complied with the terms of the act, that it shall be the duty of the President to issue his proclamation, and that "thereupon the proposed state of Oklahoma shall be deemed admitted by Congress into the Union under and by virtue of this act, *on an equal footing with the original states.*" The proclamation has been issued and the Senators and Representatives from the state admitted to their seats in the Congress.

Has Oklahoma been admitted upon an equal footing with the original states? If she has, she, by virtue of her jurisdictional sovereignty as such a state, may determine for her own people the proper location of the local seat of government. She is not equal in power to them if she cannot.

In Texas v. White, 7 Wall. 700, 725, 19 L. ed. 227, 237, Chief Justice Chase said in strong and memorable language that "the Constitution, in all of its provisions, looks to an indestructible Union, composed of indestructible states."

In Lane County v. Oregon, 7 Wall. 76, 19 L. ed. 104, he said:

580] *"The people of the United States constitute one nation, under one government; and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence. The states disunited might continue to exist. Without the states in union there could be no such political body as the United States."

To this we may add that the constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.

Judgment affirmed.

Mr. Justice **McKenna** and Mr. Justice **Holmes** dissent.

PERE ALFREDO LUIS BAGLIN, Superior General of the Order of Carthusian Monks, for Himself and All of the Other Members of Said Order, Appt.,

v.

CUSENIER COMPANY.

(See S. C. Reporter's ed. 580–602.)

Federal courts — jurisdiction — suit by alien — trademark case.

1. A Federal circuit court has jurisdiction of a controversy between foreign subjects and a domestic corporation in which the bill asserts a right under a Federal statute by virtue of the registration of a trademark.

[For other cases, see Courts, 572–575; 831–839, in Digest Sup. Ct. 1908.]

Trademark — place of origin — Chartreuse.

2. The word "Chartreuse" was susceptible of exclusive appropriation as a trademark by the Carthusian monks of the Monastery of La Grande Chartreuse to designate a liqueur made and sold by them for generations.

[For other cases, see Trademark, 23–39, in Digest Sup. Ct. 1908.]

Trademark — registration — Chartreuse.

3. The insignia of the Carthusian monks —a globe, cross, and seven stars—with the words "Gde. Chartreuse" underneath, could be registered as a valid trademark for a liqueur made by those monks at their monastery of La Grande Chartreuse, as could also a label bearing the inscription "Liqueur Fabriquée à la Gde. Chartreuse," with the same ecclesiastical symbols and a facsimile of the signature of a former procureur of the order.

[For other cases, see Trademark, 90, 91, in Digest Sup. Ct. 1908.]

International law — extra territorial operation of liquidation proceedings — trademarks.

4. The liquidation in the French courts of the properties of the Carthusian monks who had long made a liqueur by a secret process at their monastery of La Grande Chartreuse did not invest the liquidator with foreign trademark rights, so as to preclude the monks, after they have removed to Spain, where they still make and sell the liqueur in accordance with the original secret formula,

NOTE.—As to Federal question as conferring jurisdiction on United States courts—see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 7; and Earnhart v. Switzler, 105 C. C. A. 262.

On trademark in geographical name—see notes to Dyment v. Lewis, 26 L.R.A.(N.S.) 73; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 45 L. ed. U. S. 365; and Illinois Watch Case Co. v. Elgin Nat. Watch Co. 35 C. C. A. 242.

On unfair competition in trade, see note to Lare v. Harper, 30 C. C. A. 376.

from obtaining relief against unfair competition or the infringement of their registered trademarks in the United States by the French liquidator or those claiming under him.

[For other cases, see International Law, 12–30, in Digest Sup. Ct. 1908.]

Trademark — abandonment.

5. The adoption by the Carthusian monks after their expulsion from France and removal to Spain, of a new designation for the liqueur manufactured by them according to a secret process is not such an abandonment of their old marks as will preclude relief against infringement in the United States by the French liquidator of their properties, or those claiming under him, where such change was made in order to save the French market for their product, and they have continuously asserted their rights against infringers.

[For other cases, see Trademark, 85–89, in Digest Sup. Ct. 1908.]

Unfair competition — labels — Chartreuse.

6. The French liquidator of the properties of the Carthusian monks of the Monastery of La Grande Chartreuse, or those claiming under him, may not use the word "Chartreuse," the monks' trademark for a liqueur made and sold by them in connection with the sale in the United States of a liqueur not made by the monks, as the name of, or as descriptive of, the liqueur, or without clearly distinguishing it from the monks' product.

[For other cases, see Unfair Competition, in Digest Sup. Ct. 1908.]

Contempt — of injunction — unfair competition.

7. The use of the words "Pères Chartreux" instead of "Carthusian Monks" in following the form of label which the court suggested might properly be used, printed in any language, as descriptive of the liqueur manufactured by those claiming under the French liquidator of the properties of the Carthusian monks who had removed to Spain, and were there continuing to make their liqueur under the original secret formula, should not be punished as a contempt of the injunction decree granting relief to the monks against unfair competition and infringement of their trademarks.

[For other cases, see Contempt, 30–34, in Digest Sup. Ct. 1908.]

[No. 99.]

Argued March 14, 15, 1911. Decided May 29, 1911.

APPEAL from and ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed, with some modifications, a decree of the Circuit Court for the Southern District of New York, in favor of complainant in a suit to restrain infringement of trademarks and unfair competition. Reversed and remanded for the entry of an amended decree in favor of complainants.

See same case below, 90 C. C. A. 499, 164 Fed. 25.

The facts are stated in the opinion.

Mr. **Philip Mauro** argued the cause, and, with Messrs. C. A. L. Massie and Ralph L. Scott, filed a brief for appellant:

The provisions of the "French Associations act" of 1901 did not have the effect of depriving complainant of his trademark rights in this country. In fact, such a result was not within the contemplation of that enactment, or of the judicial decrees that have been passed in the enforcement thereof. That act was purely a political measure, without extraterritorial force or effect; and the judicial decrees based upon it have been strictly confined to property and rights within French territory.

French Court of Appeals, Decisions of December 12, 1905; March 27, 1906; Lecouturier v. Rey [1910] A. C. 265, 79 L. J. Ch. N. S. 394, 102 L. T. N. S. 293, 26 Times L. R. 368, 54 Sol. Jo. 375, 27 Rep. Pat. Cas. 268, 47 Scot. L. R. 892; Supreme Court of the German Empire, May 29, 1908.

A trademark, considered as property, has this unique and essential characteristic, namely, that its possession and enjoyment are subject to the invariable condition that it shall be so used as not to deceive the public.

Manhattan Medicine Co. v. Wood, 108 U. S. 218, 223, 27 L. ed. 706, 708, 2 Sup. Ct. Rep. 436.

Defendant's business is not a continuation of complainant's business.

Baglin v. Cusenier Co. 156 Fed. 1018; Decision of German Supreme Court, May 29, 1908; Lecouturier v. Rey [1910] A. C 265, 79 L. J. Ch. N. S. 394, 102 L. T. N. S. 293, 26 Times L. R. 368, 54 Sol. Jo. 375, 27 Rep. Pat. Cas. 268, 47 Scot. L. R. 892.

The French court at Grenoble has decided that the product sold by defendant is not genuine Chartreuse.

Judgment of May 18, 1905.

The word "Chartreuse" constitutes a valid trademark as applied to liqueurs, cordials, etc., and is the exclusive property of the complainant.

Falk v. American West Indies Trading Co. 180 N. Y. 451, 1 L.R.A.(N.S.) 704, 105 Am. St. Rep. 778, 73 N. E. 239, 2 A. & E. Ann. Cas. 216; Grezier v. Girard (April 13, 1876; C. C. S. D. N. Y.); Bauer v. Order of Carthusian Monks, 56 C. C. A. 484, 120 Fed. 78.

The significance of the word "Chartreuse" is not geographical.

Baglin v. Cusenier Co. 156 Fed. 1017.

Geographical names may constitute law-

ful tradenames under the circumstances of the present case.

Wotherspoon v. Currie, L. R. 5 H. L. 508, 42 L. J. Ch. N. S. 130, 27 L. T. N. S. 393; Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 550, 34 L. ed. 997, 1004, 11 Sup. Ct. Rep. 396; Scriven v. North, 67 C. C. A. 348, 134 Fed. 377; Thompson v. Montgomery, L. R. 41 Ch. Div. 50, 58 L. J. Ch. N. S. 374, 60 L. T. N. S. 766, 37 Week. Rep. 637; Reddaway v. Banham [1896] A. C. 199, 65 L. J. Q. B. N. S. 381, 74 L. T. N. S. 289, 44 Week. Rep. 638, 25 Eng. Rul. Cas. 193; Shaver v. Heller & M. Co. 65 L.R.A. 878, 48 C. C. A. 48, 108 Fed. 821; Buzby v. Davis, 80 C. C. A. 163, 150 Fed. 275, 10 A. & E. Ann. Cas. 68; Kathreiner's Malzkaffee v. Pastor Kneipp Medicine Co. 27 C. C. A. 351, 53 U. S. App. 425, 82 Fed. 324; Siegert v. Gandolfi, 79 C. C. A. 142, 149 Fed. 100; Bauer v. Siegert, 56 C. C. A. 487, 120 Fed. 81.

Possession of the building where Chartreuse was formerly manufactured, and of the stills and other appliances (if they were left behind), does not give to the present possessor the right to the good will of complainant's ancient business.

Washburn v. National Wall-Paper Co. 26 C. C. A. 312, 51 U. S. App. 380, 81 Fed. 20.

The French courts had not attempted to deal with, and were not competent to deal with, the trademark rights and the goodwill of the complainant's business outside of France.

Baglin v. Cusenier Co. 156 Fed. 1018.

The attempt of the liquidator to exercise ownership over the foreign trademarks has been disapproved by the French courts.

Court of Appeals Judgment, July 19, 1905; March 27, 1906; December 12, 1905.

The French law of 1901 and the decrees of the French courts give no color of authority to defendant to use the trademarks of complainant in the United States.

See decisions of Grenoble Civil Court, March 31, 1903; May 17, 1904; April 23, 1904; May 18, 1905; Court of Appeals of Grenoble, July 19, 1905; February 15, 1905; December 12, 1905; March 27, 1906; Court of Cassation, July 31, 1906; November 16, 1908; Tribunal of Commerce of the Seine, August 14, 1909.

Mr. **Adolph L. Pincoffs** argued the cause, and, with Mr. Roger Foster, filed a brief for appellee:

The description of a party as "of Tarragona, Spain," is insufficient to show that he is a citizen or subject of the Kingdom of Spain.

Stuart v. Easton, 156 U. S. 46, 39 L. ed. 341, 15 Sup. Ct. Rep. 268; Grand Trunk R. Co. v. Twitchell, 8 C. C. A. 237, 21 U. S. App. 45, 59 Fed. 727.

If the evidence may be examined, that would not help the complainant; for this merely shows that he is domiciled in Italy, and in no way indicates his citizenship.

Knight v. Lutcher & M. Lumber Co. 69 C. C. A. 248, 136 Fed. 404; 14 Cyc. Law & Proc. p. 834; Smith v. Groom, 7 Fla. 151; Story, Confl. L. § 41.

The description of the defendant simply as "a New York corporation," and "having its principal office and place of business in the state of New York," is insufficient to constitute an averment that it is a citizen of that state. *Non constat*, but that it was organized elsewhere, and has merely its principal place of business in that state. It may be an alien corporation, as its name suggests.

New York & N. E. R. Co. v. Hyde, 5 C. C. A. 461, 5 U. S. App. 443, 56 Fed. 191.

The allegation that a corporation is a citizen of a certain state is insufficient for the purposes of the jurisdiction of the circuit courts.

Thomas v. Ohio State University, 195 U. S. 207, 49 L. ed. 160, 25 Sup. Ct. Rep. 24; Dalton v. Milwaukee Mechanics' Ins. Co. 118 Fed. 876; Lafayette Ins. Co. v. French, 18 How. 404, 405, 15 L. ed. 451, 452; Muller v. Dows, 94 U. S. 444, 445, 24 L. ed. 207, 208; Winkler v. Chicago & E. I. R. Co. 108 Fed. 305; American Sugar Ref. Co. v. Johnson, 9 C. C. A. 110, 13 U. S. App. 681, 60 Fed. 503; DeLoy v. Traveler's Ins. Co. 59 Fed. 319; Frisbie v. Chesapeake & O. R. Co. 57 Fed. 1; Lonergan v. Illinois C. R. Co. 55 Fed. 550.

Even where a geographical word acquires a secondary meaning, so that its use by another party would give rise to an action for unfair competition, that fact is not sufficient to give this court jurisdiction on the ground that the case arises under the laws of the United States.

Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 677, 45 L. ed. 365, 382, 21 Sup. Ct. Rep. 270.

Under no view of the case could the plaintiff sustain the claim to prohibit this defendant from telling the exact truth, or designating truthfully the name or place of fabrication, or its own corporate name.

Thompson v. Montgomery, L. R. 41 Ch. Div. 35, 58 L. J. Ch. N. S. 374, 60 L. T. N. S. 766, 37 Week. Rep. 637; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 667, 45 L. ed. 365, 367, 21 Sup. Ct. Rep. 270.

The bill cannot be maintained as one to enjoin infringements by the complainant of a trademark, as the primary meaning of

the word "Chartreuse" is geographical, and no use of the word as a trademark is proved.

Ex parte Farnum, 18 Off. Gaz. 412; Pillsbury-Washburn Flour Mills Co. v. Eagle, 41 L.R.A. 162, 30 C. C. A. 386, 58 U. S. App. 490, 86 Fed. 608; American Waltham Watch Co. v. United States Watch Co. 173 Mass. 85, 43 L.R.A. 826, 73 Am. St. Rep. 263, 53 N. E. 141; Wolfe v. Goulard, 18 How. Pr. 66; Blackwell v. Dibrell, 3 Hughes, 167, Fed. Cas. No. 1,475; Lea v. Wolf, 46 How. Pr. 158.

There was no business or good will vested in complainant in this country, separate and apart from the business and good will in France.

Knoedler v. Boussod, 47 Fed. 465.

The disputed marks and the phrase, "Chartreuse," as applied to a liqueur, are primarily significant of place of manufacture; the complainant has failed to prove that they have acquired a secondary meaning, and refer merely to the fact that the article is of its manufacture.

Bauer v. Order of Carthusian Monks, 56 C. C. A. 484, 120 Fed. 78; Decision Lyons Court of Appeals, 1st of Aug. 1879, Decision, 18th of May, 1905, Tribunal of Grenoble; Cellular Clothing Co. v. Maxton [1899] A. C. 343, 68 L. J. P. C. N. S. 72, 80 L. T. N. S. 809.

Complainant cannot maintain this suit, because the marks which it seeks to enjoin defendant from using cannot be used by itself.

Atlantic Mill. Co. v. Robinson, 20 Fed. 218; Joseph Dixon Crucible Co. v. Guggenheim (Pa.) 3 Am. L. T. 288; Hudson v. Osborne, 39 L. J. Ch. N. S. 79, 21 L. T. N. S. 386; Shipwright v. Clements, 19 Week. Rep. 599; Hall v. Barrows, 4 DeG. J. & S. 150, 33 L. J. Ch. N. S. 204, 10 Jur. N. S. 55, 9 L. T. N. S. 561, 12 Week. Rep. 322; Mouson v. Boehm, L. R. 26 Ch. Div. 405, 53 L. J. Ch. N. S. 932, 50 L. T. N. S. 784, 32 Week. Rep. 612.

There is no such thing as a trademark in gross. It must be appendant to some particular business.

Weston v. Ketcham, 51 How. Pr. 455; Kidd v. Johnson, 100 U. S. 617, 25 L. ed. 769.

The complainant has failed to prove that this defendant falsely represents that the liqueur sold by it is made in accordance with any recipe of complainant, or that it is guilty of any misrepresentation in stating that its liqueur is identical with that formerly made by the monks.

Hostetter Co. v. Comerford, 97 Fed. 585.

Trademarks or tradenames may be assigned with the business to which they appertain, and will go with an assignment of the good will of that business, either voluntarily or by operation of law.

Kidd v. Johnson, 100 U. S. 617, 25 L. ed. 769; Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143; Brown Chemical Co. v. Meyer, 139 U. S. 547, 35 L ed. 250, 11 Sup. Ct. Rep. 625; Warren v. Warren Thread Co. 134 Mass. 247; Dr. S. A. Richmond Nervine Co. v. Richmond, 159 U. S. 293, 302, 40 L. ed. 155, 160, 16 Sup. Ct. Rep. 30; Fish Bros. Wagon Co. v. La Belle Wagon Works (Fish Bros. Wagon Co. v. Fish) 82 Wis. 546, 16 L.R.A. 453, 33 U. S. App. 72, 52 N. W. 595; Sarrazin v. W. R. Irby Cigar & Tobacco Co. 46 L.R.A. 541, 35 C. C. A. 496, 93 Fed. 624; Peck Bros. & Co. v. Peck Bros. Co. 62 L.R.A. 81, 51 C. C. A. 251, 113 Fed. 291; LePage Co. v. Russia Cement Co. 17 L.R.A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941.

The French judgments concerned are of the nature of a judgment *in rem*.

Black, Judgm. 2d ed. § 79; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; Kreiss v. Faron, 118 Cal. 142, 50 Pac. 388; Whitney v. Walsh, 1 Cush. 29, 48 Am. Dec. 590.

When a court of competent jurisdiction and by proceedings directed specifically against things within its jurisdiction acts on such things, its judgment, if the procedure be regular, is everywhere binding.

Wharton, Confl. L. 3d ed. 665, 666; Castrique v. Imrie, L. R. 4 H. L. 428, 39 L. J. C. P. N. S. 350, 23 L. T. N. S. 48, 19 Week. Rep. 1, 5 Eng. Rul. Cas. 899; Magoun v. New England M. Ins. Co. 1 Story, 157, Fed. Cas. No. 8,961; Peters v. Warren Ins. Co. 14 Pet. 99, 10 L. ed. 371; Hudson v. Guestier, 4 Cranch, 293, 2 L. ed. 625; Williams v. Armroyd, 7 Cranch, 423, 3 L. ed. 392; Whitney v. Walsh, 1 Cush. 29, 48 Am. Dec. 590; Black, Judgm. § 813; Monroe v. Douglas, 4 Sandf. Ch. 183; Hilton v. Guyot, 159 U. S. 167, 40 L. ed. 109, 16 Sup. Ct. Rep. 139.

This court cannot enter into an inquiry as to whether the French courts proceeded correctly as to their own law.

Black, Judgm. 5819; Castrique v. Imrie, L. R. 4 H. L. 428, 39 L. J. C. P. N. S. 350, 23 L. T. N. S. 48, 19 Week. Rep. 1, 5 Eng. Rul. Cas. 899; Williams v. Armroyd, 7 Cranch, 423, 3 L. ed. 392.

The burden upon complainant was extraordinarily heavy to show, if it could, some case or cases in which defendant's use of the old marks had actually misled someone, or a state of facts from which such deceit would be the only possible inference. If the proofs leave any doubt upon this question, defendant must prevail.

Hildreth v. D. S. McDonald Co. 164 Mass. 16, 49 Am. St. Rep. 440, 41 N. E. 56; Singer Mfg. Co. v. Wilson, L. R. 2 Ch. Div. 447; Van Camp Packing Co. v. Cruikshanks Bros. Co. 33 C. C. A. 280, 61 U. S. App. 454, 90 Fed. 814; Von Mumm v. Wittemann, 85 Fed. 966, 33 C. C. A. 404, 62 U. S. App. 284, 91 Fed. 126.

Even mere laches has been held sufficient to defeat a claim to exclusive ownership, where, owing to such laches, the name or label had ceased to designate to the public the manufacture of the complainant.

Saxlehner v. Eisner & M. Co. 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7; French Republic v. Saratoga Vichy Spring Co. 191 U. S. 427, 48 L. ed. 247, 24 Sup. Ct. Rep. 145.

But here we have much more than laches. The complainant intentionally and deliberately set out to obtain that very result, and succeeded.

Even if any doubt could be said to have originally existed as to the real meaning and extent of the authority given by the French judgments, such doubt has been solved, both by the practical construction given to such judgments, and by the latest decision of the court of appeals of Grenoble of the 5th October, 1908, on the subject.

The unquestioned German doctrine is that an action cannot be maintained where the trademark either has not been admitted to protection in the state of origin, or for some reason has lost such right to protection.

Vol. 46, Entscheidungen der Reichsgerichte, p. 120 (Liebig's Extract Case); Vol. 51, Entscheidungen der Reichsgerichte, p. 267, German Imperial Court.

Mr. Justice Hughes delivered the opinion of the court:

Père Baglin, Superior General of the Order of Carthusian Monks, for himself and the other members of the order, brought this bill in equity against the Cusenier Company, a New York corporation, to restrain the infringement of trademarks and unfair competition.

The complainant had a decree in the circuit court, and this was modified in certain particulars, to which we shall presently refer, by the circuit court of appeals. The complainant then appealed to this court, and motion was made to dismiss the appeal, it being urged that the decree below was not final. Complainant then petitioned for a writ of certiorari, and this writ and a cross-writ asked for by the respondent were granted.

The facts, so far as we deem it necessary to state them, are as follows: For several hundred years prior to 1903,—save for a comparatively brief period following the French Revolution,—the Order of Carthusian Monks occupied the Monastery of the Grande Chartreuse, near Voiron, in the Department of Isere, in France. This was their Mother House. There, by a secret[587 process, they made the liqueur or cordial which, at first sold locally, became upwards of fifty years ago the subject of an extensive trade and is known throughout the world as "Chartreuse." The monks originally manufactured the liqueur at the monastery itself, and later at Fourvoirie, close by. It was marketed, here and abroad, in bottles of distinctive shape, to which were attached labels bearing the inscription, "Liqueur Fabriquée à la Gde. Chartreuse," with a facsimile of the signature of L. Garnier, a former procureur of the order, and its insignia, a globe, cross, and seven stars; and these symbols with "Gde. Chartreuse" underneath were also ground into the glass. In 1876, the then procureur registered two trademarks in the Patent Office, and these were re-registered in 1884, under the act of 1881 [21 Stat. at L. 502, chap. 138, U. S. Comp. Stat. 1901, p. 3401]. In the accompanying statement the one was said to consist "of the word 'Chartreuse,' accompanied by a facsimile of the signature of L. Garnier," and the other "of the word-symbol 'Chartreuse;'" and the combinations in which these were used were described.

In the year 1903, having been refused authorization under the French law of July 1, 1901, known as the associations act, the congregation of the Chartreux was held to be dissolved by operation of law, and possession was taken of their properties in France by a "sequestrating administrator and liquidator" appointed by the French court. Forcibly removed from their former establishment, and taking their secret with them, the monks set up a factory at Tarragona, in Spain, and there according to their ancient process they have continued the manufacture of the liqueur, importing from France such herbs as were needed for the purpose.

The French liquidator, Henri Lecouturier, employing a skilled distiller and chemical assistants, undertook by experimentation to make at Fourvoirie a liqueur either identical with or resembling as closely as possible the *famous "Char-[588 treuse;" and, having succeeded in this effort to his satisfaction, he placed his product upon the market under the old name. His agent in this country, under date of October 25, 1904, issued a circular containing the following announcement:

"I take pleasure in informing you that I have been appointed sole agent for the

United States and Canada for the Grande Chartreuse Liqueur. Within a few days I shall receive a shipment and therefore will be able to execute orders. As there is a very extensive demand for this cordial, I shall not be able to fill large orders in full. but I trust that, within a few weeks, I will have sufficient stock on hand to enable me to satisfy the demand through the Cusenier Company, whom I have appointed my distributing agents.

"Nothing has been changed in the putting up of the products of the Grande Char treuse, which bear the same labels as heretofore, *the only guaranty of authenticity and of origin of the Chartreuse made at the Monastery.*"

The liquidator's cordial was shipped to this country, and sold here in bottles of precisely the same description, and with the same marks and symbols which had been used by the monks; if there was any difference it is frankly stated to have been unintentional.

Meanwhile the monks, debarred by the proceedings in France from the use of their old marks and symbols in that country, devised a new designation for their liqueur, in which prominence was given to the words "Pères Chartreux." The new label bore the inscription "Liqueur Fabriquée à Tarragone par les Pères Chartreux;" and this was accompanied by the statement that "this liqueur is the only one identically the same as that made at the Monastery of the Grande Chartreuse in France, previous to the expulsion of the monks, who have kept intact the secret of its manufacture." To negative the claim of abandonment they made a 589]small shipment to this country *under the old labels. And both here and in other countries, the monks have sought by legal proceedings to prevent the use of the word "Chartreuse" as a designation of the liqueur made at Fourvourie since their expulsion, and the use or imitation by the liquidator or by those claiming under him of the marks which the monks had associated with their product, and the simulating in any way of the dress or packages in which it had been sold.

For this purpose, this suit was brought against the defendant, who was then representing the liquidator in this country. Pending it, the liquidator sold the property he had acquired and the business he had been conducting in that capacity to a company known as the "Compagnie Fermière de la Grande Chartreuse," which has continued the manufacture of liqueur at Fourvoirie and also its sale in this country through the defendant as its representative.

On final hearing the circuit court adjudged "that the word-symbol 'Chartreuse,' as applied to liqueur or cordial," and that "the said word-symbol 'Chartreuse' accompanied by the facsimile signature of L. Garnier," as set forth in the certificates of registry in the Patent Office, "constitute good and valid trademarks, and in this country have been and now are the sole and exclusive property of said complainants, the Carthusian monks or fathers (Pères Chartreux); and that in this country the said complainants still have the right, and the exclusive right, to use the said marks, or any of them, upon liqueurs or cordials manufactured by the complainants." It was further adjudged that the defendant had been guilty of infringement of these trademarks and of unfair competition, and the decree also contained a perpetual injunction.

The circuit court of appeals affirmed the decree with modifications which affect only the paragraph containing the injunction. This paragraph, as amended, reads as *follows (the words inserted by the[590 court of appeals being italicized):

"It is further adjudged, ordered, and decreed that defendant, its associates, successors, assigns, officers, servants, clerks, agents, and workmen, and each of them, be, and they hereby are, perpetually enjoined from using in this country or in any possession thereof, in connection with any liqueur or cordial not manufactured by complainants, the trademark 'Chartreuse,' or of any colorable imitation thereof, *unless so used as clearly to distinguish such liqueur or cordial from the liqueur or cordial manufactured by the complainants;* or the facsimile signature of L. Garnier, or any colorable imitation thereof; or any of the trademarks above referred to, or any colorable imitation thereof; and they and each of them are likewise perpetually enjoined from importing or putting out, or selling or offering for sale, directly or indirectly, within this country, any liqueur or cordial not manufactured by complainants, in any dress or package like or simulating in any material respects the dress or package heretofore used by complainants, and in particular from making use of any [bottle or] label or [package] *symbol* like or substantially similar to *those appearing on* 'complainants' exhibit, defendant's liqueur,' being the bottle now on file as an exhibit in this court, and from in anywise attempting to make use of the good will and reputation of complainants in putting out in this country any liqueur or cordial not made by complainants."

The defendant contends that the circuit court was without jurisdiction. This objection must fail, as it sufficiently appears from the record that the controversy was

between foreign subjects and a New York corporation. And there was also an assertion by the bill of a right under the Federal statute, by virtue of the registration of the trademarks. Warner v. Searle & H. Co. 191 U. S. 195, 48 L. ed. 145, 24 Sup. Ct. Rep. 79; Standard Paint Co. v. Trinidad 591]Asphalt Mfg. *Co. decided April 10, 1911 [220 U. S. 446, ante, 536, 31 Sup. Ct. Rep. 456]; Jacobs v. Beecham, decided May 15, 1911 [221 U. S. 263, ante, 729, 31 Sup. Ct. Rep. 555].

On the merits, the questions presented are (1) what rights, with respect to the designations and marks involved, were enjoyed by the Carthusian monks prior to their expulsion from the French monastery? (2) what effect upon their rights had (a) the liquidation proceedings in France, and (b) the conduct of the monks in relation to the trade in the liqueur which they subsequently made in Spain? and, in the light of the conclusions upon these points, (3) to what remedy, if any, are the monks entitled?

It is insisted that the judgment is erroneous in determining that "the word-symbol Chartreuse" constituted a valid trademark. It is argued that "Chartreuse" is a regional name; that the characteristic qualities of the liqueur were due to certain local advantages by reason of the herbs found and cultivated within the district described; that even as used in connection with the monks' liqueur, it was still a description of place; and hence, that at most, so far as this word is concerned, the question could be one only of unfair competition.

The validity of this argument cannot be admitted upon the facts which we deem to be established and controlling. It is undoubtedly true that names which are merely geographical cannot be the subject of exclusive appropriation as trademarks. "Their nature is such that they cannot point to the origin (personal origin) or ownership of the articles of trade to which they may be applied. They point only at the place of production, not to the producer, and could they be appropriated exclusively, the appropriation would result in mischievous monopolies." Delaware & H Canal Co. v. Clark, 13 Wall. p. 324, 20 L. ed. 583. See also Columbia Mill Co. v. Alcorn, 150 U. S. 460, 37 L. ed. 1144, 14 Sup. Ct. Rep. 151; Elgin Nat. Watch Co v. Illinois Watch Case Co. 179 U. S. 665. 45 L. ed. 365, 21 Sup. Ct. Rep. 270.

This familiar principle, however, is not applicable here. It is not necessary for us to 592]determine the origin of the *name of the order and its chief monastery. If it be assumed that the monks took their name from the region in France in which they settled in the eleventh century, it still remains true that it became peculiarly their designation. And the word "Chartreuse," as applied to the liqueur which for generations they made and sold, cannot be regarded in a proper sense as a geographical name. It had exclusive reference to the fact that it was the liqueur made by the Carthusian monks at their monastery. So far as it embraced the notion of place, the description was not of a district, but of the monastery of the order,—the abode of the monks,—and the term in its entirety pointed to production by the monks.

It cannot be supposed that if, during the occupation by the monks of the Monastery of La Grande Chartreuse, another had established a factory at Fourvoirie and there manufactured a liqueur, he could have affixed to it the name "Chartreuse" or "Grande Chartreuse" or "Gde. Chartreuse," on the ground that these were place names, or descriptive of advantages pertaining to the locality. It could not fail to be recognized at once that these were the distinctive designations of the liqueur made by the monks, and not geographical descriptions available to anyone who might make cordial in a given section of country. The same would have been true if the monks had voluntarily removed, and continued their manufacture elsewhere. As was forcibly said by the lord chief justice in the court of appeal in Rey v. Lecouturier [1908] 2 Ch. p. 726: "To test this question, let us suppose that the monks had moved their manufacture to another monastery or another building in France, and had sold the fabric of the distillery, and left the district of La Grande Chartreuse, but had continued to make the liqueur in the same way; could it be contended that anyone who bought, as old bricks and mortar, the distillery at Fourvoirie, could immediately call any liqueur made there by the name of *Chartreuse, and put it on the Eng-[593 lish market under that name? It is to me quite unarguable."

The claim of the monks to an exclusive right in this designation as applied to the liqueur has been frequently the subject of litigation, and has repeatedly been sustained. In 1872, La Cour de Cassation in Le Père Louis Garnier v. Paul Garnier, 17 Annales, p. 259, held that "the word 'Chartreuse,' applied as a denomination to the liqueur manufactured by the religious community of which Père Garnier is the representative, is but an abbreviation and the equivalent of a designation more complete; for it at once indicates *the name of the fabricants* (the Chartreux); *the name or commercial firm of manufacture*, which is no other than the community of these same

Chartreux, and, finally, *the place of manufacture;* that is to say, the monastery of La Grande Chartreuse." It was concluded that the designation was the exclusive property of the monks. Mr. Browne, after quoting the above passage, adds: "That single word" (Chartreuse) "contains a long history of strife. It has repeatedly been held to be a perfect trademark, for the reasons just cited." Browne, Trade-Marks, §§ 582, 407-410. See also 17 Annales, 241, 249; Rey v. Lecouturier, supra, Grezier v. Girard, and others, United States circuit court, southern district of New York, 1876, not reported; A. Bauer & Co. v. Carthusian Monks, 56 C. C. A. 484, 120 Fed. 78.

We find no error, therefore, in this determination of the judgment. The registered trademarks were valid. In the statements for registration, the symbols actually used in combination were set forth. Take, for example, the mark in the glass of the bottle, consisting of "Gde. Chartreuse" under the globe, cross, and seven stars. This undoubtedly is a valid mark. And the same is true of the other marks, shown on the labels attached to the bottles, which included the ecclesiastical symbols and the facsimile of the signature of L. Garnier. 594]It follows that up to the time *of their expulsion from the monastery, the monks were entitled to protection against the infringement of these marks, which were their exclusive property, as well as against unfair competition.

The next inquiry is with respect to the effect of the liquidation proceedings in France. Upon the application of the procureur of the Republic, the French court proceeded to the judicial liquidation of the properties in France held by the nonauthorized congregation of the Chartreux, and it was of these properties that a liquidator was appointed. It does not appear that the court assumed jurisdiction of the trademarks registered on behalf of the monks in other countries. On the contrary, it appears to have been held that the question of the ownership of such trademarks was not involved in its determination. After a successful contest of the liquidator with the Abbe Rey, in which a judgment was pronounced to the effect that the latter was an interposed person or passive trustee under a deed of transfer found to be simulated, and that the properties claimed by him personally were in fact those of the congregation, and subject to the liquidation, the liquidator sought, by way of interpretation of this judgment, to obtain a declaration that the assets of the liquidation comprised the trademark registered in other countries. On refusing the application (March 27, 1906), the court of appeals of Grenoble used the following language, showing that the question had not been determined in the previous decision, and also directing attention to the character of the law under which the liquidation was had as "a law of exception and police:"

"The claim of the receiver to the property of the trademarks registered in the foreign countries raises the question whether the law of July 1st, 1901, which is a law of exception and police, controls or not, beyond the territory of the Republic, the properties of the dissolved congregations, and whether the trademarks *regis-[595 tered in foreign lands are an accessory of the commercial holding of Fourvoirie, thus coming under this title into the liquidation, or whether they constitute a distinct and independent property from this commercial holding.

"The question has not been debated between the parties, and the court would not have failed, if it had been submitted to it, to treat upon it in the counts of its decision, in order to solve it in its disposition.

"The silence in this respect, exclusive of any debate on this point, does not allow of admitting, as being implicitly contained in the decree, in an ambiguous or equivocal form, the decision of which Lecouturier claims the benefit, and as the interpretation which he solicits from the court would have as effect to extend beyond what was its sole object, the matter judged by the decree of July 19th last.

"Such an application must be rejected as not receivable, and it is left to Lecouturier to have recourse to such means as may be deemed proper."

Hence defendant's contention is not that the French judgments, under which its principal claims, "expressly and directly settled the status of the marks abroad, but that the said judgments were effective to vest in the defendant [liquidator] the business and good will inseparably connected both in France and in this country with the place and mode of fabrication, and therefore gave him the right, in virtue of the principles of our law, to use the trademark connected therewith."

Now what was the case with respect to the business to which the trademarks in this county related? That business consisted of the manufacture by the monks, according to their secret process, of a liqueur of which the marks and symbols were the trade designation. They took their secret with them to Spain and continued the manufacture of the liqueur. The monks' secret was not the subject of seizure by the liquidator, and did not pass to him. It is not *pretended that he or his vendee[596 have manufactured the liqueur at Fourvoirie

under a formula or recipe derived from the monks, but it is maintained that a formula believed to be essentially similar has been arrived at by experimentation, in accordance with which the liquidator and the French Company have been making their liqueur. We are not concerned with their authority under the French law to conduct this business, but it is not the business to which the trademarks in this country relate. That business is being conducted according to the ancient process by the monks themselves. The French law cannot be conceived to have any extraterritorial effect to detach the trademarks in this country from the product of the monks, which they are still manufacturing.

The matter was put thus by Lord Macnaghten in the House of Lords, in Lecouturier v. Rey [1910] A. C. p. 265:

"To me it seems perfectly plain that it must be beyond the power of any foreign court or any foreign legislature to prevent the monks from availing themselves in England of the benefit of the reputation which the liqueurs of their manufacture have acquired here, or to extend or communicate the benefit of that reputation to any rival or competitor in the English market. But it is certainly satisfactory to learn from the evidence of experts in French law, that the law of Associations is a penal law,—a law of police and order,—and is not considered to have any extraterritorial effect. It is also satisfactory to find that these legal experts confirm the conclusion which any lawyer would draw from a perusal of the French judgments in evidence in this case, that the sale by the liquidator of the property bought by the appellant company has not carried with it the English trademarks, or established the claim of the appellant company to represent their manufacture as the manufacture of the monks of La Grande Chartreuse, which most certainly it is not."

597] *And Lord Justice Buckley said in the court of appeal, Rey v. Lecouturier [1908] 2 Ch. p. 733:

"Of course, in this country a trademark can only be enjoyed in connection with a business; but I think that the monks are carrying on a business in connection with which they can enjoy any trademarks to which they may be entitled, and the labels which were put upon the register, and in respect of which the defendant Lecouturier has had his own name placed upon the register. Are those trademarks the property of the plaintiffs? In my opinion they clearly are."

If through his experiments the liquidator had not succeeded in making a liqueur which resembled that of the monks, he would have had no business to transact so far as the liqueur was concerned, and the transfer by operation of law would not have availed to give him one. But the property in the trademarks in this country did not depend upon the success of the endeavors of the liquidator's experts. The monks were enabled to continue their business because they still had the process, and continuing it they enjoyed all the rights pertaining to it, save to the extent to which, by force of the local law, they were deprived of that enjoyment in France.

Failing to establish that the monks were devested of their exclusive rights in this country by the legal proceedings in France, it is insisted that these have been lost by abandonment. This defense is based both upon nonuser of the old marks and labels, and upon the efforts made by the monks, since their expulsion from France, to associate their liqueur with a new designation, as the "Liqueur des Pères Chartreux" or "Liqueur Febriquée à Tarragone par les Pères Chartreux."

But the loss of the right of property in trademarks upon the ground of abandonment is not to be viewed as a penalty either for nonuser or for the creation and use of new devices. There must be found an *intent* to abandon, or the *property is not[598 lost; and while, of course, as in other cases, intent may be inferred when the facts are shown, yet the facts must be adequate to support the finding. "To establish the defense of abandonment, it is necessary to show not only acts indicating a practical abandonment, but an actual intent to abandon. Acts which, unexplained, would be sufficient to establish an abandonment, may be answered by showing that there never was an intention to give up and relinquish the right claimed." Saxlehner v. Eisner & M. Co. 179 U. S. p. 31, 45 L. ed. 73, 21 Sup. Ct. Rep. 7. And this court, in referring in Singer Mfg. Co. v. June Mfg. Co. 163 U. S. p. 186, 41 L. ed. 125, 16 Sup. Ct. Rep. 1002, to the loss of the right of property in a name, "like the right to an arbitrary mark," by dedication or abandonment, quoted with approval the definition of De Maragy, in his International Dictionary of Industrial Property, as follows:

"Abandonment in industrial property is an act by which the public domain originally enters or re-enters into the possession of the thing (commercial name, mark, or sign) by the will of the legitimate owner. The essential condition to constitute abandonment is, that the one having a right should consent to the dispossession. Outside of this there can be no dedication of the right, because there cannot be abandonment in the juridical sense of the word."

What basis is there in this case for a

finding of intent to abandon the old marks It is to be remembered that they were of personal character, involving the adaptatio of the name and the use of the ecclesiastical symbols of the order. It is pointed out that, to show that there was no intention to abandon, a shipment was made to this country from Tarragona, of the monks liqueur, under the old marks. But it is not necessary to rest on that. The attitude of the monks in their efforts here and in other countries to prevent the use of the old marks shows clearly that there has been no 599]intention to abandon. *It was natural enough that the monks, unable to use their former marks in France, should desire to bring into use a designation which could be available there as well as in other countries. But this is far from indicating the slightest disposition to surrender to the world the right to denominate liqueurs by the ancient name and symbols taken from their own order. As soon as the liquidator, as the result of his experiments, announced that he was prepared to put upon the market "the Grande Chartreuse Liqueur" under the same labels as theretofore,—"the only guaranty of authenticity and of origin of the Chartreuse made at the monastery,"—the monks promptly asserted their rights.

The liquidator was not moved to the use of the marks in question by any consideration of abandonment on the part of the monks, but by virtue of their exclusion from their former abode and of the rights of succession which he claimed under the French law. The main issue between the parties has been one of title, "each claiming a right to the disputed marks to the exclusion of the other." The respective parties, and those representing them, have been in constant litigation in France and elsewhere since the liquidator was appointed, and reviewing the facts in this case we find no possible ground upon which it can be said that the monks have abandoned the rights they possessed.

We come, then, to the question of remedy.

In view of the acts of the defendant, with respect to the marks, labels, and bottles shown to have been used in connection with the liqueur made at Fourvoirie after the removal of the monks, the decree adjudging it guilty of infringement and unfair competition was plainly right. We are also of the opinion that the provisions of the injunction against infringement and simulation, set forth in the decree of the circuit court, were proper.

In dealing, however, with the question of unfair trade, it is to be remembered that the 600]liquidator, and the French *company to whom he sold, lawfully conducted the manufacturing business at Fourvoirie, and, of course, were entitled respectively to sell their product here. They were entitled to state that they made it, and the place and circumstances of its manufacture. In short, they were not debarred from making a statement of the facts, including the appointment of the liquidator and the French company's succession by virtue of his sale, provided it were made fairly, and were not couched in language, or arranged in a manner, which would be misleading, and would show an endeavor to trade upon the repute of the monks' cordial. It is also to be noted that the words "Grande Chartreuse" form a part of the name of the French company which it, and the defendants, as its representative, had a right to use in lawful trade. But neither it nor the defendant was entitled to use the word "Chartreuse" as the name or designation of the liqueur it manufactured, and in any other use of that word, or in any reference to the monks, in its statement of the facts, it was bound by suitable and definite specification to make clear the distinction between its product and the liqueur made by the monks.

These considerations, undoubtedly, led the court below to modify the decree by inserting the words, "unless so used as clearly to distinguish such liqueur or cordial from the liqueur or cordial manufactured by the complainants." But this insertion was made in connection with that portion of the injunction which related to the trademark, and this, we think, was error. It amounted, by reason of the juxtaposition with what preceded, to a permission to the defendant to use the trademark "Chartreuse," or that word as the name or description of its liqueur, provided it were distinguished from the liqueur of the monks. This was inconsistent with the decree as to the ownership of the trademark.

The modification, in this form, should therefore be *struck out; but, more[601 completely to adapt the remedy to the conditions disclosed, there should be inserted in the fourth paragraph of the decree—in that portion which contains the injunction against unfair trade—a provision restraining the use of the word "Chartreuse" in connection with the sales of liqueur not made by the monks, as the name of or as descriptive of the liqueur, or without clearly distinguishing it from the monks' product.

The decree will be amended accordingly, as shown in the margin.†

†4. It is further adjudged, ordered, and decreed that defendant, its associates, successors, assigns, officers, servants clerks, agents, and workmen, and each of them, be, and they hereby are, perpetually enjoined from using in this country or in any pos-

After the decision by the court below, application was made by the complainants for an injunction against the use by the defendant, in connection with its liqueur, of the words "Pères Chartreux." The injunction was not granted, but, the parties having been heard, the court adjudged 602]*the defendant in contempt and imposed a fine. The order was reversed by the circuit court of appeals, and the complainants have applied for a writ of certiorari, which is granted.

In the opinion of the circuit court of appeals upon the appeal from the decree on the main issue, there were set forth two forms of labels which, it was suggested, might properly be used by the defendant, printed in any language. In the contempt proceeding it was shown that the defendant followed closely one of these forms, but used in place of the words "Carthusian Monks," as these there appeared, the description "Péres Chartreux."

In view of the language of its opinion, and the permission it implied, it is clear that the court rightly held that the defendant should not be fined for contempt. But, in saying this, we do not wish to be understood as approving the suggested forms of labels, for they seem to us objectionable in view of the arrangement of the inscription and the special prominence given to the words "Grande Chartreuse." Nor does the making of a fair and adequate statement as to the liqueus of the defendant, its origin and manufacture, require the use of the words "Péres Chartreux," and we are unable to escape the conclusion that such use, in the manner shown, was to serve the purpose of simulation, and to draw to the defendant's liqueur the reputation of that of the monks, contrary to the provisions of the decree.

For the reasons we have stated, the order of the court below in the contempt proceeding is affirmed, but without prejudice to any future application.

The decree is reversed and the cause is remanded with directions to enter a decree in favor of the complainants, amending the decree entered in the Circuit Court in accordance with this opinion; and the order in the contempt proceeding is affirmed without prejudice to any future application.

session thereof, in connection with any liqueur or cordial not manufactured by complainants, the trademark "Chartreuse" or any colorable imitation thereof, or the facsimile signature of L. Garnier, or any colorable imitation thereof, or any of the trademarks above referred to, or any colorable imitation thereof; and they and each of them are likewise perpetually enjoined from importing or putting out, or selling or offering for sale, directly or indirectly, within this country *or in any possession thereof*, any liqueur or cordial not manufactured by complainants in any dress or package like or simulating in any material respects the dress or package heretofore used by complainants, and in particular from making use of any label or symbol like or substantially similar to those appearing on "complainants' exhibit defendant's liqueur," being the bottle now on file as an exhibit in this court; *and from using the word "Chartreuse" in connection with the importing, putting out, or sale of such liqueur or cordial, as the name of or as descriptive of such liqueur or cordial, or without clearly distinguishing such liqueur or cordial from the liqueur or cordial manufactured by the complainants*, and from in any wise attempting to make use of the good will and reputation of complainants in putting out in this country any liqueur or cordial not made by complainants.

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*AMERICAN LITHOGRAPHIC COM-[603
PANY, Plff. in Err.,
v.
EMIL WERCKMEISTER.

(See S. C. Reporter's ed. 603–611.)

Copyright — infringement of painting — penalties.

1. The infringing copies of a copyrighted painting need not be found in the infringer's possession in order to render him liable for the penalty of $10 imposed by U. S. Rev. Stat. § 4965, U. S. Comp. Stat 1901, p. 3414, "for any copy of the same in his possession, or by him sold or exposed for sale."
[For other cases, see Copyright, 57–61, in Digest Sup. Ct. 1908.]

Witnesses — subpœna duces tecum.

2. The authority to issue subpœnas duces tecum was comprehended in the power conferred upon the Federal courts by the act of September 24, 1789 (1 Stat. at L. 81, chap. 20, § 14, U. S. Rev. Stat. § 716, U. S. Comp. Stat. 1901, p. 580), to issue all writs not specially provided for by statute which may be necessary for the exercise of

NOTE.—On the refusal to produce books or papers in response to subpœna on the ground that they contain private matter—see note to Re Bolster, 29 L.R.A.(N.S.) 716.

On compulsory production of books and papers as unreasonable search or seizure—see note to Consolidated Rendering Co. v. Vermont, 52 L. ed. U. S. 327.

On constitutional protection against being forced to furnish evidence to be used against one's self in a civil case—see note to Levy v. Superior Ct. 29 L.R.A. 811.

For the persons against whom production and inspection of books or writings may be obtained—see note to Cassatt v. Mitchell Coal & Coke Co. 81 C. C. A. 96.

their respective jurisdictions, and agreeable to the practice and usages of law.

[For other cases, see Witnesses, II., in Digest Sup. Ct. 1908.]

Witnesses — subpœna duces tecum — books of party.

3. Compulsory production of the books of a corporate defendant under a subpœna duces tecum served upon an officer of the corporation in an action to recover the penalties prescribed by U. S. Rev. Stat. § 4965, U. S. Comp. Stat. 1901, p. 3414, for printing and selling copies of a copyrighted painting, did not, after the change of the rule as to the incompetency of parties as witnesses, made by § 858, violate any of the rights of the corporation under § 724, providing for the production on notice and motion of a party's books and papers, since this section cannot be regarded as providing an exclusive proceedure.

[For other cases, see Witnesses, II., in Digest Sup. Ct. 1908.]

Witnesses — self-crimination — statutory immunity.

4. Entries in the books of a party, produced in obedience to a subpœna duces tecum, were not rendered inadmissible on the trial by U. S. Rev. Stat. § 860, U. S. Comp. Stat. 1901, p. 661, providing that no discovery or evidence obtained from a party or witness by means of a judicial proceeding shall be given in evidence or used against him in a criminal case, or in a proceeding to enforce a penalty or forfeiture, since these provisions manifestly refer to a case where, in some prior judicial proceeding, a discovery had been made or testimony had been given, and the evidence so obtained was sought to be used.

[For other cases, see Witnesses, V. C, in Digest Sup. Ct. 1908.]

Searches and seizures — production of books and papers.

5. The protection against unreasonable searches and seizures afforded by U. S. Const. 4th Amend. cannot ordinarily be invoked to justify the refusal of an officer of a corporation to produce its books and papers in obedience to a subpœna duces tecum issued in an action against the corporation to recover a statutory penalty.

[For other cases, see Searches and Seizures, in Digest Sup. Ct. 1908.]

Witnesses — self-crimination — privilege of corporation.

6. A corporation cannot object, on the ground of a constitutional protection against self-crimination, to the admissibility in evidence against it, in an action to recover a statutory penalty, of the entries in the corporate books, produced by a corporate officer in obedience to a subpœna duces tecum.

[For other cases, see Witnesses, V. c, in Digest Sup. Ct. 1908.]

[No. 115.]

Argued April 10, 1911. Decided May 29, 1911.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of New York, in favor of plaintiff in an action to recover penalties for the infringement of a copyright. Affirmed.

See same case below, 91 C. C. A. 376, 165 Fed. 426.

The facts are stated in the opinion.

Mr. **William A. Jenner** argued the cause and filed a brief for plaintiff in error:

U. S. Rev. Stat. § 4965, U. S. Comp. Stat. 1901, p. 3414, is a penal statute, and prosecutions under it, although civil in form are essentially criminal prosecutions.

Backus v. Gould, 7 How. 798–811, 12 L. ed. 919–924; Bolles v. Outing Co. 175 U. S. 262, 264, 44 L. ed. 156, 157, 20 Sup. Ct. Rep. 94; Werckmeister v. American Tobacco Co. 207 U. S. 375–381, 52 L. ed. 254–256, 28 Sup. Ct. Rep. 124.

An action to recover a penalty, though civil in form, is criminal in nature.

Lees v. United States, 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

Discovery, *i. e.*, production of books and papers, will not be ordered in chancery in aid of an action to enforce penalties and forfeitures.

Livingston v. Tompkins, 4 Johns. Ch. 431, 8 Am. Dec. 598; 2 Story, Eq. Jur. § 1319; 2 Dan. Ch. Pl. & Pr. 1557; 2 Beach, Modern Eq. Jur. § 871; 2 Story, Eq. Jur. § 1494; Horsburg v. Baker, 1 Pet. 232, 7 L. ed. 125; Boyd v. United States, 116 U. S. 616–631, 29 L. ed. 746–751, 6 Sup. Ct. Rep. 524; United States v. Saline Bank, 1 Pet. 100, 7 L. ed. 69; Counselman v. Hitchcock, 142 U. S. 563, 35 L. ed. 1114, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195.

An exemption from production has always been allowed in actions for penalties under the copyright and patent laws.

Atwill v. Ferrett, 2 Blatchf. 39, Fed. Cas. No. 640; Johnson v. Donaldson, 18 Blatchf. 287, 3 Fed. 22; Snow v. Mast, 63 Fed. 623, 65 Fed. 996; Daly v. Brady, 69 Fed. 285.

Section 724, U. S. Comp. Stat. 1901, p. 583, has been applied to exempt from production in penalty cases against corporations.

United States v. National Lead Co. 75 Fed. 94; Newgold v. American Electrical Novelty & Mfg. Co. 108 Fed. 341; Oro Water, Light & P. Co. v. Oroville, 162 Fed. 975.

Section 724 controls the production of book evidence from the adversary party at the trial, and excludes all other modes of compelling production.

Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; Union P. R. Co. v. Botsford, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000; Hanks Dental Asso. v. International Tooth Crown Co. 194 U. S. 303, 48 L. ed. 989, 24 Sup. Ct. Rep. 700.

The history of § 724 shows that its object was to provide in actions at law a method of obtaining inspection of books and papers, analogous to discovery in equity.

Owyhee Land & Irrig. Co. v. Tautphaus, 48 C. C. A. 535, 109 Fed. 547; Hylton v. Brown, 1 Wash. C. C. 298, Fed. Cas. No. 6,981; Finch v. Rikeman, 2 Blatchf. 302, Fed. Cas. No. 4,788.

At common law, parties could not be compelled to attend, or by subpœna duces tecum to produce books.

3 Bl. Com. 382; Merchants' Nat. Bank v. State Nat. Bank, 3 Cliff. 201, Fed. Cas No. 9,448; United States v. Reyburn, 6 Pet. 363, 8 L. ed. 428; Bank of Utica v. Hillard, 5 Cow. 419; Gregory v. Chicago, M. & St. P. R. Co. 3 McCrary, 374, 10 Fed. 529; Kirkpatrick v. Poper Mfg. Co. 61 Fed. 46.

Section 860, U. S. Comp. Stat. 1901, p. 661, is expressly applicable to actions for the enforcement of a penalty.

Johnson v. Donaldson, 18 Blatchf. 287, 3 Fed. 22; Tucker v. United States, 151 U. S. 164, 38 L. ed. 112, 14 Sup. Ct. Rep. 299; Johnson v. United States, 18 L.R.A. (N.S.) 1194, 89 C. C. A. 508, 163 Fed. 30.

Both §§ 724 and 860, U. S. Rev. Stat., apply to corporations.

Gregory v. Chicago, M. & St. P. R. Co. 3 McCrary, 374, 10 Fed. 529; Washburn & M. Mfg. Co. v. Freeman Wire Co. 41 Fed. 410; Merchants' Nat. Bank v. State Nat. Bank, 3 Cliff. 201, Fed. Cas. No. 9,448; Havermeyers & E. Sugar Ref. Co. v. Compañia Transatlantica Española, 43 Fed. 90; Kirkpatrick v. Pope Mfg. Co. 61 Fed. 46; Exchange Nat. Bank v. Washita Cattle Co. 61 Fed. 190; United States v. National Lead Co. 75 Fed. 94; Lucker v. Phœnix Assur. Co. 67 Fed. 18; Newgold v. American Electrical Novelty & Mfg. Co. 108 Fed. 341; Victor G. Bloede Co. v. Joseph Bancroft & Sons Co. 110 Fed. 76; Safford v. Ensign Mfg. Co. 56 C. C. A. 630, 120 Fed. 480; United States v. Bitter Root Development Co. 66 C. C. A. 652, 133 Fed. 274; General Electric Co. v. Westinghouse Electric & Mfg. Co. 144 Fed. 458.

If a corporation is a "person" within the meaning of the 14th Amendment (Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 396, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581), it would seem to be a person within the meaning of the 4th and 5th Amendments.

Actions for the recovery of statutory penalties are within the constitutional guaranty.

Coffey v. United States, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437.

An inquisition by means of a subpœna duces tecum, or a court order, is a search.

Boyd v. United States, 116 U. S. 616, 622, 29 L. ed. 746, 748, 6 Sup. Ct. Rep. 524.

Mr. **Antonio Knauth** argued the cause and filed a brief for defendant in error:

The constitutional questions have been decided against the plaintiff in error.

Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; McAlister v. Henkel, 201 U. S. 90, 50 L. ed. 671, 26 Sup. Ct. Rep. 385; Nelson v. United States, 201 U. S. 92, 50 L. ed. 673, 26 Sup. Ct. Rep. 358; Alexander v. United States, 201 U. S. 117, 50 L. ed. 686, 26 Sup. Ct. Rep. 356; Amey v. Long, 1 Campb. 17, 9 East, 473, 6 Esp. 116, 9 Revised Rep. 589; Crowther v. Appleby, L. R. 9 C. P. 27, 43 L. J. C. P. N. S. 7, 29 L. T. N. S. 580, 22 Week. Rep. 265; Johnson Steel Street-Rail Co. v. North Branch Steel Co. 48 Fed. 195; American Banana Co. v. United Fruit Co. 153 Fed. 943; New York C. & H. R. R. Co. v. United States, 91 C. C. A. 519, 165 Fed. 833; Re American Sugar Ref. Co. 178 Fed. 109; London v. Everett H. Dunbar Corp. 103 C. C. A. 130, 179 Fed. 506; International Coal Min. Co. v. Pennsylvania R. Co. 152 Fed. 557.

It being now established that a corporation cannot claim the benefits of the 5th Amendment, it seems to follow, as a necessary consequence, that it cannot insist upon any statutory rights granted by § 860 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 661, which was designed in

the spirit of the constitutional Amendment, and evidently had the same object in view.

Tucker v. United States, 151 U. S. 164, 38 L. ed. 112, 14 Sup. Ct. Rep. 299.

The words employed in § 860 show an intention to prevent the offering in evidence, or other use made at the trial, of declarations made or proceedings had in some previous litigation or upon some previous occasion.

Alkon v. United States, 90 C. C. A. 116, 163 Fed. 810; Hammond Lumber Co. v. Sailors' Union, 167 Fed. 809; Cohen v. United States, 96 C. C. A. 35, 170 Fed. 715; Johnson v. United States, 18 L.R.A. (N.S.) 1194, 89 C. C. A. 508, 163 Fed. 30.

There is no doubt that as a witness a party can be compelled by a subpœna duces tecum to produce books, documents, and papers in his possession, in the same manner as any other witness, in an action at law, as well as in suits of equity.

Merchants' Nat. Bank v. State Nat. Bank, 3 Cliff. 201, Fed. Cas. No. 9,448; Bischoffsheim v. Brown, 29 Fed. 341.

And the officers of a corporation may be required as witnesses to produce its books, when the books are necessary evidence.

Wertheim v. Continental R. & Trust Co. 21 Blatchf. 246, 15 Fed. 716; Johnson Steel Street-Rail Co. v. North Branch Steel Co. 48 Fed. 191; Edison Electric Light Co. v. United States Electric Lighting Co. 44 Fed. 294, s. c. 45 Fed. 55.

Mr. Justice **Hughes** delivered the opinion of the court:

This is a writ of error to review a judgment of the circuit court of appeals, affirming a judgment upon a verdict in favor of Emil Werckmeister, plaintiff below. The action was brought under § 4965 of the United States Revised Statutes (U. S. Comp. Stat. 1901, p. 3414), to recover penalties for the infringement of a copyright. The subject of the copyright was the painting "Chorus," and the penalties demanded were for copies printed and sold by the Lithographic Company.

It is contended that the recovery was unauthorized by the statute, for the reason that the copies were not found in the defendant's possession. Section 4965, so far as material, provides:

"Sec. 4965. If any person, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, . . . shall . . . engrave, etch, work, copy, print, publish . . . or import, either in whole or in part, . . . or, knowing the same to be so printed, published, . . . or imported, shall sell or dispose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale."

[607] The contention is "that the penalty attaches in the case of a *painting* only under the same conditions as in the case of a *print;* that the intent of the statute is to differentiate a *painting* from a *print* only in respect to the amount of the penalty, $1 in case of a print, and $10 in case of a painting; and that, in both cases, a *finding in possession of the defendant* is a condition precedent to the recovery of the penalty." It is further urged that only one action can be maintained for forfeiture of the copies and for the penalties, and that the action lies only against the person in whose possession the copies are found, and that the penalties are to be computed upon the number so found.

The argument fails to give effect to the express provision of the statute. Its words are, "He shall forfeit ten dollars for every copy of the same in his possession, *or by him sold* or exposed for sale." No process of construction can override this explicit language. The prescribed forfeiture is not only for every copy found "in his possession," but, in the alternative, for every copy "by him sold." We need not search for the reason for the distinction between maps, charts, photographs, prints, etc., on the one hand, and paintings, statues, and statuary on the other. The character of the latter suggests the basis; but the distinction is plainly made, and it must be given effect.

With respect to prints, photographs, etc., the money penalty for the acts defined is "one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale." The words "found in his possession" limit the entire clause. And no penalty can be recovered in such case except for sheets found in the possession of the defendant. Bolles v. Outing Co. 175 U. S. 262, 44 L. ed. 156, 20 Sup. Ct. Rep. 94.

The cases of American Tobacco Co. v. Werckmeister, 207 U. S. 284, 52 L. ed. 208, 28 Sup. Ct. Rep. 72, 12 A. & E. Ann. Cas. 595, and Werckmeister v. American Tobacco

608]*Co. 207 U. S. 375, 52 L. ed. 254, 28 Sup. Ct. Rep. 124, related to the same copyrighted painting that is involved here. In the first case there was a recovery in an action in the nature of replevin of 1196 sheets containing copies. The second action was brought to recover the money penalties for the sheets seized in the former action. The question was whether there could be two actions against the same party; one for the seizure of the sheets forfeited and another for the penalties, and it was held "that the statute contemplated but a single action in which the offender should be brought into court, the plates and sheets seized and adjudicated to the owner of the copyright, and the penalty, provided for by the statute, recovered." See Hills & Co. v. Hoover, 220 U. S. 334, 335, ante, 487, 31 Sup. Ct. Rep. 402. These decisions did not involve the determination that an action could not be brought to enforce the forfeiture prescribed by the statute in a case of the sale of copies of a copyrighted painting where there was no finding in possession, and hence no proceeding to forfeit copies so found. Here, there is no attempt to recover in a second action penalties which should have been embraced in a former action; and the recovery is based simply upon the forfeiture incurred by sales of the prohibited copies.

Assuming that the action for the penalties would lie, it is further contended by the defendant company that its rights under §§ 724 and 860 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 583, 661) were violated by the compulsory production of its books and the reception in evidence of entries showing sales of infringing copies.

Without attempting to state in detail the proceedings which culminated in the introduction of the book entries in evidence, it is sufficient to say that after a review of the course of the trial, and of the directions and rulings of the court during its progress, we are satisfied that the enforced production of the books cannot properly be said to rest upon an order made under § 724, 609]but that in fact they *were produced under a subpœna duces tecum served upon the company's officer.

But it is urged that the books were those of a party to the action, and hence that the limitations of § 724 must be deemed controlling; that in actions at law this section excludes all other modes of compelling production of books or writings by the adversary party.

Under § 14 of the judiciary act of 1789 [1 Stat. at L. 81, chap. 20] (U. S. Rev. Stat. § 716, U. S. Comp. Stat. 1901, p. 580), power was conferred upon the Federal courts to issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the practice and usages of law. This comprehended the authority to issue subpœnas duces tecum, for "the right to resort to means competent to compel the production of written, as well as oral, testimony, seems essential to the very existence and constitution of a court of common law." Amey v. Long, 9 East. p. 484. Section 724, which was originally § 15 of the judiciary act of 1789, was to meet the difficulty arising out of the rules relating to parties at common law, and to provide, by motion, a substitute *quoad hoc* for a bill of discovery in aid of a legal action. Carpenter v. Winn, decided this day. [221 U. S. 533, post, 842, 31 Sup. Ct. Rep. 683.]

But by the act of July 2, 1864, chap. 210, § 3 (13 Stat. at L. 351, U. S. Comp. Stat. 1901, p. 659), it was provided that there should be "no exclusion of any witness on account of color, nor in civil actions because he is a party to, or interested in, the issue tried." This provision was continued in § 858 of the Revised Statutes. "The purpose of the act in making the parties competent was, except as to those named in the proviso, to put them upon a footing or equality with other witnesses, all to be admissible to testify for themselves, and compellable to testify for the others." Texas v. Chiles, 21 Wall. 488, on p. 492, 22 L. ed. 650, 651. Section 858 was amended by the act of June 29, 1906, chap. 3608 (34 Stat. at L. 618, U. S. Comp. Stat. Supp. 1909, p. 242), which refers the competency of witnesses in the courts of the *United States to the laws of the[610 state or territory in which the court is held.

It was not the purpose of § 724 to interpose an obstacle to the exercise of the general power of the court with respect to the issuance of subpœnas duces tecum, and that was not its effect. The barrier, in the case of parties, existed independently of the provisions of the section, and by these it was sought to mitigate the resulting inconvenience. When, however, the rule as to parties was changed, it followed that the obstacle was removed, and by virtue of the general authority of the court, subpœnas duces tecum may run to parties as well as to others,—leaving those who are subpœnaed to attack the process if of improper scope or lacking in definiteness, or to assert against its compulsion whatever privileges they may enjoy. See Merchants' Nat. Bank v. State Nat. Bank, 3 Cliff. pp. 203, 204, Fed. Cas. No. 9,448; Nelson v. United States, 201 U. S. 92, 50 L. ed. 673, 26 Sup. Ct. Rep. 358.

We conclude, therefore, that no question

arises under § 724, which cannot be regarded as providing an exclusive procedure. The subpœna was valid; and the books called for were produced. The inquiry, then, is as to the admissibility of the entries.

It is insisted that the evidence was inadmissible under § 860 of the Revised Statutes. This ground, although it had been relied upon earlier in the trial, was not included in the objection—as it was formally stated at length—when the books were finally produced and the entries offered. But, apart from this, the statute did not afford a sufficient basis for objection.

Section 860—since repealed by the act of May 7, 1910, chap. 216 (36 Stat. at L. 352),—was a re-enactment of § 1 of the act of February 25, 1868, chap. 13 (15 Stat. at L. 37), and provided:

"Sec. 860. No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, 611]shall *be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture; Provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

This language is inapposite here, for it manifestly refers to a case where, in some prior judicial proceeding, discovery had been made or testimony had been given, and the evidence so obtained was sought to be used. The object of the statute is sufficiently plain. It was intended to give immunity as to subsequent proceedings to the one making discovery or testifying. But it was held to be inadequate, because it was not coextensive with the constitutional privilege. Counselman v. Hitchcock, 142 U. S. 547, 564, 35 L. ed. 1110, 1114, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Brown v. Walker, 161 U. S. 594, 40 L. ed. 820, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644.

In the present case, the question, therefore, must be whether, under the 4th and 5th Amendments of the Constitution of the United States, the defendant company, as it contends, was entitled to object to the admission in evidence of the entries from its books. As to this, we need only refer to the recent decisions of this court. Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; Nelson v. United States, supra; Hammond Packing Co. v. Arkansas, 212 U. S. 348, 349, 53 L. ed. 543, 544, 29 Sup. Ct. Rep. 370; Wilson v. United States, decided May 15, 1911 [220 U. S. 614, ante, 610, 31 Sup. Ct. Rep. 538].

We have examined the errors assigned with respect to other rulings on questions of evidence and the refusal of the court to direct a verdict for the defendant, and we find no ground for a reversal of the judgment.

Affirmed.

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*BALTIMORE & OHIO RAILROAD [612
COMPANY, Appt.,
v.
INTERSTATE COMMERCE COMMISSION.

(See S. C. Reporter's ed. 612-623.)

Commerce — Federal control — hours of railway employees.

1. Intrastate railroads and employees wholly engaged in local business were not affected by the provisions of the act of March 4, 1907 (34 Stat. at L. 1415, chap. 2939, U. S. Comp. Stat. Supp. 1909, p. 1170), § 2, making it "unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee subject to this act to be or remain on duty" for a longer period than that prescribed, since such carriers and employees are defined in § 1 as those who are engaged in the transportation of passengers or property by railroad in the District of Columbia or the territories, or in interstate or foreign commerce, although that section further defines "railroad" as including all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any carrier operating a railroad by contract, agreement, or lease, and "employees" as meaning persons actually

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Note.—As to limitation of hours of labor by statute or ordinance—see notes to People v. Orange County Road Constr. Co. 65 L.R.A. 33, and Atkin v. Kansas, 48 L. ed. U. S. 148.

On the power of Congress to regulate commerce—see notes to State v. Indiana & O. Oil, Gas & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

On compulsory production of books and papers as unreasonable search and seizure—see note to Consolidated Rendering Co. v. Vermont, 52 L. ed. U. S. 327.

On constitutional protection against being forced to furnish evidence to be used against one's self in a civil case—see note to Levy v. Superior Ct. 29 L.R.A. 811.

On refusal to produce books or papers in response to subpœna upon the ground that they contain private matter—see note to Re Bolster, 29 L.R.A.(N.S.) 716.

engaged in, or connected with, the movement of any train.

[For other cases, see Commerce, III., in Digest Sup. Ct. 1908.]

Commerce — Federal control — hours of labor.

2. The restrictions upon the hours of labor of railway employees connected with the movement of trains in interstate transportation, made by the act of March 4, 1907, are not unconstitutional because many of such employees are, by virtue of practical necessity, also employed in intrastate transportation.

[For other cases, see Commerce, III., in Digest Sup. Ct. 1908.]

Commerce — Federal control — hours of labor.

3. Congress, in the exercise of its power over commerce, could enact the provisions of the act of March 4, 1907, restricting the hours of labor of railway employees who are connected with the movement of trains in interstate or foreign commerce.

[For other cases, see Commerce, III., in Digest Sup. Ct. 1908.]

Statutes — validity — uncertainty — regulating hours of labor.

4. The words "except in case of emergency," in the proviso in the act of March 4, 1907, § 2, making it unlawful for railway carriers engaged in transportation in the District of Columbia or the territories, or in interstate or foreign commerce, to require or permit employees engaged in such transportation to be or remain on duty for a longer period than that prescribed, do not make the application of the act so uncertain as to destroy its validity, even though the proviso in § 3, limiting the effect of the entire act, can be said to include everything which may be embraced within the term "emergency."

[For other cases, see Statutes, I. d, 1, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — reports from carriers — hours of labor.

5. Authority to require the secretary or similar officer of the carriers subject to the act of March 4, 1907, regulating the hours of labor of employees, to make monthly reports under oath, showing the instances where employees subject to the act have rendered excess service, and giving the cause and explanatory facts, if any, or, where there has been no excess service, to make a separate oath to that effect in lieu of the form to be used in detailing excess service, was conferred upon the Interstate Commerce Commission by the provision of § 4, empowering it to call to its aid in the enforcement of the act "all powers granted to it," when read in connection with the act of June 18, 1910 (36 Stat. at L. 556, chap. 309), § 14, amending § 20 of the act to regulate commerce so that the commission may require the carriers to file periodical or special reports under oath concerning any matter about which it is by law authorized or required to keep itself informed, or which it is required to enforce.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Searches and seizures — reports from carriers — hours of labor.

6. The constitutional protection against unreasonable searches and seizures is not denied by an order of the Interstate Commerce Commission requiring the secretary or other similar officer of the carriers subject to the act of March 4, 1907, regulating the hours of labor of employees, to make monthly reports under oath, showing the instances where employees subject to the act have rendered excess service, and giving the cause and explanatory facts, if any, or, where there has been no excess service, to make a separate oath to that effect, in lieu of the form to be used in detailing excess service.

[For other cases, see Searches and Seizures, in Digest Sup. Ct. 1908.]

Criminal law — self-crimination — corporation cannot claim privilege.

7. Carriers subject to the act of March 4, 1907, regulating hours of labor of employees, cannot claim a privilege against self-crimination to justify the refusal to comply with an order of the Interstate Commerce Commission, requiring the secretary or similar officer to make monthly reports under oath, showing the instances where employees subject to the act have rendered excess service, and giving the cause and explanatory facts, if any, or, where there has been no excess service, to make a separate oath to that effect, in lieu of the form to be used in detailing excess service.

[For other cases, see Witnesses, V. e, in Digest Sup. Ct. 1908.]

Criminal law — self-crimination — privilege of corporate officer.

8. The secretary or similar officer of a carrier subject to the act of March 4, 1907, regulating hours of labor of employees, cannot claim a personal privilege against self-crimination to justify a refusal to comply with an order of the Interstate Commerce Commission, requiring such official to make monthly reports under oath, showing the instances where employees subject to the act have rendered excess service, and giving the cause and explanatory facts, if any, or, where there has been no excess service, to make a separate oath to that effect, in lieu of the form to be used in detailing excess service.

[For other cases, see Witnesses, V. e, in Digest Sup. Ct. 1908.]

[No. 222.]

Argued December 17 and 20, 1909. Ordered for reargument May 16, 1910. Reargued April 17 and 18, 1911. Decided May 29, 1911.

APPEAL from the Circuit Court of the United States for the District of Maryland to review a decree sustaining a demurrer to a bill seeking relief in equity against an order of the Interstate Commerce Commission, requiring monthly re-

ports under oath from carriers subject to the hours-of-service act. Affirmed.

The facts are stated in the opinion.

Messrs. **Frederic D. McKenney** and **John G. Johnson** argued the cause, and, with Mr. Hugh L. Bond, Jr., filed a brief for appellant:

Taken even in its most restricted sense, the act of March 4, 1907, cannot be said to solely apply to and regulate interstate commerce; nor does it lie within any true definition of the authority, express or implied, to use all means appropriate to the exercise of the power conferred by the Constitution in such regard.

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

The act should, in all conscience and by strict law, be held too uncertain to be valid.

United States v. Reese, 92 U. S. 220, 23 L. ed. 565; Cook v. State, 26 Ind. App. 278, 59 N. E. 489; Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129; Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917.

The statute attempts to deprive the carriers of property, and to invade their liberty without due process of law, contrary to the provisions of the 5th Amendment.

Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764.

The orders of the Interstate Commerce Commission here complained of are invalid because, among other things, they compel reports under oath as to excess hours served by any employees engaged in or connected with the movement of purely local as well as of interstate trains, and also when there has been no such excess hours served.

Merritt v. Welsh, 104 U. S. 694, 26 L. ed. 896; Morrill v. Jones, 106 U. S. 466, 27 L. ed. 267, 1 Sup. Ct. Rep. 423; United States v. Eaton, 144 U. S. 687, 36 L. ed. 594, 12 Sup. Ct. Rep. 764.

Solicitor General **Bowers** argued the cause and filed a brief for appellee on original argument:

Congress has power to regulate the hours of service of employees of interstate carriers by railroad, as it attempted in the hours-of-service law.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764.

The law does not unwarrantably interfere with the right of contract guaranteed by the Constitution.

Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; Lochner v. New York, 198 U. S. 45, 54, 49 L. ed. 937, 940, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 539; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 A. & E. Ann. Cas. 957.

The hours-of-service law being valid, the Interstate Commerce Commission had statutory authority to make its order requiring monthly reports from common carriers of their practice in reference to the working and resting time of their employees engaged in or connected with the movement of trains.

Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

Solicitor General **Lehmann** argued the cause and filed a brief for appellee on reargument.

Mr. Justice **Hughes** delivered the opinion of the court:

This is a bill in equity to annul an order made by the Interstate Commerce Commission on March 3, 1908, and for injunction. The order required the carriers within the provisions of the act of Congress of March 4, 1907, chapter 2939, 34 Stat. at L. 1415, U. S. Comp. Stat. Supp. 1909, p. 1170, to make monthly reports, under oath, showing the instances where employees subject to that act had been on duty for a longer period than that allowed. The statute, entitled "An Act to Promote the Safety of Employees and Travelers upon Railroads by Limiting the Hours of Service of Employees Thereon," is set forth in the margin.†

*By stipulation there were intro-[614 duced into record additional instructions issued by the Commission under date of August 15, 1908. These prescribed new forms, and also a separate form of oath for use in case there had been no excessive service; and it was further directed that reports of hours of service of the employees described should be made by the secretary or similar officer of the carrier.

†*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, that the provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia or any territory of the United States, or from

It was agreed that a number of like suits brought by other carriers should abide the final disposition of this cause, and that meanwhile the reports should not be required.

The bill alleged that the purpose of the 615]Commission in *making the order was to secure from carriers evidence of infractions of the law in order that suits might be brought to recover penalties; that, even if this were not the purpose, the result of the requirement would be the same, because of the provision that the Commission should lodge with the proper district attorneys information of the violations coming to its knowledge; and that this compulsory disclosure, both as to the corporation itself and as to the officers concerned in such violations, was repugnant to the 4th and 5th Amendments of the Constitution of the United States. It was also alleged *that[616 the Commission was without authority to make the order, either under the provisions of the act or otherwise.

A demurrer for want of equity was sustained, and the complainant appeals.

First. Although the question was not specifically raised by the bill, it is now contended that the statute is unconstitutional in its entirety, and therefore no action of the Commission can be based upon it. It is said that it goes beyond the power which Congress may exercise in the regulation of interstate commerce; that while

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one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad," as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees," as used in this act, shall be held to mean persons actually engaged in or connected with the movement of any train.

Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours, he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: Provided, that no operator, train despatcher, or other employee who, by the use of the telegraph or telephone, despatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: Provided further, the Interstate Commerce Commission may, after full hearing in a particular case, and for good cause shown, extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

Sec. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: Provided, that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen: Provided further, that the provisions of this act shall not apply to the crews of wrecking or relief trains.

Sec. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this act, and all powers granted to the interstate Commerce Commission are hereby extended to it in the execution of this act.

Sec. 5. That this act shall take effect and be in force one year after its passage.

addressed to common carriers engaged in interstate transportation by railroad to any extent whatever, its prohibitions and penalties are not limited to interstate commerce, but apply to intrastate railroads and to employees engaged in local business.

The prohibitions of the act are found in § 2. This provides that it shall be "unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee subject to this act to be or remain on duty" for a longer period than that prescribed. The carriers and employees subject to the act are defined in § 1 as follows:

"That the provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia or any territory of the United States, or from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term 'railroad,' as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a rail-
617]road, *whether owned or operated under a contract, agreement, or lease; and the term 'employees,' as used in this act, shall be held to mean persons actually engaged in or connected with the movement of any train."

No difficulty arises in the construction of this language. The first sentence states the application to carriers and employees who are "engaged in the transportation of passengers or property by railroad" in the District of Columbia or the territories, or in interstate or foreign commerce. The definition in the second sentence, of what the terms "railroad" and "employees" shall include, qualify these words as previously used, but do not remove the limitation as to the nature of the transportation in which the employees must be engaged in order to come within the provisions of the statute. If the definition in the last part of the sentence, of the words used in the first part, be read in connection with the latter, the meaning of the whole becomes obvious. The section, in effect, thus provides: "This act shall apply to any common carrier or carriers, their officers, agents, and employees (meaning by 'employees' persons actually engaged in or connected with the movement of any train), engaged in the transportation of passengers or property by railroad (meaning by 'railroad' to include all bridges and ferries used or operated in connection with any railroad) in the District of Columbia or any territory . . . or from one state . . . to any other state," etc. In short, the employees to which the act refers, embracing the persons described in the last sentence of the section, are those engaged in the transportation of passengers or property by railroad in the district, territorial, interstate, or foreign commerce defined; and the railroad, including bridges and ferries, is the railroad by means of which the defined commerce is conducted.

The statute, therefore, in its scope, is materially different from the act of June 11, 1906, chapter 3073, 34 Stat. at L. 232, U. S. Comp. Stat. Supp. 1909, p. 1148, *which was before this court in the[618 Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141. There, while the carriers described were those engaged in the commerce subject to the regulating power of Congress, it appeared that if a carrier was so engaged, the act governed its relation to every employee, although the employment of the latter might have nothing whatever to do with interstate commerce. In the present statute, the limiting words govern the employees as well as the carriers.

But the argument, undoubtedly, involves the consideration that the interstate and intrastate operations of interstate carriers are so interwoven that it is utterly impracticable for them to divide their employees in such manner that the duties of those who are engaged in connection with interstate commerce shall be confined to that commerce exclusively. And thus, many employees who have to do with the movement of trains in interstate transportation are, by virtue of practical necessity, also employed in intrastate transportation.

This consideration, however, lends no support to the contention that the statute is invalid. For there cannot be denied to Congress the effective exercise of its constitutional authority. By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce, and of those who are employed in transporting them. Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; Adair v. United States, 208 U. S. pp. 177, 178, 52 L. ed. 443, 444, 28 Sup. Ct. Rep. 217, 13 A. & E. Ann. Cas. 764; St. Louis I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616; Chicago, B. & Q. R. Co. v. United States, decided

May 15, 1911 [220 U. S. 559, ante, 582, 31 Sup. Ct. Rep. 612]. The fundamental question here is whether a restriction upon the hours of labor of employees who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation. This question admits of but one 619]*answer. The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employees and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train despatchers, telegraphers, and other persons embraced within the class defined by the act. And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the Constitution. Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, ante, 328, 31 Sup. Ct. Rep. 259.

If, then, it be assumed, as it must be, that, in the furtherance of its purpose, Congress can limit the hours of labor of employees engaged in interstate transportation, it follows that this power cannot be defeated either by prolonging the period of service through other requirements of the carriers, or by the commanding of duties relating to interstate and intrastate operations.

Second. It is also urged that the statute is void for uncertainty. This objection is based on the wording of the first proviso in § 2 of the act, which is as follows:

"Provided, that no operator, train despatcher, . . . shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the em-620]ployees named in this *proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period, on not exceeding three days in any week."

It is said that the words, "except in case of emergency," make the application of the act so uncertain as to destroy its validity. But this argument in substance denies to the legislature the power to use a generic description, and, if pressed to its logical conclusion, would practically nullify the legislative authority by making it essential that legislation should define, without the use of generic terms, all the specific instances to be brought within it. In a legal sense there is no uncertainty. Congress, by an appropriate description of an exceptional class, has established a standard with respect to which cases that arise must be adjudged.

Nor does the contention gather strength from the broad scope of the proviso in § 3, for if the latter, in limiting the effect of the entire act, could be said to include everything that may be embraced within the term "emergency," as used in § 2, this would be merely a duplication which would not invalidate the act.

Third. Finding that the objections to the validity of the statute are not well taken, we are brought to the question whether the Interstate Commerce Commission has authority to require the reports called for by its order.

Section 4 of the act provides:

"Sec. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act."

The commission, then, may call to its aid the enforcement of the act "all powers granted" to it. And although there might have been doubt as to the adequacy of the authority of the Commission, under the law as it formerly *stood, to require these[621 reports, there can be none now, in view of the amendment of § 20 of the act to regulate commerce by the act of June 18, 1910, chapter 309, 36 Stat. at L. 556. As so amended, this section contains the following provision:

"The Commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodicals or special, or both periodical and special, reports concerning any matters about which the Commission is authorized or required by this or any other law to inquire or to keep itself informed, or which it is required to enforce; and such periodical or special reports shall be under oath whenever the Commission so requires."

This clearly embraces the power which the Commission here asserts, and it is certainly now entitled to promulgate an order requiring reports to be made. It follows that as, under the stipulation of record here, the requirement of the Commis-

sion is to operate wholly in the future, and it has been suspended awaiting the final determination of this cause, the question of the authority of the Commission at the time the order was made has become a moot one. Were there no other question before us, the appeal would accordingly be dismissed; and to justify a reversal of the judgment and the sustaining of the complainant's bill, other grounds must appear.

Nor can it be said, so far as the scope of the requirement of the order is concerned, that it goes beyond the authority which has been conferred upon the Commission. The order relates to the employees who are "subject to said act." The bill alleges that, in the original forms prescribed, the carrier was required to show the employees who were "either on duty for a period of time in excess of that contemplated by the act, or who had not been off duty after any period of service, for the length of time prescribed by the act, and in the case of every such employee 622]*the carrier was required to state the cause of, and the facts, if any, explanatory of, the excess service thus rendered by the employee." By the amended instructions set forth in the stipulation, it appears that "in case no employee has been employed in excess of the time named in said act, and in case no employee has gone on duty with less then the statutory period off duty," a separate form of oath to that effect will be accepted in lieu of the forms which are to be used in detailing excess service. And, as already noted, the reports are to be made by the secretary or similar officer.

To enable the Commission properly to perform its duty to enforce the law, it is necessary that it should have full information as to the hours of service exacted of the employees who are subject to the provisions of the statute, and the requirements to which we have referred are appropriate for that purpose, and are comprehended within the power of the Commission.

Fourth. There is the final objection that to compel the disclosure by these reports of violations of the law is contrary to the 4th and 5th Amendments of the Constitution of the United States.

The order of the Commission is suitably specific and reasonable, and there is not the faintest semblance of an unreasonable search and seizure. The 4th Amendment has no application.

Nor can the corporation plead a privilege against self-crimination under the 5th Amendment. Hale v. Henkel, 201 U. S. pp. 74. 75, 665, 666, 26 Sup. Ct. Rep. 370; Hammond Packing Co. v. Arkansas, 212 U. S. pp. 348, 349, 53 L. ed. 543, 544, 29 Sup. Ct. Rep. 370; Wilson v. United States, decided May 15, 1911. [220 U. S. 614, ante, 610, 31 Sup. Ct. Rep. 538]. With respect to its officers, it would be sufficient to say that the privilege guaranteed to them by this amendment is a personal one, which cannot be asserted on their behalf by the corporation. But the transactions to which the required reports relate are corporate transactions, subject to the regulating power of Congress. And, with regard to[623 the keeping of suitable records of corporate administration, and the making of reports of corporate action, where these are ordered by the Commission under the authority of Congress, the officers of the corporation, by virtue of the assumption of their duties as such, are bound by the corporate obligation, and cannot claim a personal privilege in hostility to the requirement. Wilson v. United States, supra.

The decree of the Circuit Court is affirmed.

JOAQUIN JOVER Y COSTAS, Appt. and Plff. in Err.,

v.

INSULAR GOVERNMENT OF THE PHILIPPINE ISLANDS and the City of Manila. (No. 112.)

INSULAR GOVERNMENT OF THE PHILIPPINE ISLANDS and the City of Manila, Appts. and Plffs. in Err.,

v.

JOAQUIN JOVER Y COSTAS. (No. 113.)

(See S. C. Reporter's ed. 623–635.)

Private land claims — grant of tide lands — authority of Spanish King.

1. The transference of national sovereignty, and not the disposal of public land as property, was what was comprehended by the declaration of the Spanish Constitution that "to alienate, cede, or exchange any part of Spanish territory," the King required "the authority of a special law."

[For other cases, see Private Land Claims, I. a., in Digest Sup. Ct. 1908.]

Private land claims — grant of tide lands — authority of Spanish King.

2. A grant of tide lands by the King of Spain for purposes of reclamation and improvement was not forbidden by Partida 3, title 28, laws 3 and 4, which affirm that the sea and its shore are among the things which belong in common to all men.

[For other cases, see Private Land Claims, I. a., in Digest Sup. Ct. 1908.]

Note.—On the right of state to grant tide lands—see note to State ex rel. Ellis v. Gerbing, 22 L.R.A.(N.S.) 337.

On the appellate jurisdiction of the Federal Supreme Court over the supreme court of the Philippine Islands—see note to Martinez v. International Bkg. Corp. ante, 438,

Private land claims — grant of tide lands in Philippines — authority of governor general.

3. The governor general of the Philippines must be deemed to have had the authority to make a grant of tide lands for purposes of reclamation and improvement, in view of the uniform construction given by the successive governors general to the provisions of the Laws of the Indies, book 2, title 15, law 11, defining the powers of that official, and acquiesced in by the King of Spain, as empowering him to do whatever the King could do were he present, except where otherwise specially provided, and of the failure of the Spanish authorities for thirty-nine years to call the grant into question, meanwhile imposing taxes upon the land as private property.

[For other cases, see Private Land Claims, I. a., in Digest Sup. Ct. 1908.]

Evidence — presumption — official acts.

4. It will be presumed, in the absence of any showing to the contrary, that the governor general of the Philippines reported a grant of tide lands to his superiors at Madrid, as required by royal decree.

[For other cases, see Evidence, II. i, in Digest Sup. Ct. 1908.]

Private land claims — grant of tide lands — condition — reclamation.

5. A grant of the "possession and ownership" of tide lands in contemplation of reclamation cannot be deemed to have been made upon condition, so as to defeat the title thereunder because part of the land has not been reclaimed, where the grant fixes no time for beginning or completing the work, and recites that it is made in consideration, *inter alia*, of the official and industrial merits of the grantee, and his offer of protection stated in a prior decree, and where, during many years, the representatives of Spain and those claiming under the grant practically interpreted the same as leaving the grantee free to effect the reclamation at such time as to him might seem practical and advantageous.

[For other cases, see Private Land Claims I. d, 3, in Digest Sup. Ct. 1908.]

Appeal — mode of review — providing for land registration.

6. Writ of error, and not appeal, is the proper mode of bringing up to the Federal Supreme Court for review a judgment of the supreme court of the Philippine Islands, affirming a judgment of the court of land registration, granting registration of a part only of a tract of land.

[For other cases, see Appeal and Error, II. b, in Digest Sup. Ct. 1908.]

[Nos. 112, 113.]

Argued April 7, 1911. Decided May 29, 1911.

CROSS APPEALS from, and WRITS OF ERROR to, the Supreme Court of the Philippine Islands to review a judgment which affirmed a judgment of the Court of Land Registration, granting registration of a part only of a tract of land. Appeals dismissed and judgments reversed on writ of error, with a direction to allow registration of the entire tract.

See same case below, 10 Philippine, 522.

The facts are stated in the opinion.

Mr. Aldis B. Browne argued the cause, and, with Messrs. W. A. Kincaid, Alexander Britton, J. H. Blount, and Evans Browne, filed a brief for Jover y Costas:

The Spanish governor of the Philippines must be deemed empowered to make the original grant.

United States v. Arredondo, 6 Pet. 691, 722, 8 L. ed. 547, 558; Strother v. Lucas, 12 Pet. 410, 438, 9 L. ed. 1137, 1148.

The deed shows on its face a good (and therefore a binding) consideration, *viz.*, the gratitude of a government toward a faithful public servant advanced in years and retired from the service on account of age.

Fremont v. United States, 17 How. 542, 15 L. ed. 241.

Before an obligation can be held to contain a condition, it is necessary that something would result from the fulfilment or nonfulfilment of the supposed "condition;" otherwise, the supposed condition would not have the effect of modifying or extending the reach of the obligation,—a requisite essential to every condition.

Supreme Court of Spain, decision of Dec. 24, 1866.

The grant cannot be regarded as made upon condition.

United States v. Rodman, 15 Pet. 130, 10 L. ed. 685; Frémont v. United States, 17 How. 544, 15 L. ed. 241; Rawson v. School Dist. No. 5, 7 Allen, 125, 83 Am. Dec. 670; Thornton v. Trammell, 39 Ga. 202; Devlin, Deeds, §§ 977, 978, 990, 991; Bangs v. Potter, 135 Mass. 245.

Any interpretation which would nullify a contract should be avoided, instead of sought.

Supreme Court of Spain, decision of Feb. 25, 1865.

The wording of the conditions of a contract cannot be given a construction which, being contrary to the object and purpose of the contract, would be a repeal of the obligation expressly and conclusively contracted.

Supreme Court of Spain, decision of March 11, 1870.

That the Spanish government was unwilling to procure the cancelation of a grant of royal concessions by means of similar tergiversation of the sense of the words, and that it always interpreted the doubtful and vague clauses favorably for the grantee, is evident.

2 Coronado, Legislacion Ultramarina, p. 236.

Assistant Attorney General **Fowler** argued the cause and filed a brief for the Insular Government:

No presumption whatever will be indulged in favor of a grant which purports to convey a part of the seashore or lands lying beneath the sea.

Mann v. Tacoma Land Co. 153 U. S. 273, 38 L. ed. 714, 14 Sup. Ct. Rep. 820; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

None but the supreme power can confer private rights upon lands in any part of the sea, or upon the shore.

Gann v. Whitestable, 11 H. L. Cas. 192, 19 C. B. N. S. 802, 20 C. B. N. S. 1, 35 L. J. C. P. N. S. 29, 12 L. T. N. S. 50, 13 Week. Rep. 589; Williams v. Wilcox, 8 Ad. & El. 332, 3 Nev. & P. 606, 1 W. W. & H. 477, 7 L. J. Q. B. N. S. 229, 25 Eng. Rul. Cas. 427; Somerset v. Fogwell, 5 Barn. & C. 875, 8 Dowl. & R. 747, 5 L. J. K. B. 49, 29 Revised Rep. 449; Galveston v. Menard, 23 Tex. 6, 395; Reg. v. Keyn, 46 L. J. Mag. Cas. N. S. 17, L. R. 2 Exch Div. 63, 13 Cox, C. C. 403, 5 Eng. Rul. Cas. 946.

In Tiglao v. Philippine Islands, 215 U. S. 410, 54 L. ed. 257, 30 Sup. Ct. Rep. 129, this court held that a grant which was executed by certain subordinate officials was void because such officials were vested with no authority to execute the same; and there is no reason why any presumption should arise in the present case that did not arise in that one.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This was a petition to the court of land registration of the Philippine Islands for the registration of the title to a tract of land in the city of Manila, claimed to have been granted to Don José Camps, February 12, 1859, by a decree of the governor general of those islands, reading as follows:

625] *"Acting upon the petition in which Don José Camps on November 17, 1858, solicited a grant for the land which he fills at his expense on the lowlands situated along the northern wharf (Murallon der Norte) and on the north side thereof, on the right side of the mouth of the Pasig river, with an extension of 200 brazas in length and 100 brazas in width, beginning at a distance of 25 varas (Spanish yards) west of the bridge built on said wharf for the connection of the waters of the river and of the bay from the beach of Binondo, as appears on the plan hereto attached, to which land, after it has been filled in, he intends to move his artistic establishment called 'Camps é Hijos,' and a manufactory of hemp rope; in view of the report made on the 26th of the said month of November by the alcalde mayor 1.° of Manila, who, after consultation with the director of public works of the province, is of the opinion that the waste land asked for should be granted to Camps, said land being at present covered by the sea, and being far from the houses situated on the Binondo beach, it is very suitable for purposes of maritime commerce, and it is convenient for the purpose of public adornment that the foundry, ironworking, and scientific instrument establishment of Camps é Hijos be located on that place, provided that the said Camps shall agree not to erect such buildings with brick and stone or strong materials, for the reason that the same is outside of the military lines; in view of the report made on December 17, 1858, by the commanding general of marine, in agreement with the captain of the port, regarding the convenience of such concession for the merchant marine and public adornment, but with the precise condition that Camps shall leave a distance of 16½ varas between the outside edge of the wharf and the intended building, which width is the one fixed for wharves; in view also of the report of the subinspector of engineers, with the approval of the commander of the *port, propos-[626 ing that the concession asked for shall not be granted for a building of strong materials, on account of the forts of the place, and that the building to be erected shall consist of only one story, and shall be removed at the expense of its owner, at the discretion of the superior authority of the Islands, when the public interests so require, taking into consideration the circumstances and official and industrial merits of the said Don José Camps, and the offer of protection stated in the decree dated November 4, 1858, when refusing the sale, asked for by him, of an irregular piece of land adjoining the new Cuartel del Carenero, and in conformity with the above-mentioned reports of the commanding general of marine, the subinspector of engineers, and the civil chief of the province of Manila, I hereby decree. Don José Camps, *comisario de guerra honorario, oficial mayor jubilado* of the office of the secretary of his superior government, and director of the ironworking and nautical instrument establishment of Camps é Hijos, is granted the possession and ownership of a parcel of land 200 brazas in length and 100 brazas in width, covered at present by the waters of the sea, near the Binondo beach, which land is situated alongside the Murallon del Norte, and requested authority to fill in the same at his expense is

also hereby granted, subject to the following conditions and restrictions:

"First. The land to be filled in shall form a quadrangle 200 brazas long and 100 brazas wide; beginning on the longer side, nearest to the Pasig river, at a point 25 varas from the bridge connecting the waters of the river and of the bay, and running parallel with the wharf toward the lighthouse.

"Second. The buildings to be erected by Camps on this new land so granted shall be located along the said longer side, parallel to the breakwater, separated from the edge of the exterior wharf for its whole length, a distance of 16½ varas, which is the width required for wharves.

627] *"Third. The said buildings shall consist of only one story, no materials of the kind prohibited in the military zone shall be employed therein, and shall be roofed with zinc, tarred paper, nipa, or other similar materials.

"Fourth. The said buildings shall be removed at the expense of Don José Camps or his successors whenever, at the discretion of the superior authority of the Islands, the military service so requires.

"Let the interested party be notified and a certified copy be issued to him.

(Signed) Norzagaray."

Opposition to the registration was made by the insular government and the city of Manila upon the ground that the grant was unauthorized, because the land was a part of the shore of the sea. The court of land registration pronounced the grant valid, sustained the petitioner's asserted ownership of all existing title under it, construed it as made upon condition that the land be reclaimed from the sea, found that the condition had been fulfilled as to part of the land only, and entered a judgment allowing registration of that part, and refusing registration of the remainder. Appeals to the supreme court of the Philippines resulted in an affirmance of the judgment by an opinion saying:

"Although we are unable to agree upon the grounds upon which our conclusion is based, we are of opinion that the judgment of the court of land registration should be affirmed, without costs to either party." 10 Philippine, 522.

One member of the court (Johnson, J.) dissented because he was of opinion that the grant was not made upon condition that the land be reclaimed, and another member (Tracey, J.) dissented because he was of opinion that the grant, being of land covered by tidal waters, was one which only the King of Spain could make. Each of 628]the parties *has appealed to this court and has also sued out a writ of error.

In addition to the authenticity of the grant and the petitioner's ownership of all existing title under it, neither of which was questioned, the facts disclosed by the record are these: At the date of the grant the land was marshy waste land, which was covered by the sea at high tide and was uncovered at low tide. Soon after the grant was made, the grantee marked its boundaries and began filling in the land. In the course of twenty years, about one third of the tract was reclaimed and was then improved by erecting warehouses and other buildings thereon. At irregular intervals further work was done toward filling in the remainder, but the area fully reclaimed was not materially enlarged. The grantee and those claiming under him were in the exclusive occupancy and use of the land reclaimed from the time the work was done, and at all times asserted title to the entire tract, and intended to complete its reclamation. What was done by them in filling in and improving the land was done openly and at large expense, and neither their work nor their occupancy was at any time disturbed, although both were at all times well known to those in authority at Manila. Nor was the validity or extent of the grant in any wise called in question while the Philippines remained under the dominion of Spain, or until four years thereafter, which was forty-four years after the date of the grant. On the contrary, taxes were imposed upon the land as private property, and at the commencement of the proceeding for registration, the land and the improvements were assessed to the petitioner at a valuation of $255,578.

It is the contention of the insular government and the city of Manila that the grant was unauthorized and void, first, because the King of Spain was without power to make it, and so could not devolve that power upon the governor general, and second, because, even if the King possessed *that power, he had not devolved it[629 upon the governor general.

The first branch of the contention is rested, primarily, upon article 46 of the then Constitution of Spain, which declared that "to alienate, cede, or exchange any part of Spanish territory," the King required "the authority of a special law;" and, secondarily, upon laws 3 and 4, title 28, Partida, 3, which affirm that the sea and its shore are among the things which belong in common to all men. Of the article in the Spanish Constitution it is enough to say that it obviously did not relate to the disposal of public land as property, but only to the transference of national sovereignty; and of the laws cited from Partida 3 it is enough to say that the same meaning and

influence must be attributed to them now that were attributed to them by the Supreme Judicial Tribunal of Spain in its decision of May 1, 1863 (Book 8, p. 288), wherein, in sustaining a royal order of January 15, 1853, making a grant of tide land to one who desired to reclaim and improve it, it was said:

"While it is true that Partida 3, title 28, laws 3 and 4, in determining what things are the common right of men, and how they may use them, enumerates as such, among other things, the sea and its shore, this is not to be taken in an absolutely literal manner, since a number of limitations to the general proposition have been recognized for the common benefit of the community as being conducive to the general welfare of the state, which latter may grant shore land for improvement where the same has not already lawfully come under private ownership."

As, then, the King possessed the power to make the grant, we come to the second branch of the contention; namely, that he had not devolved that power upon the governor general. Many royal orders bearing upon the subject have been called to our attention. The one of first importance is embodied in law 11, title 15, book 2, Laws of the Indies, and reads as follows:

630] *"In the city of Manila, island of Luzon, capital of the Philippines, another audiencia and royal chancery is established, with a president, *who shall be the governor and captain general;* four associate judges (oidores), who shall also be criminal judges (alcaldes del crimen); one fiscal, one high constable, one vice grand chancellor (teniente de gran chanceler), and the other necessary ministers and officials; and the said audiencia shall have as its district the lands of the said island of Luzon, already discovered and which may be discovered. And *we order that the governor and captain general* of the said islands and province, and president of the royal audiencia of the same, *hold exclusively the superior government of the whole district of said audiencia in peace and war, and make in our royal name those sentences and grant those favors which, in conformity with the laws of this compilation and of these kingdoms of Castile, and with the instructions and power received from us, he may and ought to make; and in all* those administrative cases and *matters of importance*, the said president governor shall try the same together with the oidores of said audiencia in order that they may give him their opinion in consultation, and after hearing the same, *he shall provide for what is best for the service of God and our own interests, and the peace and tranquillity of the said province and community.*"

Without doubt it was intended by this order to invest the governor general with large powers and a wide range of discretion, fully commensurate with the situation in which they were to be exercised. The language used was general and comprehensive. Possibly, according to Spanish standards, its meaning was much the same as if it had been said directly that the governor general of the Philippines was empowered thereby to do in that distant province whatever the King could do, if he were present, save where it was otherwise specially provided. The other orders bearing upon the subject are not inconsistent with *that view of it. But[631 whatever the original meaning of the order may have been, the one suggested was adopted and adhered to by the successive governors general, and their action in that regard was acquiesced in, and therefore ratified, by the King. Thus, in the course of approved usage, the order came to be, in effect, the same as the one relating to the viceroys of Peru and New Spain, which is embodied in law 2, title 3, book 3, Laws of the Indies, and declares: "They shall do what they may think and consider to be suitable, and provide for everything we might do and provide for, of whatever quality and condition it may be, in the provinces under their charge, as if the same were governed by ourselves, in all cases where no special prohibition exists."

Recognition of this is found in Coronado's Legislación Ultramarina, vol. 2, pp. 175, 176, where, after stating that the powers of the governors general of the Philippines and other provinces beyond the seas include the powers named "under the titles of viceroys and presidents in the Laws of the Indies," the author proceeds:

"This consolidation of such vastly important powers, although it has some inconveniences, has been deemed necessary in order to surround with prestige and sustain a superior authority at so great a distance from the sovereign, in the capitals of those large provinces, sufficiently to provide speedily and easily all requirements for their preservation and tranquillity, for which the captains general are responsible, and to provide also a good policy and administration, the security of the persons and property of the inhabitants, the publication and due execution of the laws and orders emanating from the high government, and, generally, every wise and prudent measure demanded by the public order, the tranquillity, and greater prosperity of the countries intrusted to them."

See also San Pedro's Legislación Ultramarina, vol. 1, p. 65.

*And so it is that historical reviews[632 of the Philippines, while under Spanish do-

minion, uniformly speak of the governors general as possessing almost absolute authority, as is illustrated by the following:

In the history by Juan José Delgado, chapter 17, pp. 212 et seq., which was written in 1754, it is said:

"In no kingdom or province of the Spanish Crown do the viceroys or governors enjoy greater privileges, superiority, and grandeur than in Filipinas. That is advisable because of the long distance from the court, and their proximity to so many kingdoms and nations, some of them civilized, but others barbaric. . . . The governors of these islands are almost absolute. . . . They exercise supreme authority by reason of their charge, for receiving and sending embassies to the neighboring Kings and tyrants, for sending them gifts and presents in the name of their King, and for accepting those which those Kings and tyrants send them. They can make and preserve peace, declare and make war, and take vengeance on all who insult us, without awaiting any resolution from court for it. . . . Besides the above, the governors of these islands have absolute authority privately to provide and attend to all that pertains to the royal estate."

In Montero y Vidal's work, p. 162, published in 1866, this appears:

"A governor and captain general exercises the supreme authority in Filipinas. In his charge is the direction of all civil and military matters, and even the direction of ecclesiastical matters, in so far as they touch the royal patronage. . . . The authority, then, of the governor general, is complete."

And in the Philippine census of 1903, vol. 1, p. 364, Trinidad H. Pardo de Tavera of the Philippine Commission states that "the powers given to a governor of the Philippine Islands was practically unlimited."

Considering, then, that the governor gen-633]eral, within the *territory committed to his charge, possessed all the powers of his master, the King, save where it was otherwise specially provided, the question whether the grant was within or in excess of the authority of the governor general is to be determined, not by inquiring whether there was a law or order specially confiding to him the disposal of the tide land, but by inquiring whether there was a law or order specially prohibiting such a disposal; that is to say, the existence of power, being usual, will be presumed, and the absence of it, being exceptional, must be shown. United States v. Arredondo, 6 Pet. 691, 728, 8 L. ed. 547, 561; United States v. Clarke, 8 Pet. 436, 451, 8 L. ed. 1001, 1006.

The laws and orders brought to our attention do not contain anything which, rightly considered, amounted to a prohibition of this grant. Laws 3 and 4, title 28, Partida, 3 which affirm that the sea and its shore are among the things which are common to all men, are the nearest in point, but they, as interpreted by the Supreme Judicial Tribunal of Spain, were not to be taken literally, and did not forbid the granting of tide land for purposes of reclamation and improvement.

What has been said sufficiently shows that the grant was made upon adequate authority, but there are other considerations which enforce this conclusion. The Spanish authorities at Manila, although familiar with what was done and claimed under the grant, and although in a position to know and enforce the law applicable to it, did not call it in question at any time during the thirty-nine years of Spanish dominion after it was made, but on the contrary, treated it as valid by imposing taxes upon the land as private property. This is persuasive proof that, in making the grant, the governor general did not exceed his authority. Besides, it must be presumed, there being no showing to the contrary, that he reported the grant to his superiors at Madrid, as was required by the royal order of January 4, 1856 (San Pedro's Legislación Ultramarina, *vol. 1, p. 75), and[634 therefore the fact that the grant went unchallenged, as it did, dispels all doubt of his authority.

Next to be considered is the contention, advanced by the insular government and the city of Manila, that the grant was made upon condition that the land be reclaimed from the sea, and that "all title thereunder is defeated," because part of the land has not as yet been reclaimed. The granting words, "is granted the possession and ownership," are plain, and import a present and immediate transfer of the ownership of all the land. There are no words of exception, nor any which purport to postpone the transfer until a later time. And while it clearly is contemplated that the land is to be reclaimed, there is no language which fixes a time for beginning or completing that work. Nor is the contemplated reclamation treated as the sole inducement to the grant, for it recites that it is made in consideration, *inter alia*, of 'the official and industrial merits of the said Don José Camps and the offer of protection stated" in a prior decree. Thus, upon a survey of the grant, it is manifest that there was no express condition, either precedent or subsequent, that the land be

reclaimed within any period of time. Of course, it was for the governor general to judge of the restrictions to be imposed. He could have designated a time within which the reclamation should be effected, and could have made compliance with that requirement a condition, either precedent or subsequent. Or, if to him it seemed wise, he could have left the grantee free to effect the reclamation at such time as to the latter might seem practicable and advantageous, considering the cost of the undertaking, the means at hand for completing it, and the benefits to be derived from it. But the governor general did not expressly adopt either of these alternatives. On the contrary, his will and purpose in that regard were expressed with such uncertainty that they could be determined only by resorting to interpretation. But that uncer-
635] tainty was *effectually eliminated before the termination of Spanish dominion in the Philippines. During the many intervening years the parties concerned, that is to say, the representatives of Spain and those claiming under the grant, pursued a course of action, heretofore described, which admits of no other conclusion than that they concurred in treating the grant as embodying the latter of the two alternatives suggested. In that way a practical interpretation was given to the grant by those who were authorized to interpret it, and full effect must be given to that interpretation now.

It follows that the contention last stated must be rejected, and that the petitioner's contention that registration should have been allowed of the entire tract, including the part not as yet reclaimed, must be sustained.

The parties, being in doubt whether they should invoke our appellate jurisdiction in cases such as this by writ of error or by appeal, resorted to both methods. Since then it has been settled that the appropriate method is by writ of error. Cariño v. Philippine Islands, 212 U. S. 449, 456, 53 L. ed. 594, 595, 29 Sup. Ct. Rep. 334; Tiglao v. Philippine Islands, 215 U. S. 410, 414, 54 L. ed. 257, 258, 30 Sup. Ct. Rep. 129.

The appeals are dismissed and the judgment of the Supreme Court of the Philippines is reversed, and the cause is remanded to that court, with a direction to reverse the judgment of the Court of Land Registration, and remand the cause to that court, with a direction to allow registration of the entire tract, as prayed in the petition.

*DR. JOHN HOPKINS, Plff. in Err., [636
v.
CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA.

(See S. C. Reporter's ed. 636-649.)

States — immunity from suit — tort of public corporation.

1. A public corporation such as an agricultural college receiving state aid and invested with municipal powers cannot avail itself of the state's constitutional immunity from suit in a proceeding against it for constructing, under state authority, but for its own corporate purposes and advantages, a dyke upon land owned by the state, but in the use, possession, and enjoyment of the college, so as to damage or take private property without due process of law.

[For other cases, see States, IX. b, in Digest Sup. Ct. 1908.]

States — immunity from suit — tort of public corporations.

2. The possibility that the judgment cannot be enforced by levy and sale under execution affords no reason why a court should decline jurisdiction of a suit against a state college for taking private property for its corporate purposes without due process of law.

[For other cases, see States, IX. b, in Digest Sup. Ct. 1908.]

States — immunity from suit — tort of public corporation.

3. The prayer for the removal of a dyke constructed by a state college under state authority on state land may be stricken from the bill without affecting the jurisdiction of the court to hear and determine the question whether the college, by building such dyke for its own proprietary and corporate purposes, is liable to an opposite riparian owner for damaging or taking his land without due process of law.

[For other cases, see States, IX. b, in Digest Sup. Ct. 1908.]

[No. 70.]

Submitted December 7, 1910. Restored to docket January 30, 1911. Resubmitted March 15, 1911. Decided May 29, 1911.

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment which affirmed a judgment of the Court of Common Pleas for Oconee County in that state, dismissing a complaint which

Note.—On suits against a state—see notes to Murdock Parlor Grate Co. v. Com. 8 L.R.A. 399; Carr v. State, 11 L.R.A. 370; Beers v. Arkansas, 15 L. ed. U. S. 991; Hans v. Louisiana, 33 L. ed. U. S. 842; Tindall v. Wesley, 13 C. C. A. 165; and Murray v. Wilson Distilling Co. 92 C. C. A. 25.

On the liability of eleemosynary institution maintained by state or municipality for personal tort of agent or servant—see note to Leavell v. Western Kentucky Asylum 4 L.R.A.(N.S.) 269.

asks for damages for the construction of a dyke by an agricultural college on the opposite bank, and prays for the abatement and removal of such dyke. Reversed and remanded for further proceedings.

See same case below, 77 S. C. 12, 57 S. E. 551.

Statement by Mr. Justice Lamar:

In his complaint the plaintiff alleged that he owned a valuable body of fertile bottom lands, on the west side of Seneca river, on which he had raised large crops from the time of purchasing the farm, in 1880, until 1895, when the defendant, by its trustees, erected and maintained a high embankment on the eastern side of the river. This dyke was to protect the lands of the college from overflow, but its construction so narrowed the channel of the river that it caused the rapid current of the stream in time of high water to flow across the lands of plaintiff, whereby the natural bank had been destroyed, the rich soil had been washed away, and his property practically ruined for agricultural purposes, and "during the period aforesaid said injury has been and still is continuous from day to day and year to year." He prayed for judgment for $8,000; that the defendant be required to abate and remove the dyke and restore the condition prevailing prior to its construction, and for general relief.

The defendant denied all the allegations of the complaint, and alleged that the college had no title to the land, or any other property in connection with the establishment and maintenance of the institution; that the construction of the dyke was authorized by the state, and had been built by the college, as a public agent, on land the title and possession of which was in the state. It therefore prayed that the complaint be dismissed.

By stipulation the case was heard solely on the question of jurisdiction. Evidence 638]was introduced showing that *by his will, probated April 20, 1888, Thomas G. Clemson left personal property and the "Fort Hill" place, consisting of 814 acres, providing that whenever the state of South Carolina should accept the property for the purpose of founding an agricultural college, his executor should convey it to the state, to be held so long as it in good faith devoted the property to the purposes of the donation,—such college to be governed by a board of trustees, which should never be increased to more than thirteen. Seven trustees named by the testator, and their successors, were to have the right to fill vacancies in their number, but the legislature might elect six other trustees.

On November 27, 1889, the state accepted the Clemson bequest, subject to the terms set forth in the will, and enacted that upon the transfer of the property to the state by the executor, a college should be established in connection with the devise, to be styled the Clemson Agricultural College of South Carolina, to be situated at Fort Hill, on the plantation so devised, in which should be taught all branches of study relating to agriculture, the college to be under the management of a board of thirteen trustees, composed of the seven nominated by the will, and their successors, and six members elected by the legislature.

Sec. 4 of the charter provided:

"That the said board of trustees is hereby declared to be a body politic and corporate, under the name and style of the Clemson Agricultural College of South Carolina. They shall have a corporate seal, which they may change at their discretion; and in their corporate name they may contract for, purchase, and hold property, for the purpose of this act, and may take any property or money conveyed by deed, devise, or bequest to said college, and may hold the same for his use and benefit; Provided that the conditions of such gift or conveyance shall in no case be inconsistent with the purposes of this act, *and shall incur no obligation on the[639 part of the state. They shall securely invest all funds and keep all property which may come into their possession, and may sell any of the personal property not subject to trust, and reinvest the same in such way as they may deem best for the interest of said college. They may sue and be sued, plead and be impleaded, in their corporate name, and may do all things necessary to carry out the provisions of this act, and may make by-laws for this purpose if they deem it necessary."

By the act of January 4, 1894, it was declared that fifty convicts might *be employed by the trustees of Clemson College in dyking Seneca river, adjoining the college farm, and such other work as the trustees deem useful, for twelve months.*

In April, 1894, a resolution was passed by the board of trustees concerning the work of "building the dykes necesary to protect the bottom lands of Clemson College." It does not appear when this work began or was finished, but various extracts from the minutes or the trustees, from April, 1894, to July, 1905, were introduced in evidence from which it appeared that the dyke was constructed according to plans and specifications approved by the board, under the direction of engineers selected by the board, and that payments were made by it on account of work thereon. The embankment was either wholly or partially washed

away, and, in 1903, a resolution was adopted by the board "to have a survey made of the dyke for the purpose of submitting estimates of the work necessary to be done to afford protection to the bottom lands on the college property,—the cost of the estimate to be based on the recent flood."

Evidence was introduced as to the property owned by the college and the sources of its income, from which it appeared that a tract of land, partially paid for by the state, had been conveyed to the college in 640]fee simple, and *other land had been conveyed for college purposes. The state appropriated more than $100,000 per annum which, with the interest on the securities passing under the residuary clause of Dr. Clemson's will, constituted the main source of income, though the college did receive about $6,500 per annum from tuition, rent, sale of dairy products, and the proceeds derived from the electric plant and textile department.

There is copied in the record the act of 1894 to incorporate Clemson College for the purpose of police regulation over the territory within 5 miles of the college building.

The trial court found that the current expenses were paid out of interest on the donation and from the annual appropriations by the state: that the college had no property which could be sold under execution: and that title to the land on which the dyke was erected was in the state. Referring also to the act of 1894, conferring municipal powers on Clemson College, the court held that the defendant was a public agent which could not be sued without the consent of the state; that such consent was not given by the provision of the charter that the trustees "might sue and be sued, plead and be impleaded, in their corporate capacity," inasmuch as that related to contracts made for college purposes, and did not warrant suits against a public agent for a tort. Holding that the state was an indispensable party, and had not given its consent to be sued, the court dismissed the complaint.

On the appeal, the plaintiff, in his assignments of error, contended that the title to the land was in the state only as trustee; that the college was not a public corporation, but a private educational institution, without governmental powers; that it had not been established or endowed by the state, and was not governed by the state, or solely by trustees appointed by the state (Dartmouth College v. Woodward, 4 Wheat. 634, 4 L. ed. 658); that in addition to the 641]equitable ownership of the Fort *Hill place, it owned certain lands in fee simple, which were subject to levy and sale, and that the corporation was liable for its own torts.

The 23d assignment of error was as follows:

"Because the 14th Amendment to the Constitution of the United States provides: 'Nor shall any state deprive any person of life, liberty, or property without due process of law.' The allegations of the complaint show that plaintiff has been deprived of his property for all practical purposes as agricultural lands as effectually as if there had been a physical taking thereof; that plaintiff has thus been deprived of his property by the defendant corporation, acting by and through its board of trustees, and this constitutional guaranty has been violated by such action, whether taken pursuant to an act of the legislature or otherwise, and his Honor erred in not so holding."

The supreme court of the state adopted the opinion of the trial judge, and on the ground that the state was a necessary party and had not consented to be sued, dismissed the bill of complaint. 77 S. C. 12, 57 S. E. 551. Thereupon the plaintiff sued out a writ of error to this court.

Mr. **R. T. Jaynes** submitted the cause for plaintiff in error:

It is no answer for the wrongdoer, whether a natural or artificial person, to say that he or it represents the state, or that the state would be affected by the result of the action.

Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; New Jersey v. Wilson, 7 Cranch, 164, 3 L. ed. 303; Green v. Biddle, 8 Wheat. 174, 5 L. ed. 589; Providence Bank v. Billings, 4 Pet. 514, 7 L. ed. 939; Woodruff v. Trapnall, 10 How. 190, 13 L. ed. 383; Wolff v. New Orleans, 103 U. S. 358, 26 L. ed. 395; Jefferson Branch Bank v. Skelly, 1 Black, 436, 17 L. ed. 173; Langford v. United States, 101 U. S. 341, 25 L. ed. 1010; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; Tindal v. Wesley, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770; Pennoyer v. McConnaughy, 140 U. S. 1, 10, 35 L. ed. 363, 365, 11 Sup. Ct. Rep. 699; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Tomlinson v. Branch, 15 Wall. 460, 21 L. ed. 189; Litchfield v. Webster County, 101 U. S. 773, 25 L. ed. 925; Allen v. Baltimore & O. R. Co. 114 U. S. 311, 29 L. ed. 200, 5 Sup. Ct. Rep. 925, 962; Board of Liquidation v. McComb, 92 U. S. 531, 23 L. ed. 623; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; Re Tyler, 149 U. S. 164, 190, 37 L. ed. 689, 697, 13 Sup. Ct. Rep. 785; Scott v. Donald, 165 U. S. 58,

69, 41 L. ed. 632, 633, 17 Sup. Ct. Rep. 265; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 236, 241, 41 L. ed. 979, 984, 986, 17 Sup. Ct. Rep. 581; Herr v. Central Kentucky Lunatic Asylum, 97 Ky. 458, 28 L.R.A. 394, 53 Am. St. Rep. 414, 30 S. W. 971; Bank of Hopkinsville v. Western Kentucky Asylum, 108 Ky. 357, 56 S. W. 525.

The ordinary municipal corporations created by the state, and which are in a sense subdivisions of the government of the state, wielding, under a delegated authority from the state, a portion of its political or governmental power for certain local or general purposes of a public nature, are public corporations.

Vincennes University v. Indiana, 14 How. 268, 14 L. ed. 416; Bakewell v. Board of Education, — Ill. —, 33 N. E. 186; Franklin County Grammar School v. Bailey, 62 Vt. 467, 10 L.R.A. 405, 20 Atl. 820; Thomp. Corp. §§ 5385, 5386, et seq.

But such a corporation can be sued for any act or delict pertaining to the discharge of its functions as a corporation.

Dabney v. Bank of State, 3 S. C. 139; State ex rel. Atty. Gen. v. State Bank, 1 S. C. 76; Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495; St. Mary's Industrial School v. Brown, 45 Md. 330; Nelson v. Cushing, 2 Cush. 521; Moore v. Fitchburg R. Corp. 4 Gray, 465, 64 Am. Dec. 83; Hewitt v. Swift, 3 Allen, 422; Head v. Providence Ins. Co. 2 Cranch, 127, 2 L. ed. 229; Rogers v. Burlington, 3 Wall. 669, 18 L. ed. 84.

Where jurisdiction depends on the party itself, it is the party named in the record, and the suit may be maintained against an officer or agent of the state in his individual capacity, when his action amounts to an invasion of the private right of property.

Osborn v. Bank of United States, 9 Wheat. 738, 858, 6 L. ed. 204, 232; Charles River Bridge v. Warren Bridge, 11 Pet. 572, 9 L. ed. 834; United States v. Lee, 106 U. S. 212, 27 L. ed. 179, 1 Sup. Ct. Rep. 240; Pennoyer v. McConnaughy, 140 U. S. 10, 35 L. ed. 366, 11 Sup. Ct. Rep. 699; Blanton v. Southern Fertilizing Co. 77 Va. 337; McClanahan v. Western Lunatic Asylum, 88 Va. 469, 13 S. E. 977; Western Lunatic Asylum v. Miller, 29 W. Va. 326, 6 Am. St. Rep. 644, 1 S. E. 740; Bank of United States v. Planters' Bank, 9 Wheat. 904, 6 L. ed. 244; Butler v. Ellerbe, 44 S. C. 256, 22 S. E. 425; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Baring v. Erdman, Fed. Cas. No. 981; Delafield v. Illinois, 26 Wend. 221; Dunn v. University of Oregon, 9 Or. 362; Chaffraix v. Board of Liquidation, 11 Fed. 649; Reagan v. Farmers' Loan & T. Co. 154 U. S. 389, 38 L. ed. 1020, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Scott v. McDonald, 165 U. S. 112, 41 L. ed. 653, 17 Sup. Ct. Rep. 262; Re Tyler, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785.

Mr. **Joseph A. McCullough** also submitted the cause for plaintiff in error:

The Clemson Agricultural College is not a public corporation.

Dartmouth College v. Woodward, 4 Wheat. 518, 578, 4 L. ed. 629, 644; 29 Am. & Eng. Enc. Law, pp. 321, 322; State ex rel. Atty. Gen. v. State Bank, 1 S. C. 63; Dabney v. Bank of State, 3 S. C. 124; Bank of United States v. Planters' Bank, 9 Wheat. 904, 907, 6 L. ed. 244; Bank of Kentucky v. Wister, 2 Pet. 318, 7 L. ed. 437; Briscoe v. Bank of the Commonwealth, 11 Pet. 257, 9 L. ed. 709; Darrington v. Bank of Alabama, 13 How. 12, 14 L. ed. 30; Curran v. Arkansas, 15 How. 304, 14 L. ed. 705; Yarmouth v. North Yarmouth, 34 Me. 411, 56 Am. Dec. 667; Board of Education v. Bakewell, 122 Ill. 339, 10 N. E. 384; State ex rel. Robinson v. Carr, 111 Ind. 335, 12 N. E. 318; University of Maryland v. Williams, 9 Gill & J. 385, 31 Am. Dec. 72; North Yarmouth v. Skillings, 45 Me. 133, 71 Am. Dec. 530; 1 Dill. Mun. Corp. 52, 53; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; Foster v. Fowler, 60 Pa. 27; Montpelier Academy v. George, 14 La. 395, 33 Am. Dec. 588; Downing v. Indiana State Bd. of Agriculture, 129 Ind. 443, 128 L.R.A. 664, 28 N. E. 123, 614; Angell & A. Priv. Corp. § 14; Vincennes University v. Indiana, 14 How. 268, 14 L. ed. 416; Union P. R. Co. v. United States, 99 U. S. 700, 727, 25 L. ed. 496, 504; State v. Vicksburg & N. R. Co. 51 Miss. 361; State ex rel. Wyoming Agri. College v. Irvine, 14 Wyo. 318, 84 Pac. 105; University of North Carolina v. Maultsby, 43 N. C. (8 Ired. Eq.) 257; State ex rel. Atty. Gen. v. Knowles, 16 Fla. 577; Head v. University of the State, 47 Mo. 220; Mead v. Ballard, 7 Wall. 290, 19 L. ed. 190.

Mr. **James P. Carey** submitted the cause for defendant in error:

This action is a suit against the state.

Lowry v. Thompson, 25 S. C. 416, 1 S. E. 141; Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 43 S. C. 154, 20 S. E. 1002; Carolina Nat. Bank v. State, 60 S. C. 474, 85 Am. St. Rep. 865, 38 S. E. 629.

The functions of such an institution as Clemson College are governmental, and the act of the legislature simply provides for the custody, care, and education of the children of the state, and damages cannot be taken from such a sacred trust fund without the express consent of the state.

Dabney v. Bank of State, 3 S. C. 124; Williamson v. Louisville Industrial School, 95 Ky. 251, 23 L.R.A. 200, 44 Am. St. Rep. 243, 24 S. W. 1065; Brown v. People, 75 N. Y. 441; Overholser v. National Home for Disabled Soldiers, 68 Ohio St. 236, 62 L.R.A. 936, 96 Am. St. Rep. 658, 67 N. E. 487; United States v. Kirkpatrick, 9 Wheat. 720, 6 L. ed. 199; Beers v. Arkansas, 20 How. 527, 15 L. ed. 991.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court:

The plaintiff sued the Clemson Agricultural College of South Carolina, for damages to his farm, resulting from the college having built a dyke which forced the waters of the Seneca river across his land, where-642]by the soil had *been washed away and the land ruined for agricultural purposes. There was no demurrer, but the defendant filed what was treated as a plea to the jurisdiction, in which it averred that it owned no property, and had constructed the dyke as a public agent only, by authority of the state, on land belonging to the state. By stipulation the hearing was confined solely to the question of jurisdiction, and after considering the evidence, the complaint was dismissed.

That ruling and the assignments of error thereon raise the question as to whether a public corporation can avail itself of the state's immunity from suit, in a proceeding against it for so managing the land of the state as to damage or take private property without due process of law.

With the exception named in the Constitution, every state has absolute immunity from suit. Without its consent it cannot be sued in any court, by any person, for any cause of action whatever. And, looking through form to substance, the 11th Amendment has been held to apply, not only where the state is actually named as a party defendant on the record, but where the proceeding, though nominally against an officer, is really against the state, or is one to which it is an indispensable party. No suit, therefore, can be maintained against a public officer, which seeks to compel him to exercise the state's power of taxation, or to pay out its money in his possession on the state's obligations, or to execute a contract, or to do any affirmative act which affects the state's political or property rights. Cunningham v. Macon & B. R. Co. 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609; North Carolina v. Temple, 134 U. S. 22, 33 L. ed. 849, 10 Sup. Ct. Rep. 509; Louisiana ex rel. New York Guaranty & I. Co. v. Steele, 134 U. S. 230, 33 L. ed. 891, 10 Sup. Ct. Rep. 511; Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; Hans v. Louisiana, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct Rep. 504; Harkrader v. Wadley, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119; Hagood v. Southern, 117 U. S. 52, 70, 29 L. ed. 805, 811, 6 Sup. Ct. Rep. 608.

But immunity from suit is a high attribute of sovereignty,—*a prerogative[643 of the state itself,—which cannot be availed of by public agents when sued for their own torts. The 11th Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the state's citizens. To grant them such immunity would be to create a privileged class, free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to be put above the law. For how "can these principles of individual liberty and right be maintained if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders . . . whenever they interpose the shield of the state? . . . The whole frame and scheme of the political institutions of this country, state and Federal protest" against extending to any agent the sovereign's exemption from legal process. Poindexter v. Greenhow, 114 U. S. 270, 291, 29 L. ed. 185, 193, 5 Sup. Ct. Rep. 903, 962.

The many claims of immunity from suit have therefore been uniformly denied, where the action was brought for injuries done or threatened by public officers. If they were indeed agents, acting for the state, they—though not exempt from suit—could successfully defend by exhibiting the valid power of attorney or lawful authority under which they acted. Cunningham v. Macon & B. R. Co. 109 U. S. 446, 452, 27 L. ed. 992, 994, 3 Sup. Ct. Rep. 292, 609. But if it appeared that they proceeded under an unconstitutional statute, their justification failed, and their claim of immunity disappeared on the production of the void statute. Besides, neither a state nor an individual can confer upon an agent authority to commit a tort, so as to excuse the perpetrator. In such cases the law of agency has no application,—the wrongdoer is treated as a principal, and individually liable for the damages inflicted, and subject to injunction against the commission of acts causing irreparable injury.

Consequently there have been recoveries in ejectment *where the public agent[644

in possession defended under a void title of the government. United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; Tindal v. Wesley, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770. A suit against a bank was sustained, even though the state held part of the stock. Bank of United States v. Planters' Bank, 9 Wheat. 904, 6 L. ed. 244. A tax collector was enjoined, where, under an unconstitutional law, he was about to sell the property of the taxpayer. Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962. An attorney general was restrained from suing to recover penalties imposed by an unconstitutional statute. Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas. 764. Commissions have been enjoined from enforcing confiscatory rates. Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Prout v. Starr, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398. A state land commissioner was enjoined from proceeding, under an unconstitutional act, to cause irreparable damage to defendant's property rights. Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699. Commissions have been restrained from enforcing a statute which illegally burdened interstate commeree. McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90.

Other cases might be cited which deny public boards, agents, and officers immunity from suit. But the principle underlying the decisions is the same. All recognize that the state, as a sovereign, is not subject to suit; that the state cannot be enjoined; and that the state's officers, when sued, cannot be restrained from enforcing the state's laws, or be held liable for the consequences flowing from obedience to the state's command.

But a void act is neither a law nor a command. It is a nullity. It confers no authority. It affords no protection. Whoever seeks to enforce unconstitutional statutes, or to justify under them, or to obtain immunity through them, fails in his defense and in his claim of exemption from suit.

It is said, however, that, in the cases re-
645]ferred to, the officers *were held liable to suit because, in the transaction complained of, the statute being unconstitutional, they could not be treated as agents of the state. And it is argued that these authorities have no application to suits against those public corporations which exist, and can act, in no other capacity than as governmental agencies, or political subdivisions of the state itself. But neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the state alone by virtue of its sovereignty. In Lincoln County v. Luning, 133 U. S. 529, 33 L. ed. 766, 10 Sup. Ct. Rep. 363, the court said that "while the county is territorially a part of the state, yet politically it is also a corporation, created by and with such powers as are given to it by the state. In this respect it is a part of the state only in that remote sense in which any city, town, or other municipal corporation may be said to be a part." The court there held that the 11th Amendment was limited to those cases in which the state is the real party, or party on the record, but that counties were corporations which might be sued. Dunn v. University of Oregon, 9 Or. 357, 362; Herr v. Central Kentucky Lunatic Asylum, 97 Ky. 463, 28 L.R.A. 394, 53 Am. St. Rep. 414, 30 S. W. 971.

Corporate agents or individual officers of the state stand in no better position than officers of the general government, and as to them it has often been held that "the exemption of the United States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States." Belknap v. Schild, 161 U. S. 18, 40 L. ed. 601, 16 Sup. Ct. Rep. 443.

Undoubtedly counties, cities, townships, and similar bodies politic often have a defense which relieves them from responsibility where a private corporation would be liable. But they must at least make that defense. They *cannot rely on free-[646
dom from accountability as could a state.

In this case there is no question of corporate existence and no claim that building the dyke was *ultra vires*. Plaintiff was denied a hearing, not on the ground that his complaint did not set out a cause of action, but solely for the reason that, even if the college did destroy his farm, the court had no jurisdiction over a public agent.

If the state had in so many words granted the college authority to take or damage the plaintiff's property for its corporate advantage without compensation, the Constitution would have substituted liability for the attempted exemption. But the state of South Carolina passed no such act, and attempted to grant no such immunity from suit as is claimed by the college. On the contrary, the statute created an entity, a corporation, a juristic person, whose right

to hold and use property was coupled with the provision that it might sue and be sued, plead and be impleaded, in its corporate name.

Reference is made, however, to State ex rel. Little v. University of Kansas, and the note in 29 L.R.A. 378, where state colleges, prison boards, lunatic asylums, and other public institutions have been held to be agents of the state, not liable to suit unless expressly made so by statute.

But an examination of the cases cited, in any respect similar to this, will show that they involve questions of liability in a suit, rather than immunity from suit. Most of them were actions for torts committed, not by the public corporation itself, but by officers of the law. These public corporations were held free from liability in the suit, on the same ground that municipalities are held not to be responsible for the negligence of policemen, jailers, prison guards, firemen, and other agents performing governmental duties. Workman v. New York, 179 U. S. 556, 45 L. ed. 318, 21 Sup. Ct. Rep. 212. That general rule is of force in South Caro-[647]lina, as *appears from Gibbes v. Beaufort, 20 S. C. 218, cited in the opinion of the court below, where it was said that "a municipal corporation, instituted for the purpose of assisting the state in the conduct of local civil government, is not liable to be sued in an action of tort for nonfeasance or misfeasance of its officers in regard to their public duties, unless expressly made, so liable by statute." But the plaintiff is not seeking here to hold the college liable for the nonfeasance or misfeasance either of its own officers or officers of the public. This is a suit against the college itself for its own corporate act in building a dyke, whereby the channel had been narrowed, the swift current had been diverted from the usual course across the plaintiff's farm, and, as it is alleged, destroying the banks, washing away the soil, and for all practical purposes as effectually depriving him of his property as if there had been a physical taking. Compare Lewis, Em. Dom. 2d ed. § 67; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; United States v. Welch, 217 U. S. 333, 54 L. ed. 787, 28 L.R.A.(N.S.) 385, 30 Sup. Ct. Rep. 527; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Farnham, Waters, § 191; Conniff v. San Francisco, 67 Cal. 45, 50, 7 Pac. 41.

Again, and still treating the question as though involved in the plea to the jurisdiction, that is not an action against the college for a tort committed in the prosecution of any governmental function. The fee was in the state, but the corporation, as equitable owner, was in the possession, use, and enjoyment of the property. For protecting the bottom land, the college, for its own corporate purposes and advantages, constructed the dyke. In so doing it was not acting in any governmental capacity. The embankment was in law similar to one which might have been built for private purposes by the plaintiff on the other side of the river. If he had there constructed a dyke to protect his farm, and in so doing had taken or damaged the land of the college, he could have been sued *and[648 held liable. In the same way, and on similar principles of justice and legal liability, the college is responsible to him if, for its own benefit, and for protecting land which it held and used, it built a dyke which resulted in taking or damaging the plaintiff's farm. 2 Dill. Mun. Corp. 4th ed. § 966, p. 1180.

As a part of its plea to the jurisdiction, the college also claimed that "it never had any interest or title in the land described in the complaint, or in any other property connected with the establishment and maintenance of Clemson Agricultural College of South Carolina, all of it being the property of the state of South Carolina." And it is argued that the court could take no jurisdiction of a case against a public corporation which, at most, could only result in a judgment unenforceable by levy and sale under execution.

As a matter of fact, the record indicates that besides the state's annual appropriation and the interest on securities held under the residuary clause of Dr. Clemson's will, the college has other sources of income. It appears to own some land in fee simple. The charter authorizes it to receive bequests. So that if the Fort Hill place is not subject to levy and sale, it does not follow that the institution may not now or hereafter own property out of which a judgment in plaintiff's favor could be satisfied. Besides, we have no right to proceed on the theory that if, at the end of the litigation, plaintiff establishes his right to damages, the judgment would not be paid. These suggestions, though made in a plea to the jurisdiction, afford no reason why the college should be granted immunity from suit, when it is claimed that, in violation of the Constitution, it has taken private property for its corporate purposes without compensation.

The plaintiff prayed not only for damages, but that the embankment should be removed. The title to the land and everything annexed to the soil is in the state, subject *to the conditions named in the will.[649 The state, therefore, may be a necessary

party to any proceeding which seeks to affect the land itself, or to remove any structure thereon which has become a part of the land. If so, and unless it consents to be sued, the court cannot decree the removal of the embankment which forms a part of the state's property. Cunningham v. Macon & B. R. Co. 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609. But the prayer for that part of the relief can be stricken out without depriving the court of jurisdiction to hear and determine the question whether Clemson Agricultural College of South Carolina is liable to the plaintiff for its own corporate act in building for its own proprietary and corporate purposes a dyke which it is alleged damaged or took the plaintiff's farm. Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 43 S. C. 155, (1), 167, 169, 20 S. E. 1002. And, if the facts hereafter warrant it, the college may be enjoined against further acts looking to the maintenance or reconstruction of the dyke. The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice **Harlan** dissents.

ALEXANDER E. FABER and Rudolph C. Faber, Doing Business under the Name and Style of G. W. Faber, Appts.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 649-660.)

Duties — on imports from Cuba — preferential rates.

The Philippine Islands are not "another country" within the meaning of the provision of the commercial convention with Cuba of December 17, 1903 (33 Stat. at L. 2136), art. 8, that the rates of duty granted to Cuba by that treaty, being a reduction of 20 per cent from the rates prescribed by the tariff act of July 24, 1897 (30 Stat. at L. 151, chap. 11, U. S. Comp. Stat. 1901, p. 1626), or any tariff laws subsequently enacted, shall continue preferential in respect to all like imports from other countries.

[For other cases, see Duties, 89-96, in Digest Sup. Ct. 1908.]

[No. 134.]

Submitted April 20, 1911. Decided May 29, 1911.

APPEAL from the Circuit Court of the United States for the Southern District of New York to review a judgment which affirmed a ruling of the Board of General Appraisers, overruling a protest against the assessment of duties on imports from Cuba. Affirmed.

See same case below, 157 Fed. 140.

Statement by Mr. Justice **Lamar**:

This case raises the question as to whether Cuban imports are entitled to a reduction of 20 per cent upon the rates charged on goods coming from the Philippine Islands, or only 20 per cent upon the regular tariff rates on goods imported from foreign countries.

The tariff act of July 24, 1897 [30 Stat. at L. 151, chap. 11, U. S. Comp. Stat. 1901, p. 1626], lays a duty on cigars of $4.50 per pound and 25 per cent ad valorem.

The act of March 8, 1902, to raise revenue for the Philippine Islands, provides that there shall be "levied, collected, and paid upon all articles coming into the United States from the Philippine Archipelago the rates of duty which are required to be collected and paid upon like articles imported from foreign countries; provided that upon all articles the growth and *prod-[651 uct of the Philippine Archipelago, *coming into the United States from the Philippine Archipelago, there shall be levied, collected, and paid only seventy-five per centum of the rates of duty aforesaid.* . . . All duties and taxes collected in the United States upon articles coming from the Philippine Archipelago . . . shall not be covered into the general fund of the Treasury of the United States, but shall be held as a separate fund, and paid into the Treasury of the Philippine Islands, to be used and expended for the government and benefit of said islands." 32 Stat. at L. 54, chap. 140, 5 Fed. Stat. Anno. 716.

The commercial convention with Cuba, proclaimed December 17, 1903 (33 Stat. at L. 2136), declares, in article 2, that "during the term of this convention all articles of merchandise . . . being the product of the soil or industry of the Republic of Cuba, imported into the United States, shall be admitted at a reduction of twenty per centum of the rates of duty thereon, as provided by the tariff act of the United States, approved July 24, 1897, or as may be provided by any tariff law of the United States subsequently enacted."

Article 8 provides that "*the rates of duty herein granted by the United States to the Republic of Cuba are and shall continue during the term of this convention preferential in respect to all like imports from other countries*, and, in return for said preferential rates of duty granted to the Republic of Cuba by the United States, it is agreed that the concession herein granted on the part of the said Republic of Cuba

to the products of the United States shall likewise be, and shall continue, during the term of this convention, preferential in respect to all like imports from other countries."

In April, 1906, the convention and statutes above referred to being of force, the plaintiff imported cigars and alcohol into the United States from Cuba. He contended that under the convention he could only 652]be required to *pay a duty 20 per cent less than that collected on tobacco coming into the United States from Philippine Islands, which paid 75 per cent of the regular rate under the tariff act of July, 1897. He also claimed that he should not be required to pay 20 per cent less than the regular tariff on alcohol, but 20 per cent less than special rates allowed on importations of alcohol from France, Germany, Italy, and Portugal.

His claim being disallowed, he paid, under protest, a duty of 20 per cent less than the tariff rate on cigars and alcohol. On a hearing by the board of appraisers, his protest was overruled. That judgment was affirmed by the circuit court (157 Fed. 140), and the case was brought here.

Mr. **Edward S. Hatch** submitted the cause for appellants. Mr. Walter F. Welch was on the brief:

In commercial conventions and treaties of trade and commerce between two nations, such nations have always regarded countries over which either of the contracting parties had dominion and sovereignty as being outside of the convention or treaty, and to be treated as other countries, when such countries were outside of the customs union of either of the sovereign contracting parties.

United States v. Tartar Chemical Co. 62 C. C. A. 576, 127 Fed. 944; Reg. v. Stamps & Tax Comrs. 18 L. J. Q. B. N. S. 201, 13 Jur. 624; Campbell v. Hall, Cowp. pt. 1, p. 211, Loftt, 655; 1 Cooley's Bl. Com. 4th ed. 106, 107; United States v. The Nancy, 3 Wash. C. C. 281, Fed. Cas. No. 15,854.

Assistant Attorney General **Lloyd** and Mr. **Charles E. McNabb**, Special Attorney, submitted the cause for appellee:

The Philippine Islands are neither a "foreign country" nor an "other country," within the meaning of the Cuban convention.

The Adventure, 1 Brock. 241, Fed. Cas. No. 93; The Eliza, 2 Gall. 4, Fed. Cas. No. 4,346; Taber v. United States, 1 Story, 1, Fed. Cas. No. 13,722; De Lima v. Bidwell, 182 U. S. 1, 180, 196, 200, 45 L. ed. 1041, 1049, 1056, 1057, 21 Sup. Ct. Rep. 743; Fourteen Diamond Rings v. United States, 183 U. S. 176, 178–182, 46 L. ed. 138, 141, 142, 22 Sup. Ct. Rep. 59; United States v. Heinszen, 206 U. S. 370, 379, 380, 51 L. ed. 1098, 1101, 27 Sup. Ct. Rep. 742, 11 A. & E. Ann. Cas. 688; United States v. The Recorder, 1* Blatchf. 218, Fed. Cas. No. 16,120; Stairs v. Peaslee, 18 How. 521, 526, 15 L. ed. 474, 476; 28 Ops. Atty. Gen. 422, 423.

Mr. Justice **Lamar**, after making the foregoing statement, delivered the opinion of the court:

Article 2 of the convention with Cuba provides that the products of that island shall be admitted into the *United[658 States at a reduction of 20 per cent of the rates of duty in the tariff of 1897 [30 Stat. at L. 151, chap. 11, U. S. Comp. Stat. 1901, p. 1626], or tariff laws subsequently enacted. There is much force in the suggestion that the reduction is limited to the rates of duty in general tariff acts, and does not apply to special rates under special agreements with other countries. Whitney v. Robertson, 124 U. S. 190, 31 L. ed. 386, 8 Sup. Ct. Rep. 456. This point, however, we purposely leave open, and limit our consideration to the principal question discussed in the brief, whether the Philippine Islands are "another country," within the meaning of the 8th article of the Cuban treaty, providing that the rates therein granted shall continue "preferential in respect to all like imports from other countries."

This treaty was signed and proclaimed several years after it had been decided, in the Insular Cases, that Porto Rico and the Philippine Islands were not foreign countries, but territory of the United States, subject to such laws as Congress might enact for their political and fiscal management. In 1901 this court, in Fourteen Diamond Rings v. United States, 183 U. S. 177, 46 L. ed. 141, 22 Sup. Ct. Rep. 59, said that "the theory that a country remains foreign with respect to the tariff laws, until Congress has acted by embracing it within the customs union, presupposes that a country may be domestic for one purpose and foreign for another." That case and De Lima v. Bidwell, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743; United States v. Heinszen, 206 U. S. 370, 51 L. ed. 1098, 27 Sup. Ct. Rep. 742, 11 A. & E. Ann. Cas. 688; Dooley v. United States, 183 U. S. 151, 46 L. ed. 128, 22 Sup. Ct. Rep. 62, show that notwithstanding their geographical remoteness, the Philippines are not a foreign country, and, if so, not "another country" within the meaning of the Cuban treaty.

There have been statutes in which the language indicated an intent to make a

distinction between a country and its colonies. But, in the absence of some qualifying phrase, "the word 'country' in the revenue laws of the United States has always 659]been construed to embrace all *the possessions of a foreign state, however widely separated, which are subject to the same supreme executive and legislative control." Stairs v. Peaslee, 18 How. 521, 526, 15 L. ed. 474, 476. If, therefore, in our revenue laws, a colony is treated as a part of the country to which it belongs, the Philippine Islands must be treated as a part of this nation, and not as another country. It must be presumed that the words "other country" in the Cuban treaty were used according to their known and established interpretation (Ibid.), and did not refer to charges on shipments from territory belonging to the United States. That they were not so regarded appears from the language of the act of March 8, 1902 [32 Stat. at L. 54, chap. 140], which studiously avoids using the words "imports," and enacts that upon articles "*coming into* the United States from the Philippine Archipelago," there shall be levied only seventy-five per cent of the rates of duty imposed on like articles imported from foreign countries. These duties, when collected, are not covered into the Treasury of the United States, but are to be used and expended solely for the use and government of the Philippine Islands.

But it is argued that even if the United States understood the Philippine Islands to be a part of this country, Cuba could not be expected to understand that the words "other countries" did not include the Philippines, if a duty was in fact charged on goods coming from those islands.

But the 8th article refers to "imports"—the correlative of "exports." This necessarily related to shipments from a country which was foreign to the United States. Pittsburg & S. Coal Co. v. Louisiana, 156 U. S. 600, 39 L. ed. 544, 5 Interc. Com. Rep. 18, 15 Sup. Ct. Rep. 459; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 353, 43 L. ed. 194, 18 Sup. Ct. Rep. 862. The provision that the rates granted to Cuba shall continue "preferential in respect to all like imports from other countries" does not relate to charges on shipments between places under the same flag, but to duties 660]laid on shipments—on *imports—from countries which are foreign to the United States. Both in the light of our own legislation and in view of the generally accepted interpretation of the word "imports," the 8th article of the treaty cannot be construed to have been intended to give to Cuba an advantage over shipments of merchandise coming into the United States from a part of its own territory, where the collections were in part made as a means for raising revenue for the support of the government of the Philippine Islands. Cuba was given a preferential of 20 per cent over tariff rates on imports from countries which are foreign to the United States.

We make no ruling as to the duty to be charged on alcohol, because in the brief of the government it is said that, without conceding plaintiffs' contention to be sound, and for reasons unnecessary to state, it consents to a reversal of so much of the judgment as relates to alcohol. It will be so ordered. The judgment of the Circuit Court as to the rate of duty on the cigars is affirmed.

PROVIDENT INSTITUTION FOR SAVINGS IN THE TOWN OF BOSTON, Plff. in Err.,

v.

DANA MALONE, Attorney General of the Commonwealth of Massachusetts.

(See S. C. Reporter's ed. 660-666.)

Statutes — by whom validity may be assailed.

1. A savings bank, so far, at least, as its rights are involved in those of its depositors, may raise the objection that property is taken without due process of law by Mass. Laws 1907, chap. 340, providing that deposits which have remained inactive and unclaimed for thirty years, where the claimant is unknown or the depositor cannot be found, shall be paid to the treasurer and receiver general, to be held by him as trustee for the true owner or his legal representatives.

[For other cases, see Statutes, 53-60, in Digest Sup. Ct. 1908.]

NOTE.—As to what constitutes due process of law—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to the validity of class legislation—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see notes to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

As to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Fetcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

Constitutional law — due process of law —unclaimed savings-bank deposits.

2. The property of a savings bank is not taken without due process of law by Mass. Laws 1907, chap. 340, providing that deposits which have remained inactive and unclaimed for thirty years, where the claimant is unknown or the depositor cannot be found, shall be paid to the treasurer and receiver general, to be held by him as trustee for the true owner or his legal representatives.

[For other cases, see Constitutional Law, 441–522, in Digest Sup. Ct. 1908.]

Constitutional law — discrimination — unclaimed savings-bank deposits.

3. Savings banks are not unconstitutionally discriminated against by making applicable to them alone the provisions of Mass. Laws 1907, chap. 340, that deposits which have remained inactive and unclaimed for thirty years, where the claimant is unknown or the depositor cannot be found, shall be paid to the treasurer and receiver general, to be held by him as trustee for the true owner or his legal representatives.

[For other cases, see Constitutional Law, 239–253, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — unclaimed savings-bank deposits.

4. The obligation of the contract between a savings bank and its depositor is not unconstitutionally impaired by Mass. Laws 1907, chap, 340, providing that deposits which have remained inactive and unclaimed for thirty years, where the claimant is unknown or the depositor cannot be found, shall be paid to the treasurer and receiver general, to be held by him as trustee for the true owner or his legal representatives.

[For other cases, see Constitutional Law, 1250–1262, in Digest Sup. Ct. 1908.]

[No. 151.]

Argued April 26, 1911. Decided May 29, 1911.

IN ERROR to the Supreme Judicial Court of the State of Massachusetts to review a judgment which affirmed a judgment of the Probate Court in and for the County of Suffolk, in that state, requiring a savings bank to pay over unclaimed deposits to the treasurer and receiver general. Affirmed.

See same case below, 201 Mass. 23, 86 N. E. 912.

Statement by Mr. Justice **Lamar:**

In 1907 the general court of the commonwealth of Massachusetts passed an act providing that deposits in savings banks which had remained inactive and unclaimed for thirty years, and where the claimant was unknown or the depositor could not be found, should be paid to the treasurer and receiver general.

Under this statute, which is copied in the margin,† the *attorney general on[662 May 5th, 1908, filed in the probate court of Suffolk county a petition, setting out the names and last known addresses of 226 persons who had deposit accounts ranging from $1 to $4,284 in the "Provident Institution for Savings in the Town of Boston." He alleged that for more than thirty years no part of the principal or interest had been withdrawn, no interest had been added upon any of the pass books, and no additional deposits had been made on any of the accounts; that no claimant for any of said deposits was known, and that the depositors could not be found. He thereupon prayed that the court would order the said sums of money, with the increases thereof, to be paid over to the treasurer and receiver general of the commonwealth. A copy of the petition was served on the bank, and a citation, addressed to the depositors, was published once in each week for three successive weeks in two newspapers in Boston, requiring them each to show cause on July 16, 1908, why the prayer of the petition should not be granted.

The savings bank alone answered. It admitted the allegations of the petition. It averred, however, that when each deposit was made, an agreement was signed by which the by-laws of the bank, made in pursuance of the charter granted December 11, 1816, were assented to by the depositor. These by-laws provided that regular semi-

†Sec. 56. The probate court shall, upon the application of the attorney general, and after public notice, order and decree that all amounts of money heretofore or hereafter deposited with any savings bank or trust company to the credit of depositors who have not made a deposit on said account, or withdrawn any part thereof or the interest, or on whose pass books the interest has not been added, which shall have remained unclaimed for more than thirty years after the date of such last deposit, withdrawal of any part of principal or interest, or adding of interest on the pass book, and for which no claimant is known or the depositor of it cannot be found, shall, with the increase and proceeds thereof, be paid to the treasurer and receiver general, to be held and used by him according to law, subject to be repaid to the person having and establishing a lawful right thereto, with interest at the rate of 3 per cent per annum from the time when it was paid to said treasurer to the time when it is paid over by him to such person.

Sec. 57. Any person claiming a right to money deposited with the treasurer and receiver general under the provisions of either of the two preceding sections . . . may establish the same by a petition to the superior court. . . .

annual dividends of 4 per cent should be declared on all deposits of $5 and over, and should be added to the principal; that no dividends should be paid on sums above $1,600; that no money could be withdrawn without the production of the pass book, 663]and that by a vote of the *trustees they might dissolve the institution at any time, and divide the whole property among the depositors, in proportion to their respective interests therein.

The bank contended that the act requiring deposits to be paid over to the receiver general deprived persons of their property without due process of law, and also impaired the obligation of contracts. After hearing, the probate court directed the bank to pay over and transfer to the treasurer and receiver general of the commonwealth the amounts deposited by the persons named in the petition. On appeal, that order was affirmed by the supreme judicial court of Massachusetts. 201 Mass. 23, 86 N. E. 912.

Mr. **John C. Gray** argued the cause, and, with Messrs. William Ropes Trask and Roland Gray, filed a brief for plaintiff in error:

A statute which says that money owed by A to B shall not be owed by A, but shall be owed by C, impairs the obligation of a contract, and deprives a man of his property without process of law.

Bank of Louisville v. Public Schools, 83 Ky. 219.

If a change of debtor by statute impairs a contract, and deprives a creditor of his property, *a fortiori* the deprivation of the property right in the security given him by the contract is an impairment of the contract.

Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; McCracken v. Hayward, 2 How. 608, 11 L. ed. 397.

The statute cannot be considered as merely substituting a new trustee; even if it were, such substitution would be unconstitutional.

Knapp v. Troy & B. R. Co. 20 Wall. 117. 123, 22 L. ed. 328, 330.

If the contract is changed, it is immaterial that something just as good is given instead.

Dartmouth College v. Woodward, 4 Wheat. 518, 662, 4 L. ed. 629, 665.

The legislature cannot impair the depositor's right to the interest due under the contract.

Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 168, 36 L. ed. 925, 928, 13 Sup. Ct. Rep. 54.

Both the Provident Institution and the depositor have a right to make a contract according to the terms of the original charter, and this right cannot constitutionally be impaired.

Planters' Bank v. Sharp, 6 How. 301, 326, 12 L. ed. 447, 458.

A statute appointing a curator of an absentee is a statute made in the interest of the absentee. This is a statute not in the interest of the absentee, and not purporting to be made in the interest of the absentee.

The statute does not purport to be a statute of escheat, and would not be such a statute, even if it called itself such. An escheat is a passing to the state when a man dies, and dies without heirs.

Hamilton v. Brown, 161 U. S. 256, 267, 40 L. ed. 691, 696, 16 Sup. Ct. Rep. 585.

Mr. **Dana Malone**, Attorney General of Massachusetts, argued the cause, and, with Mr. Fred T. Field, filed a brief for defendant in error:

Objections to the validity of the statute, on the ground that it infringes the constitutional rights of the depositors, are not open in this case. No depositors have appeared, and no one representing them, or any of them, is before the court, attacking the validity of the statute.

Lampasas v. Bell, 180 U. S. 276, 284, 45 L. ed. 527, 530, 21 Sup. Ct. Rep. 368; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736; Austin v. Boston, 7 Wall. 694, 19 L. ed. 224; Albany County v. Stanley, 105 U. S. 305, 26 L. ed. 1044; Clark v. Kansas City, 176 U. S. 114, 118, 44 L. ed. 392, 396, 20 Sup. Ct. Rep. 284; Tyler v. Registration Ct. Judges, 179 U. S. 405, 410, 45 L. ed. 252, 254, 21 Sup. Ct. Rep. 206; Red River Valley Nat. Bank v. Craig, 181 U. S. 548, 558, 45 L. ed. 994, 1000, 21 Sup. Ct. Rep. 703; Turpin v. Lemon, 187 U. S. 51, 60, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20; Chadwick v. Kelley, 187 U. S. 540, 546, 47 L. ed. 293, 295, 23 Sup. Ct. Rep. 175; Cronin v. Adams, 192 U. S. 108, 48 L. ed. 365, 24 Sup. Ct. Rep. 219; Cronin v. Denver, 192 U. S. 115, 48 L. ed. 368, 24 Sup. Ct. Rep. 220; Hooker v. Burr, 194 U. S. 415, 419, 48 L. ed. 1046, 1050, 24 Sup. Ct. Rep. 706; Smiley v. Kansas, 196 U. S. 447, 457, 49 L. ed. 546, 551, 25 Sup. Ct. Rep. 289; The Winnebago (Iroquois Transp. Co. v. DeLaney Forge & Iron Co.) 205 U. S. 354, 360, 51 L. ed. 836, 839, 27 Sup. Ct. Rep. 509; Lee v. New Jersey, 207 U. S. 67, 70, 52 L. ed. 106, 107, 28 Sup. Ct. Rep. 22; Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 86, 52 L. ed. 111, 115, 28 Sup. Ct. Rep. 26, 12 A. & E. Ann. Cas. 555; Grenada Lumber Co. v. Mississippi, 217 U. S. 433,

442, 54 L. ed. 826, 831, 30 Sup. Ct. Rep. 535; Citizens' Nat. Bank v. Kentucky, 217 U. S. 443, 453, 54 L. ed. 832, 836, 30 Sup. Ct. Rep. 532; Southern R. Co. v. King, 217 U. S. 524, 534, 54 L. ed. 868, 871, 30 Sup. Ct. Rep. 594; Engel v. O'Malley, 219 U. S. 128, ante, 128, 31 Sup. Ct. Rep. 190.

The state has jurisdiction to take in charge and administer property abandoned or left unclaimed or uncared for.

Cunnius v. Reading School Dist. 198 U. S. 458, 49 L. ed. 1125, 25 Sup. Ct. Rep. 721, 3 A. & E. Ann. Cas. 1121, 206 Pa. 469, 98 Am. St. Rep. 790, 56 Atl. 16; Barton v. Kimmerley, 165 Ind. 609, 112 Am. St. Rep. 252, 76 N. E. 250; New York L. Ins. Co. v. Chittenden, 134 Iowa, 613, 11 L.R.A.(N.S.) 233, 120 Am. St. Rep. 444, 112 N. W. 96, 13 A. & E. Ann. Cas. 408; Savings Bank v. Weeks, 110 Md. 78, 22 L.R.A.(N.S.) 221, 72 Atl. 475; Nelson v. Blinn, 197 Mass. 279, 15 L.R.A.(N.S.) 651, 125 Am. St. Rep. 364, 83 N. E. 889, 14 A. & E. Ann. Cas. 147; Atty. Gen. v. Provident Inst. for Savings, 201 Mass. 23, 86 N. E. 912; Deaderick v. County Ct. 1 Coldw. 202; Bickford v. Stewart, 55 Wash. 278, — L.R.A.(N.S.) —, 104 Pac. 263, 106 Pac. 1115.

The deposits here in question are within the category of abandoned, unclaimed, or uncared for property within the commonwealth, which the state may take in charge and administer. They are property subject to the jurisdiction of the state.

Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277.

They are debts owed by the bank to the depositors.

Reed v. Home Sav. Bank, 130 Mass. 446, 39 Am. Rep. 468; Lewis v. Lynn Inst. for Savings, 148 Mass. 245, 1 L.R.A. 785, 12 Am. St. Rep. 535, 19 N. E. 365; Dickinson v. Leominster Sav. Bank, 152 Mass. 52, 25 N. E. 12.

That the statute in question in the case at bar applies only to a limited class of property, *i. e.*, deposits in savings banks and trust companies, does not make it objectionable.

Watson v. Maryland, 218 U. S. 173, 178, 54 L. ed. 987, 990, 30 Sup. Ct. Rep. 644; Griffith v. Connecticut, 218 U. S. 563, 569, 54 L. ed. 1151, 1153, 31 Sup. Ct. Rep. 132; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 269, 48 L. ed. 971, 972, 24 Sup. Ct. Rep. 638; Williams v. Arkansas, 217 U. S. 79, 90, 54 L. ed. 673, 677, 30 Sup. Ct. Rep. 493, 18 A. & E. Ann. Cas. 865; Kentucky Union Co. v. Kentucky, 219 U. S. 140, 161, ante, 137, 157, 31 Sup. Ct. Rep. 171; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676; Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57, 54 L. ed. 930, 30 Sup. Ct. Rep. 663; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, ante, 78, 31 Sup. Ct. Rep. 136; Assaria State Bank v. Dolley, 219 U. S. 121, ante, 123, 31 Sup. Ct. Rep. 189; House v. Mayes, 219 U. S. 270, ante, 213, 31 Sup. Ct. Rep. 234; Broadnax v. Missouri, 219 U. S. 285, ante, 219, 31 Sup. Ct. Rep. 238; German Alliance Ins. Co. v. Hale, 219 U. S. 307, ante, 229, 31 Sup. Ct. Rep. 246.

The statute does not impair any obligation of contract embodied in the charter.

Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; Piqua Branch of State Bank v. Knoop, 16 How. 369, 14 L. ed. 977.

Mr. Justice **Lamar**, after making the foregoing statement, delivered the opinion of the court:

The Massachusetts statute as to abandoned funds in saving banks only applies where the owner cannot be found. In the nature of the case, therefore, no depositor could except to the judgment of the probate court which directed the money to be turned over to the treasurer; and, it is claimed that, as the bank does not represent the depositors, it cannot be heard to raise the objection that their property has been taken without due process of law. New York ex rel. Hatch v. Reardon, 204 U. S. 160, 51 L. ed. 422, 27 Sup. Ct. Rep. 188. This may be true, except in so far as its rights are involved in those of the depositor. Savings banks are maintained in the expectation that the deposits may, for years, remain uncalled *for, to the mu-[664 tual advantage of bank and customer. So that, if the statute had provided that the money should be paid over to the receiver general if the owner, after a short absence, could not be found, or if the account remained inactive for a brief period, a very different question would be presented from that arising under an act which deals with absence and nonaction so long continued as to suggest that the law of escheats or of lost property might be enforced. This, however, is not a statute of escheats, since it does not proceed on the theory that the depositor is dead, leaving no heirs. It does not purport to dispose of lost property, but deals with a deposit the owner of which, though known, cannot be found. The act is like those which provide for the appointment of custodians for the real and personal property of an absentee.

In this case, though the money is on deposit with a bank, which has faithfully kept its contract, yet the statute proceeds on the general principle that corporations may become involved, or may be dissolved;

or that, after long lapses of time, changes may occur which would require someone to look after the rights of the depositor. The statute deals with accounts of an absent owner, who has so long failed to exercise any act of ownership as to raise the presumption that he has abandoned his property. And if abandoned, it should be preserved until he or his representative appear to claim it; or, failing that, until it should be escheated to the state. The right and power so to legislate is undoubted. Cunnius v. Reading School Dist. 198 U. S. 458, 49 L. ed. 1125, 25 Sup. Ct. Rep. 721, 3 A. & E. Ann. Cas. 1121.

The statute here is reasonable in its terms and is so framed as to work injustice to no one. It only applies to cases where no deposit has been made, no interest added on pass book, no check drawn against the account, for thirty years, and where no claimant is known, and the depositor cannot be found. Before the money can be turned over to the receiver general, proceedings **665**]must be *instituted in the probate court, and, under the decision of the supreme court of the state, personal notice must be given to the bank, and citation and notice, usual in the probate court, published, so as to give the depositor, if living, and his heirs, if dead, opportunity to appear and be heard. Even then the property is not escheated, but deposited with the treasurer, to hold as trustee for the owner or his legal representatives, to whom it is payable when they establish their right.

It is true that the rate of interest paid by the state is not the same as that paid by the bank,—as to sums under $1,600 it is less, and as to those over $1,600 it is more. But this is a matter with which the plaintiff in error is not concerned, and can arise only between the state and the claimant when he asserts a right to property long neglected and apparently abandoned.

But the bank insists that there has been no abandonment; that the money is in safe hands where it was originally left, under by-laws which contemplated that the deposit might remain in the bank without interest on sums over $1,600 until the corporation was dissolved. It contends that to deprive it of the benefit of such deposits is to take property without due process of law.

But while there was a possibility that the money might so remain, the bank had no right to require that it should be so left. Neither the charter nor the by-laws create anything in the nature of a tontine, under which, on dissolution of the corporation, the then depositors would receive the money of those absent and unknown. On dissolution, the share of a depositor who could not be found would be paid over to his legal representative, who might be an administrator in case his death was established, or a guardian, in case of mental incapacity, or a trustee in bankruptcy in case of insolvency, or a representative appointed under statutes applicable to abandoned property. But it is not necessary to wait for the dissolution *of the bank.[**666** If the facts warrant it, a legal representative can be appointed at any time, with all the rights incident to such appointment, including that of withdrawing the funds and holding them for the true owner when he shall establish his claim.

There is nothing unequal or discriminatory in making the act applicable only to abandoned deposits in a savings bank. The classification is reasonable. Deposits in savings banks are made in expectation that they may remain much longer uncalled for than is usual in deposits in other banks. This fact makes savings deposits all the more likely to be forgotten and abandoned. And as the depositors are often wage earners, moving from place to place, there is special reasons for intervening to protect their interest in this class of property in banks as to which the state's supervisory power is constantly exercised.

The other questions as to payment without the production of the pass book, the rights and relations of the parties arising out of the charter and contract of deposit, present no Federal question. The statute does not violate the Constitution of the United States. The judgment is affirmed.

APPENDIX I.

Supreme Court of the United States.

OCTOBER TERM, 1910.

ORDER.

Mr. Justice Harlan said:

"Gentlemen of the Bar: The President of the United States has appointed Mr. Justice White, of this court, Chief Justice of the United States, and the Senate has confirmed that appointment. His commission has been received and is in the hands of the clerk of the court, who will read and record the same. We extend to our Brother White a cordial welcome in his new position as the head of the court."

The clerk then read the commission, and immediately thereafter the oath of office was administered by Mr. Justice Harlan, and Mr. Chief Justice White took the seat of the Chief Justice.

December 19, 1910.

APPENDIX II.

Supreme Court of the United States.

OCTOBER TERM, 1910.

ORDER.

The Chief Justice said:

"It gives me pleasure to announce the appointment of Mr. Willis Van Devanter, of Wyoming, and Mr. Joseph Rucker Lamar, of Georgia, to fill the vacancies on this Bench. The gentlemen are present and ready to take the oath. Their commissions will be read in the order named, and the oath administered accordingly."

The commissions were then read and the oaths administered by the clerk, and Mr. Justice Van Devanter and Mr. Justice Lamar took their seats on the Bench.

January 3, 1911.

APPENDIX III.

Supreme Court of the United States.

OCTOBER TERM, 1910.

ORDER.

There having been a Chief Justice and three Associate Justices of this court appointed since the last allotment of the Chief Justice and Associate Justices among the circuits:

Therefore, in pursuance of § 606 of the Revised Statutes, it is now here ordered by the court that the following allotment of the Chief Justice and the Associate Justices among the circuits be, and the same is hereby, made, and that such allotment be entered of record, *viz.:*

For the First Circuit, Oliver Wendell Holmes, Associate Justice.
For the Second Circuit, Charles E. Hughes, Associate Justice.
For the Third Circuit, Horace H. Lurton, Associate Justice.
For the Fourth Circuit, Edward D. White, Chief Justice.
For the Fifth Circuit, Joseph R. Lamar, Associate Justice.
For the Sixth Circuit, John M. Harlan, Associate Justice.
For the Seventh Circuit, William R. Day, Associate Justice.
For the Eighth Circuit, Willis Van Devanter, Associate Justice.
For the Ninth Circuit, Joseph McKenna, Associate Justice.

January 9, 1911.

APPENDIX IV.

Supreme Court of the United States.

OCTOBER TERM, 1910.

ORDER.

It is ordered by the court that the provisions of rule 31 of the rules of this court shall apply to all records to be printed, as provided in the act of Congress entitled, "An Act to Diminish the Expense of Proceedings on Appeal and Writ of Error or of Certiorari," approved February 13, 1911.

March 13, 1911.

APPENDIX V.

Supreme Court of the United States.

OCTOBER TERM, 1910.

ORDER.

The reporter having represented that, owing to the number of decisions at the present term, it would be impracticable to put the reports in one volume, it is therefore now here ordered that he publish an additional volume in this year, pursuant to § 681 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 560).

April 17, 1911.

APPENDIX VI.

Supreme Court of the United States.

OCTOBER TERM, 1910.

ORDER.

It is now here ordered by this court that the following table of fees to be charged in the United States commerce court be, and the same is hereby, adopted and approved, *viz.*:

Clerk:	
For docketing a case	$5.00
For entering any final decree or order or judgment	1.00
For a certified copy of any entry, record or paper on file, for each folio of 100 words (no such fee, however, to be less than 50 cents)	.10
For admission to the bar, including certificate, under seal	1.00
For a copy of any opinion of the court or judge, certified under seal	2.00
Marshal:	
For service of any writ, subpœna, or order, for each party upon whom service is made	2.00

In case of the service of process by the marshal of a district outside of the city of Washington, in addition to the fees just prescribed, the marshal shall receive the same mileage as is by law allowed to marshals for serving process issued by the district court of the United States in the district where such service is performed.

It is further ordered that no fees shall be taxed against the United States or the Interstate Commerce Commission.

May 15, 1911.

APPENDIX VII.

Supreme Court of the United States.

OCTOBER TERM, 1910.

ORDER.

It is now here ordered by the court that all the cases on the docket not decided, and all the other business of the term not disposed of, be, and the same are hereby, continued until the next term.

May 29, 1911.

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Ref 348.73 Un35
United States. Supreme
Court.
Cases argued and decided in
the Supreme Court of the

For Reference

Not to be taken from this room

PHILLIPS ACADEMY
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